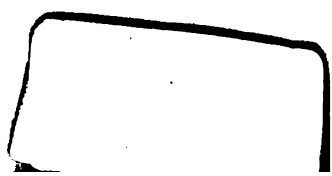

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF ADMIRALTY;

COMMENCING WITH THE

JUDGMENTS

OF

THE RIGHT HON. SIR WILLIAM SCOTT,

Michaelmas Term 1798.

By CHR. ROBINSON, LL.D. ADVOCATE.

VOLUME THE SECOND.

LONDON:

PRINTED BY A. STRAHAN,

LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY,

FOR J. BUTTERWORTH, AND FOR J. WHITE, FLEET-STREET.

1812.

TABLE

OF

CASES REPORTED

IN THIS VOLUME.

TABLE

OF

CASES REPORTED

IN THIS VOLUME.

TABLE OF CASES REPORTED.

NAMES

OF

CASES CITED

IN THIS VOLUME.

Caſes of the former Volume ſince heard on Appeal.

Before the Lords Commiſſioners of Appeal in Prize Cauſes.

BETSEY, *Murphy, June* 22, 1799.—Affirmed, but *no Coſts* given.—Corr. vol.i. p.101.

EMBDEN, *Meyer, February* 10, 1800.—Affirmed.

Before the Judges Delegate in Cauſes civil and maritime.

THE BETTY CATHCART, *Gilleſpie, July* 1, 1800.—Affirmed.

REPORTS

OF

CASES

DETERMINED IN THE

HIGH COURT OF ADMIRALTY,

&c. &c. &c.

THE EENROM, FROMIER Maſter.

May 21st, 1799.

THIS was a caſe of a ſhip and cargo taken on a voyage from *Batavia* to *Copenhagen*, *December* 27, 1798, by His Majeſty's ſhip the *Brilliant*.

Trade of neutrals with the colony of the enemy. Effect of covering enemy's property, by neutral merchants, with regard to other goods belonging to them, in the ſame caſe.

JUDGMENT.

Sir *William Scott*. — In this caſe the ſhip is claimed as the entire property of Meſſieurs *Fabritius* and *Wever* of *Copenhagen;* and half the cargo alſo is claimed as belonging to them, by Mr. *Fabritius* the ſon, being employed as ſupercargo on board this veſſel.

The Court directed that this gentleman ſhould give ſome account of the property of the remainder

The Ennrov. — May 21st, 1799.

of the cargo; it being claimed "as the undivided property of *Fabritius* and *others*," he was called upon to ſpecify who were the copartners: The Court was more particularly induced to make this order, by the ſpecial application which had been made on the part of the claimant to allow this very gentleman to be examined, as a perſon who was acquainted with every particle of the tranſaction, and who could give the Court the moſt ſatisfactory information upon every circumſtance belonging to it. To the ſurpriſe of the Court this gentleman has now ſaid in his affidavit, "that he cannot ſet forth the ſpecific intereſts, except as hereafter mentioned, as he was ſick and confined at *Batavia*, and obliged to entruſt the actual ſhipment of the cargo to Mr. *Inglehart*, with whom he had not come to any final ſettlement before he left that place." It is worthy of notice that, although Mr. *Inglehart* was the actual ſhipper, his name does not appear in any one of the ſhip's papers, although it has happened to peep out ſince in ſeveral other caſes. It is, I think, on the face of this excuſe, an extraordinary circumſtance, that a perſon employed as ſupercargo in a foreign country, (who muſt neceſſarily be required to give an account of all his tranſactions to his principals,) falling from illneſs, under the neceſſity of executing his truſt by an agent, ſhould not, immediately on his recovery, put himſelf in poſſeſſion of every thing that had been done for him by his ſubſtituted agent during his confinement; this is ſurely no more than what every agent, in ſuch a ſituation, would naturally have done: Mr. *Fabritius* ſays "he did not;"—"but knowing that the funds ariſing from the outward cargo of this veſſel, and

The Eenrom: May 21st, 1799.

and from the profits of her voyage to *China*, as far as they were applied to the present cargo, were not equal to more than a moiety: and also learning in *England* that Messrs. *Fabritius* and *Wever* had caused insurance to be made here to the amount of about half of this cargo, he is led to believe that not more than a moiety belongs to these gentlemen." The Court cannot forget that in a very late case, the *Denmark*, this very outward cargo of the *Eenrom* was represented as overflowing the capacity of her return, and as being employed in purchasing a large ship over and above that returned cargo. It now however appears that it was not equal to a moiety of the returned cargo; the other moiety, Mr. *Fabritius* says, "he supposes to have belonged to Mr. *Inglehart*, or to some person for whom he acted:" he says, indeed, that Mr. *Inglehart* told him it belonged to him; but whether in his own right or as agent he cannot say: "but from hearing on his return to *England* that *Marshall Blucker* had caused an insurance to be made here on a part distinct from Messrs. *Fabritius* and *Wever*, he is induced to think that some part belongs to him."

This leads me to dispose of this part of the case, the interest of Mr. *Blucker*, first. Mr. *Cowie* states in his affidavit "that he received orders (he does not say from whom) in *May* 1798 to insure for *Marshall Blucker*, in the *Eenrom*, one thousand two hundred pounds on ship and cargo; and that he believes him to be interested to that amount:"—it appeared to the Court to be an extraordinary circumstance that the insurance should be made in these terms, on ship and cargo, for a person who was not suggested to have any

The Exmouth. May 21st, 1799.

any intereſt in the ſhip; and the explanation was, that *Marſhall Blucker* not being a mercantile man, might have fallen into this error inadvertently. I ſhould rather have thought that ſuch an expreſſion, deviating from common ſpeech, was more like the phraſe of a perſon ſpeaking in technical language, than of a perſon ignorant of trade, and writing ſimply from his own apprehenſion of his own concerns; and more eſpecially ſince I learn, on reference to the merchants, that it is mercantile language, and that ſuch an inſurance, though including ſhip and cargo, is allowed to apply ſolely to an intereſt of that amount in the cargo, if the party had an intereſt in the cargo to that amount, and no intereſt in the ſhip. Mr. *Gowie* ſtates farther, "that he has written for inſtructions," but does not ſay when. This ſhip was brought in, in *January* 1799: as a careful and diligent agent he muſt have taken the firſt opportunity of giving intelligence of the capture: But it is not ſaid what anſwer was received, nor is it even ſaid that Mr. *Gowie* expects directions to claim; no paper on board expreſſes the name of Mr. *Blucker*, and he is perfectly quieſcent, and, as far as appears, ignorant of the matter; therefore on the whole I think this is not ſuch a claim as I can admit under the circumſtances in which it is introduced: if *Marſhall Blucker* has any real intereſt in this cargo, he may ſtill claim it elſewhere, in the Court of Appeal.

There is another claim that I will alſo diſpoſe of before I come to the conſideration of the ſhip and cargo. It is a claim of Mr. *Fabritius* the ſupercargo, for ſome bills of exchange aſſerted to have been given for money borrowed for the repairs of the ſhip, and

purchaſed

purchaſed afterwards on his own account from the perſon in whoſe favor he had originally drawn them: theſe are preſſed as regular bottomree bonds. It is not a little extraordinary that Mr. *Fabritius*, having ſuch full power over the whole concern as ſupercargo, ſhould reſort to this mode of raiſing money; but it is only neceſſary to look at the papers produced to ſee whether they are of that ſpecies of inſtruments which, in maritime law, will conſtitute a lien on the ſhip. If I ſhould think that they are not of that deſcription it will not be neceſſary to enter into the queſtion, Whether a claim can be given on account of a mere lien on a captured ſhip? Though I am of opinion, for the moment, that it is not ſuch an intereſt as is regarded and protected by the prize law. Now, looking at theſe bills, I am rather inclined to think that they are not of that kind which the maritime law ſupports as hypothecation bonds; there is no binding of the veſſel, no hypothecation whatever; they are mere bills of exchange, ſtating ſomething about repairs indeed, but in no ſenſe bearing the binding force of bottomree bonds. In the moſt liberal way in which they can be conſidered and with the leaſt ſcrupulous adherence to form that is conſiſtent with ſubſtantial reaſoning, I cannot hold them to be maritime bottomree bonds, and I reject the claim founded on them.

The Ennom. May 21ſt, 1799.

I come now to the conſideration of the ſhip and cargo; or rather, I ſhall invert the order, and conſider the cargo firſt: The outward cargo of this voyage conſiſted of tar, ſheathing copper, ſail cloth, and other articles, which by treaty this country and *Denmark* are expreſsly forbidden to carry to the enemy of the other;

The Ernrom. May 21st, 1799.

other; it ſets out therefore with a violation of public treaties, and of the private law of *Denmark*; becauſe every treaty is a part of the private law of the country which has entered into that treaty, and is as binding on the ſubjects as any part of their municipal laws: the clearance was general to the *Eaſt Indies*, though in ſome papers a deſtination to *Frederickſnagore* is held out: with reſpect to theſe general clearances to the *Eaſt* or *Weſt Indies*, I cannot ſay that they are abſolutely and neceſſarily illegal, although they are certainly inconvenient to all Parties, by throwing a great uncertainty on the nature of the intended voyage: if neutral governments permit theſe indefinite clearances which ſeem to allow a deſtination to the ports of a belligerent, (if ſuch belligerent has any ports in the *Eaſt* or *Weſt Indies*,) it ſeems proper at leaſt that the nature of the cargo ſhould correſpond, and care ſhould be taken that the cargo ſhould be ſuch as their ſubjects are allowed to carry to an enemy's port; there ſhould be an affidavit, as in voyages to an enemy's port, that the cargo contains no prohibited goods: for without ſome precaution of this kind great frauds may be committed againſt the public treaties of the country, and the country may be involved in the conſequences of ſuch frauds. There ſeems to have been no ſuch ſecurity taken in this caſe, and therefore I am inclined to think that there muſt have been ſome underſtanding on this ſubject at *Copenhagen*, that the voyage was to be to their own ports, or to neutral ports only; for it is not to be imagined that ſuch a general clearance could have been obtained for articles of this deſcription, being underſtood to have a liberty of going to an enemy's port; ſuch a thing cannot be ſuppoſed,

ſuppoſed, without imputing to the *Daniſh* government, ſuch a connivance at the irregular and illegal conduct of its ſubjects, as I am in no degree diſpoſed to ſurmiſe. The fact, however, is aſſerted to be, that this veſſel left *Copenhagen* with theſe noxious articles on board, and with full liberty of going to any port; that there was any other deſtination than to *Batavia* is not ſuggeſted by any one circumſtance in the cauſe, therefore we may deſcribe it to have been a voyage not contingent, nor left optional, but clear and certain, and definite, in direct violation of public treaties, and of the law of *Denmark*, founded on thoſe treaties.

The Emanuel. May 24th, 1749.

Theſe are circumſtances *in limine*, and this is the manner in which the voyage ſets out; the next circumſtance on which I ſhall obſerve is, that the management of this whole affair ſeems to have been committed to Mr. *Fabritius* jun. and that he acted with unlimited controul, although he is ſcarcely mentioned in the papers; only in a corner of the inſtructions given to the maſter, who was to conduct every thing: Mr. *Ponſaing*, who was maſter of the outward voyage, is directed to go to *Frederickſnagore* and manage every thing; but in a note "*Ponſaing and the ſupercargo* are directed to diſpoſe of the cargo and to inveſt another in the beſt manner they might be able:" this is the only manner in which Mr. *Fabritius* is mentioned, in a character merely *aſſiſtendo*, although he now appears to have been intruſted with unlimited power over the whole buſineſs.

The inſtructions farther direct, "that if the cargo ſhould not be ſufficient for the returned voyage, other

The Elenrom. May 21st, 1799.

goods might be taken on freight, with a condition that they ſhould be conſigned to Meſſieurs *Fabritius* and *Wever*:" This is not like an authority to buy a cargo in undivided moieties for theſe gentlemen, and other perſons; there are no directions for a partnerſhip: when I ſee how theſe inſtructions are executed and by whom, in a manner totally different from what they purport, I am ſtrongly induced to ſuſpect that they are merely colourable inſtructions, and that the real hiſtory of this tranſaction is connected with previous arrangements in *Batavia* between Meſſieurs *Fabritius* and *Wever*, and Mr. *Inglehart*, the perſon actually employed in putting this cargo on board.

The cargo is put on board by him, and it is a very material queſtion, on which the fate of the cargo, and of the ſhip likewiſe may depend; Whether it was the intention of the ſupercargo, in this part of the tranſaction, to miſlead the *Britiſh* courts of juſtice, and *Britiſh* cruizers, as to the property of the cargo? for I am of opinion, that if ſuch an intention can be proved in the agent, let the intereſts of his employers in *Denmark* be what they may, the muſt be affected by his conduct, and the conſequence will attach on them to confiſcate their property ſo engaged. This is no ordinary ſupercargo, he is the ſon of his employer, and appears to have been delegated with greater powers than ſupercargoes uſually enjoy; his conduct muſt in point of law and conſcience, and under the moſt lenient conſiderations of equity, be held to bind his principal with peculiar force. In ſtrict law every ſupercargo will bind his employer; and although where law is adminſtered with great indulgence, caſes may ariſe in which the Court will not implicate the owner;

owners, as in ſome caſes where ſupercargoes have appeared, taking in ſmall parcels of goods in contradiction to the orders of their employers, the Court has thought it hard to involve the intereſts of the owners, though perhaps ſtrictly reſponſible; yet this is not a caſe entitled to any ſuch favourable treatment; this is not the caſe of a ſmall portion of a cargo taken in from falſe compaſſion to others, or from corrupt views of private intereſt; the fraud, if any, in this inſtance muſt be that of a deliberate interfering in the war, to maſk and withdraw from the rights of a belligerent, the property of his enemy, to the amount of one half of a moſt valuable cargo. It is not the caſe of an ordinary ſupercargo; the perſon delegated is intruſted with the fulleſt powers, and if he has abuſed his powers ſo largely conferred, it is to him that the owners muſt look for redreſs.

The Ernrom. May 21ſt, 1799.

The regular penalty of ſuch a proceeding muſt be confiſcation; for it is a rule of this Court, which I ſhall ever hold, till I am better inſtructed by the ſuperior Court, that if a neutral will weave a web of fraud of this ſort, this Court will not take the trouble of picking out the threads for him, in order to diſtinguiſh the ſound from the unſound; if he is detected in fraud he will be involved *in toto*.—A neutral ſurely cannot be permitted to ſay, "I have endeavoured to protect the whole, but this part is *really* my property, take the reſt and let me go with my own:" If he will engage in fraudulent concerns with other perſons, they muſt all ſtand or fall together. Let us ſee then if there is not reaſon, not only to ſuſpect, but *to conclude, that* there was a deſign to repreſent the cargo, which appears to have belonged in great part to

Inglehart

The Earnest.

May 9th, 1799.

Inglehart the *Dutchman*, as the entire property of *Fabritius* and *Wever*. — In the first place Mr. *Inglehart* was the shipper, yet his name is not once mentioned in the papers; in no one place does his name occur, which cannot be an accidental omission, since it is according to the most ordinary course of business that the name of the shipper should be specified; I must therefore consider this suppression, as a studied contrivance, to withdraw from the notice of the Court, every connection that Mr. *Inglehart* has had with this transaction. The master and the mate describe *Fabritius* and *Wever* as the entire proprietors, and Mr. *Fabritius* jun. as the shipper; they were examined as soon as the ship was brought in; and, as we may presume, before they were apprised of the existence of other papers; they agree with the formal papers in keeping out of sight the name of *Inglehart*, and never once make mention of him: This is an extraordinary circumstance, for the master is in this case not a common carrier-master; he is a confidential manager of the business, according to the instructions, yet so much is he kept in the dark, or keeps himself so, that he represents *Fabritius* and *Wever* as the entire proprietors of the cargo. It is said, as an excuse for this man, that he was affected with an almost total derangement of mind whilst he was at *Batavia*, owing to the climate, and that he came home perfectly ignorant of the transaction; but there is no mention of this malady in his deposition, nor are there any signs of it; he gives a cool and rational recital of facts, and shews at least *a method in his madness*, in every part of his conduct that presents itself to our view; he was appointed joint agent with *Fabritius*, yet

yet he was left under the delusion that the whole cargo, of which only half is now claimed, belonged to Messrs. *Fabritius* and *Wever*.—If he was deceived, it serves to establish the imposition on the part of others;—if he joined in the deceit, it still farther fortifies the suspicion of a general combination of fraud. Mr. *Fronier*, who was the master substituted in his place for the returned voyage, lies under the same mistake; he describes the cargo as the entire property of *Fabritius* and *Wever*. I do not say that this Court will lay down a rule so harsh as to require that every carrier-master should know the property of every part of her cargo; yet in time of war it cannot be unknown to neutrals that the master is expected to speak to the property of his cargo; more especially in a case like this, where the property is so great as one half, and where the master is a confidential person, and where there is a son of his employer in the character of a supercargo on board; total ignorance can scarcely happen to such a master; and where it is pretended, it strongly rivets on the mind of the Court a suspicion (by which I always mean a legal suspicion) that there is something behind, which it is for the interest of the parties to conceal. But the matter does not end here: there is no mention of any distinction of property in the papers: The invoice describes the whole cargo as the property of *Fabritius* and *Wever*; and this paper is signed, not by the master but by the supercargo. It is said that the invoice is not a paper of consequence, that the bill of lading is the document to which reference is usually made; but this is both: it is a bill of lading as well as an invoice—then how came

The Ennrom. May 21st, 1799.

came this on board? It is said that Mr. *Fabritius* was ill, that the lading was conducted for him, and that he signed the paper without attention to its contents: How can I accede to such an explanation? Is it credible that a man, entrusted with the management of so large a concern, should fall into such a misapprehension as to sign a solemn paper asserting the whole property to belong to his employer, when he well knew that it did not? or can it be believed that on his recovery he should not have made himself acquainted with every thing that had been done for him? to act otherwise would be so monstrous, that no pretence of illness is sufficient to apologise for it.

But it is said Mr. *Fabritius* has, since his arrival in *England*, disclosed the truth and given in his claim for only one half, and much credit is assumed for this instance of fair and ingenuous conduct.—Allowing all the merit that is due to such a recantation, I do not know that it can be of any avail to protect this case from the penalties attaching on the former part of the transaction; for if the Court is satisfied that the intention was to hold out to *British* cruizers a *noli me tangere* as to the whole on an appearance of its being *Danish* property—although a *locus penitentiæ* is to be allowed to all men, I cannot but think that it comes a little too late, under the circumstances of the present case:—Shall a deceit be allowed during the whole of such a voyage; and after it has had a great part of its effect in deceiving our cruizers, shall it be done away by this late confession? If the representation of the papers, and the master, and the substituted master, had been believed, the whole of this

cargo would have been long ago ſafe in *Copenhagen* or *America*. But what is more material, it is to be remembered that, before the preſent claim was given, a diſcloſure of evidence had been obtained from the papers of ſome other caſes; in the *Nancy*, which was a ſhip under the management of the ſame parties, it had come to light that Mr. *Inglehart* was concerned in the cargo of the *Eenrom*, and in the exact proportion which ſquares with Mr. *Fabritius*'s amended claim; this circumſtance very much detracts from the merit of the confeſſion; there being every reaſon to preſume that no ſuch claim would have been given if the evidence already exhibited in that caſe had not ſhewn that a claim for the whole would be completely falſified—if ſo, the purpoſe of fraud is abandoned, merely becauſe it can no longer be maintained.

Is the Court then to believe that Mr. *Fabritius* came into this country with an intention of making this diſcloſure, and of making the claim as it now ſtands? or that he meant to hold out the property to be as the formal papers repreſent? When I look to the other ſteps leading to this fraud, when I find all the papers on board in this tenor, and ſee the maſter and the diſplaced maſter uſing the ſame language in their depoſitions, even after their arrival in this country, it would be a ſtrain of charity, much beyond what is conſiſtent with juſtice, if I did not ſay that it was an intention, carried into effect, to cover the whole cargo, as the property of *Fabritius* and *Wever*, by perſons knowing the contrary, and whoſe acts will legally affect their employers: What in my judgment deciſively proves that ſuch was the determined purpoſe

The Ennom. May 21st, 1799.

pose of the parties is, the fact that appears, that this ship was first carried into *Lisbon*, and that an inquiry was there instituted respecting the property of this ship and cargo. It has been pressed upon the Court, by the captors, to receive the depositions there made by Mr. *Fabritius* and others; but the Court has declined to receive those depositions, as irregularly taken, and therefore cannot advert to them. How Mr. *Fabritius* swore upon that occasion, with respect to this cargo, I cannot say; but I cannot think it otherwise than highly probable, that he represented the property as entirely belonging to the house of *Fabritius* and *Wever*; because I think it impossible that after such an inquiry had been pursued at *Lisbon*, the master and the displaced master should have continued in the error (if it is a mere error) that has led them to depose here to the same effect; unless he had so held it out, as well in those depositions, as in the conversations which he must since have had with them, prior to their examinations here. And when I recollect his extreme eagerness to be examined here upon his arrival, I cannot but think that he was at that time fully prepared to support upon oath the same representation; and that nothing but the subsequent information he received, that the secrets had already been betrayed by the papers of the *Nancy*, prevented him from so doing.

With respect to the ship, Is the property in that so proved as to support a claim for restitution without farther proof? If that could be maintained, I might perhaps allow it to be distinguished from the other part of the case. But if farther proof is necessary, it comes to this question, Are persons so convicted of

The EENROM. May 21st, 1799.

of an attempt to impoſe on the Court entitled to the privilege of giving farther proof? The ſhip was built at *Batavia*, and has been conſtantly trading from *Batavia*. It muſt have been the property of *Dutchmen*; and therefore under any circumſtances a bill of ſale would be neceſſary; and under the particular circumſtances which I have pointed out, a bill of ſale could hardly be deemed ſufficient. But a thicker cloud is raiſed over this part of the caſe, from what appears from a paper in the *Nancy*, which is ſigned by *Inglehart*, and ſtates—"I ſhall accompany this with the accounts of the *Eenrom*, of which Meſſrs. *Fabritius* and *Wever* are ſharers." It is ſaid that this applies to the cargo only; it may be ſo; it is a poſſible explanation; but how can this be proved? It can be only by farther proof. Again: There are many paſſages in which Mr. *Inglehart* ſeems to aſſume great authority over the conduct of the veſſel. It is ſaid that this was in conſequence of a charter-party, by which he had chartered the veſſel: It may be ſo; but this is matter of explanation only, and of farther proof; as it is left at preſent, on the face of it, very ambiguous. There being the neceſſity of farther proof, have the parties placed themſelves in a ſituation in which they are entitled to a privilege of this kind? It is a rule that I ſhall uniformly adhere to, till I am better inſtructed, that where a party has been convicted of an attempt to impoſe on the Court in the ſame tranſaction, the privilege of farther proof ſhall be denied him, as a privilege which is juſtly forfeited by deception and fraud. I ſhall therefore pronounce both the ſhip and cargo ſubject to condemnation.

THE VRYHEID, Admiral De Winter.

Claim of joint capture—conſtructive aſſiſtance not to be extended—claim rejected.

This was a caſe of an *allegation of joint capture* on behalf of the *Veſtal* frigate, in the capture of the *Dutch* fleet under the command of Admiral *De Winter*, *October* 11, 1798.—The ſubſtance of the allegation is recited in the judgment; *vide infra*.

Againſt the Allegation, the King's Advocate and Laurence—The legal principles on which this queſtion muſt be decided, lie, it is apprehended, in a very narrow compaſs, although it is a queſtion of very conſiderable importance; and one in which the navy are waiting, with great anxiety, for the deciſion of this Court: the allegation aſſerts only the merit of being aſſociated in one common ſervice, without ſetting forth any averment of being in ſight at the time of capture. Formerly, it is well known, joint-capture was confined to caſes of actual co-operation; and when, in conſequence of frequent litigations, it was extended to caſes of conſtructive aſſiſtance, for the purpoſe of preſerving harmony and a good underſtanding in the navy, the being in ſight became the principal criterion; and even that circumſtance was in all caſes not allowed to be ſufficient, if there was anything to rebut the general preſumption of intimidation and encouragement proceeding from it. It is on this preſumption of intimidation conveyed to the enemy, and of encouragement given to the actual captor, that the principle of conſtructive aſſiſtance is founded; and unleſs it is extended much beyond what

The VRYHEID. June 19th, 1799.

what has ever been done in former inſtances, the preſent caſe cannot, by any interpretation, be brought within the benefit of that principle. Even in caſes of joint cruizing, it has been decided, that that circumſtance without the being in ſight will not entitle parties to ſhare as joint-captors.—But the preſent caſe is infinitely weaker; it is a caſe of a ſhip detached merely to convey intelligence, ſeparating long before the engagement, or the earlieſt preparations for it, and not returning till the engagement was entirely over. Suppoſe the caſe of an officer landed with diſpatches, and that a prize is made by the veſſel in the mean time, he would not ſhare undoubtedly; it is ſubmitted, this caſe is nearly ſimilar to that: The abſence of the parties from the ſcene of action muſt alike preclude them from ſharing in the capture.—No precedent can be adduced from the practice of this Court to ſupport ſuch a claim; and the Court will not, for many reaſons, be diſpoſed to extend the conſtruction, but will, it is hoped, reject this allegation in the firſt inſtance, rather than ſuffer it to go to proof, at a great expence and waſte of time, on facts that if proved ever ſo clearly, cannot entitle the parties to any benefit from them.

In ſupport of the allegation, the Advocate of the Admiralty, and Arnold—This is a queſtion of very great importance to the navy, as a general queſtion; and, therefore, if the Court entertains but a ſlight doubt about the admiſſibility of this allegation, it will, in conformity to the general practice of the Admiralty, and the Eccleſiaſtical Courts, admit it to proof, reſerving the queſtion of law to be conſidered, together with the facts of the caſe, at the final hear-

The VRYHEID. June 19th, 1799.

ing:—Whatever may have been the hiſtory of this branch of the law, it is now the eſtabliſhed law of this Court, that a party may become a joint-captor by mere conſtructive aſſiſtance; it is, no doubt, deſirable to preſerve the rule of conſtruction in the greateſt ſimplicity: but the application which is now contended for, will not in any degree break into that ſimplicity; being in ſight is the moſt obvious ſpecies of conſtructive aſſiſtance, but it is not neceſſarily the only one; and although it is founded on a preſumption of encouragement and intimidation, thoſe are circumſtances which it is not neceſſary to prove; it is not attempted to introduce a new principle, nor to aſſert this poſition, that in the caſe of an aſſociated fleet, ſervices performed by any detached part, will entitle all to ſhare; but that a ſhip detached on a particular ſervice connected with the main enterpriſe, and materially contributing to its ſucceſs, may be admitted to ſhare in the intereſt of prize reſulting from it; no uncertainty will be introduced by ſuch a rule, the principle of deciſion would remain as ſimple as before; the Court would only have to conſider whether the object of capture was, in fact, the object in view, and the cauſe of the detached ſervice.—To be detached for the purpoſe of watching the motions of the enemy, or of procuring aſſiſtance, are eſſential ſervices intimately connected with the main enterpriſe, and ſuch as may juſtly entitle the parties to a prize intereſt; and in the caſe of the *San Joſeph*, in which a whole fleet not in ſight ſhared in the capture made by a detached veſſel, it is apprehended the deciſion paſſed on the ground, that there was that *joint enterpriſe*, which might be held ſufficient to carry with it a participation of intereſt; if it were otherwiſe,

Lords, May 4, 1784.

The VREHEID. June 19th, 1799.

otherwiſe, to detach a veſſel from the ſquadron would be to inflict hardſhip and puniſhment on meritorious perſons, by making them incapable of ſharing in the ſucceſs of the main enterpriſe, however much the object of their being detached might have contributed to it. It has been ſaid, that an officer ſeparated from a veſſel, and landed with diſpatches, would not ſhare—but that ariſes out of the direct words of the Act of Parliament and Proclamation, which give the prize to *perſons on board*, looking generally to perſonal ſervices—but there is no caſe in which ſuch a particular abſence as this has been held to forfeit the intereſt of joint-capture,—it would be going too far to maintain it: ſuppoſe a party ſent on ſhore to ſilence a fort, or on any other ſervice immediately connected with the capture, it would not be ſaid that they would not ſhare.—Then what were the ſervices in this caſe; the *Veſtal* was regularly aſſociated with Admiral *Duncan*'s fleet, and had acted under Captain *Trollop*'s orders in reconnoitring the *Dutch* fleet from their firſt appearance; ſhe was then ſent to call in aid the whole body of the fleet under the command of Admiral *Duncan*, and give information to the Admiralty; this important ſervice performed, ſhe again returned, and joined the fleet, and was actually aſſiſting in ſecuring the priſoners, and bringing the captured veſſels home: This is a ſervice of a very active nature, and comes within the principle rather of co-operation than of aſſiſtance merely conſtructive: It may not be improper to advert to the underſtanding and practice of the navy in this matter—amongſt them this is almoſt the firſt inſtance in which ſuch a claim has been reſiſted. In Lord *Howe*'s memorable victory over the *French* fleet

The VRYHEID. — *June* 19th, 1799.

on the 1ſt of *June* 1794, the *Audacious* was allowed to ſhare, though ſhe had parted from the fleet on the 28th of *May*. There is alſo an inſtance in the caſe of the *Canada*, which had chaſed, and been out of ſight of the fleet to which ſhe belonged for three days, yet the whole fleet ſhared in her prize; and in another inſtance in the *Mediterranean*, in the caſe of the *Loweſtoff*, making a capture from the fleet, the whole fleet ſhared: On theſe grounds, conſidering that there is no direct caſe againſt us, and that the ſervice rendered in the preſent inſtance is fairly within the line of analogy by which this Court is uſed to put a conſtruction of co-operation and joint ſervice, on acts eſſentially connected with the main enterpriſe; it is ſubmitted that this ſhip is entitled to be admitted as a joint captor.

In Reply, the King's Adv. contended—That the caſes alluded to by no means broke in upon his argument; that in the caſe of the *San Joſeph* there was a great deal of contradictory evidence, and that it was by no means eſtabliſhed that the whole fleet was not in ſight: that the *Audacious* was one of Lord *Howe*'s fleet, and had engaged in the conteſt of the 28th of *May*, and had actually ſeparated with a *French* veſſel, the *Revolutionaire*, by that means contributing to reduce the enemy's force, and make the ſucceſs of the enſuing conteſt of the 1ſt of *June* more certain: that the *Canada* had been detached from the fleet to which ſhe belonged on that particular chaſe; and that in the caſe of the *Loweſtoff*, the whole fleet were in ſight; that theſe caſes referred therefore to the claſs of caſes *in ſight* at the time of the engagement, or the commencement of the chaſe; of which there could be no doubt—but that the facts of the preſent caſe were not

of

of a nature to ſupport any ſuch pretenſions. It was alſo ſaid that the *Veſtal* had herſelf taken a prize off the *Texel* in which Lord *Duncan* ſhared as Admiral of the ſtation, but that his fleet did not; affording therefore an unanſwerable reaſon, on all terms of reciprocity, why *ſhe* ſhould not ſhare in the prize made by the fleet during her abſence.

The VRYHEID. June 19th, 1799.

JUDGMENT.

Sir W. Scott—This is a conteſt between two bodies of perſons, all deſerving moſt highly of the public, and therefore as far as individual merit can go, all equally entitled to every attention; it is a caſe of joint capture, and the Court has to lament that caſes of this nature are in general attended with much difficulty, as they depend frequently on very minute facts, on which the Court has to decide between contradictory repreſentations; and it is to be regretted that the deciſions of the Courts on this ſubject have not always been ſo uniform as it is highly deſirable they ſhould be. It would be a very great ſatisfaction to me, if, with the aſſiſtance which I may hope to receive from the Gentlemen of the Bar, it ſhould fall within my power to eſtabliſh a ſettled and intelligible ſyſtem, on principles that may become in future eaſily applicable to the various caſes that may ariſe.

The Act of Parliament and the Proclamation give the benefit of prize "to the takers," by which term are naturally to be underſtood thoſe who *actually take poſſeſſion*, or thoſe affording an actual contribution of endeavour to that event: Either of theſe perſons are naturally included under the denomination of *Takers*; but the courts of law have gone further, and have

The Vrouw Margaretha. June 19th, 1799.

extended the term "Taker," to another deſcription of perſons — to thoſe, who, not having contributed actual ſervice, are ſtill ſuppoſed to have rendered a conſtructive aſſiſtance, either by conveying encouragement to the captor, or intimidation to the enemy.

Capture has therefore been divided into capture *de facto*, and capture by conſtruction: I need not ſay, that the conſtruction muſt be ſuch as the courts of law have already recognized, and not a new, unauthorized conſtruction; for as the word has already travelled a conſiderable way beyond the meaning of the Act of Parliament, the diſpoſition of the Court will lean, not to extend it ſtill farther, but to narrow it, and bring it nearer to the terms of the Act, than has been done in ſome former caſes. The caſe of the *Mars* (*a*) is a ſtrong authority on this point; in which the claim of joint capture was diſallowed to ſhips not in company, but ſtationed at different outlets to catch the enemy, who were known to be under the neceſſity of paſſing through one of them; and it was in that caſe intimated to be the opinion of the Judges of the Common Law, (as I have had means of knowing,) that the Court ought to come nearer home, and conform more ſtrictly to the preciſe words of the Act of Parliament.

Lords, 1760.

In all caſes, the *onus probandi* lies on thoſe ſetting up the conſtruction, becauſe they are not perſons ſtrictly

(*a*) This was a caſe of a *French* ſhip, taken by one of three King's ſhips; which, being apprized of the deſign of the enemy to eſcape from *Port au Prince*, had taken their ſtation at different outlets to intercept them. The capture was made by one ſhip. A claim was given on behalf of the other two to ſhare as joint captors, though not preſent at the capture; but it was rejected.

within

The VESTRED. June 19th. 1793.

within the words of the Act, but let in only by the interpretation of thoſe acting under a competent authority to interpret it; it lies with the claimants in joint capture, therefore, either to allege ſome caſes in which their conſtruction has been admitted in former inſtances, or to ſhew ſome principle in their favor, ſo clearly recognized and eſtabliſhed, as to have become almoſt a firſt principle in caſes of this nature. The being in ſight, generally, and with ſome few exceptions has been ſo often held to be ſufficient to entitle parties to be admitted joint captors, that where that fact is alledged, we do not call for particular caſes to authorize the claim; but where that circumſtance is wanting, it is incumbent on the party to make out his claim by an appeal to decided caſes, or at leaſt to principles, which are fairly to be extracted from thoſe caſes.

The facts of this caſe come before the Court at preſent on the admiſſion of the allegation — a very convenient mode ſurely of taking the opinion of the Court in the firſt inſtance; for, if the facts ſtated, would not in the judgment of the Court be ſufficient to ſuſtain the claim, admitting them to be proved; it would only be attended with unneceſſary expence and delay to the parties, to permit them to enter into proof; it would be more convenient to reſort in the firſt inſtance to higher authority. The allegation is therefore very properly examinable on its firſt admiſſion; it is alſo very deſirable that all the facts ſhould be ſtated at once; and that the allegation ſhould not be ſent to be amended, (as it was neceſſary to do in this inſtance;) to ſhew the Court in what manner Mr. *Trollop* compoſed a part of Ad-

The VRYHEID.

June 19th, 1799.

miral *Duncan*'s fleet;) for a repetition of argument on theſe facts, begets expence, and other conſequences very incommodious to the parties, and to the Court. All the particulars are however now before the Court, and if I ſhould be of opinion that they are not ſufficient to ſuſtain the claim, I cannot ſee what ſervice I ſhould do the parties by admitting them to proof; and therefore I ſhould hold it better in all reſpects to ſend them to take the opinion of a ſuperior Court in the firſt inſtance. The allegation ſtates, "that the *Veſtal* received orders from the Admiralty to join Admiral *Duncan*; that ſhe accordingly did join him, and formed one of the fleet under his command, and received directions from him to cruize off the *Texel*, to reconnoitre and obtain intelligence of the *Dutch* fleet, which ſhe did; that Admiral *Duncan* cruized till the latter end of *September*, and then returned to *Yarmouth*, ordering Captain *Trollop* to ſail with two or three veſſels to watch the motions of the enemy; and leaving directions for the *Veſtal* to put herſelf under the command of Captain *Trollop*: that the *Veſtal* accordingly did join Captain *Trollop*, and made one of the ſhips under his command, being part of Admiral *Duncan*'s fleet, and on falling in with the *Dutch* fleet on the 8th of *October* was ſent by Captain *Trollop* to reconnoitre them; that on the next day, Captain *Trollop* gave the *Veſtal* a written order to ſail immediately for the firſt port in *England*, uſing her utmoſt endeavours to fall in with Admiral *Duncan* on the way, to ſend an expreſs to the Admiralty, and then to uſe his beſt endeavours immediately to fall in with Admiral *Duncan* wherever he was, and acquaint him with the ſituation of the *Dutch* fleet: that in purſuance of

of theſe orders ſhe ſailed to *England*, landed the diſpatches, and again returned, and actually joined Admiral *Duncan* on the 13th of *October*; that after the *Veſtal* was ſo detached, Captain *Trollop*, with his Majeſty's ſhips cruiſing with him, joined Admiral *Duncan*, and never loſt ſight of the *Dutch* fleet, from the time the *Veſtal* was ſo detached, to the time of the capture of the ſhip proceeded againſt; that at the time of capture, the *Veſtal* belonged to and compoſed a part of Admiral *Duncan*'s fleet, and was aiding and aſſiſting in the capture; and afterwards, with his Majeſty's ſhips the *Endymion* and *Ethalion*, aſſiſted in bringing into the *Humber* two of the *Dutch* fleet captured in that engagement."

The VRYHEID. June 19th, 1799.

Now on theſe facts, and having ſtated the *onus probandi* to lie on the perſons ſetting up the conſtruction, I am to inquire on what authority this claim is to be ſuſtained; there are no caſes cited as being directly in point; but the caſe of the *Signior San Joſeph* has been alluded to; that is a caſe which I perfectly recollect, having been concerned in arguing it, but it was in its principal circumſtances entirely different from the preſent caſe: that was a caſe of two veſſels detached from the fleet under the command of Admiral *Pigot* in the *Weſt Indies*, to chaſe two ſtrange ſhips appearing in ſight, the fleet bearing up all the time as faſt as poſſible to ſupport them; the chaſing veſſels took the two ſhips firſt appearing, and alſo a third, on which the diſpute aroſe. There was much contrariety of evidence, whether the fleet (which was continuing to ſail in the ſame direction,) was not up, and in ſight, and the chief doubt aroſe owing to the night coming on, for if it had been day, the fleet would

Lords, May 4, 1784.

The Vestal. June 19th, 1795.

would clearly have been in sight; and it was, at all events, well known to be at hand and ready to have given any support that might be wanting: under these circumstances the Court of Appeal affirmed the sentence of the Court below pronouncing for joint capture; and in that sentence it is I believe true, as it has been stated by the counsel, that some mention was made of the words *joint enterprize* — but taking the case altogether it can by no means be said to go the length of the present claim.

As far as cases go then, there is an entire failure of authority on the part of the *Vestal*; but the usage of the navy has been resorted to, and a case has been cited of the *Audacious*, one of the fleet under the command of Lord *Howe*, being permitted to share in the victory of the 1st of *June* 1794. It is admitted and it is certainly true, that the practice of the navy, in opposition to the words of the Act of Parliament, or a Proclamation, or to the established practice of law, cannot weigh or be of any authority: at the same time the Court would be extremely unwilling to break in on any settled and received notions of the navy, or to disturb a practice generally prevailing among themselves. But I agree with the King's Advocate, that the case cited is different from the present; in that case the *Audacious* had actually engaged the enemy's fleet, and had separated only in chase of one of their ships: The *Canada*, another case which has been mentioned, chased from the fleet by signal on the prize coming in sight: and the *Lowestoff*, which is another case, stated to have happened in the *Mediterranean*, was not detached from the *Mediterranean* fleet till after the chase had actually begun; these circumstances, therefore, materially

materially distinguish these cases from the present; and I am at liberty to say, that no case in point, no authority has been produced. Is there then any admitted principle? The gentlemen have resorted to the general principle of *common enterprize*; and it has been contended, that where ships are associated in a common enterprize, that circumstance is sufficient to entitle them to share equally and alike in the prizes that are made;—but certainly this cannot be maintained to the full extent of these terms; many cases might be stated in which ships so associated would *not* share. Suppose a case, that ships going out on the same enterprise, and using all their endeavours to effectuate their purpose, should be separated by storm, or otherwise, no one would contend that *they* should share in each other's captures; there is no case in which such persons have been allowed to share after separation, being not in sight at the time of chasing: it cannot be laid down to that extent, and indeed it would be extremely incommodious that it should; nothing is more difficult than to say precisely where a common enterprise begins: In a more enlarged sense, the whole navy of *England* may be said to be contributing in the joint enterprise of annoying the enemy. In particular expeditions every service has its divisions and subdivisions; operations are to be begun and conducted at different places; in the attack of an island there may be different ports, and different fortresses, and different ships of the enemy lying before them; it may be necessary to make the attack on the opposite side of the island; or to associate other neighbouring islands as objects of the same attack: The difficulty is, to say where the joint enterprise actually begins. Again,

Is

The VRYHEID. June 19th, 1799.

Is it every remote contribution, given *with intention* or *without intention*, that can be ſufficient? I apprehend *that* is not to be maintained; an actual ſervice may be done without intention; or there may be a general intention to aſſiſt, and yet no actual aſſiſtance given. Can any body ſay that a mere intention to aſſiſt, without actual aſſiſtance, though acted upon with the moſt prompt activity, would in all caſes be ſufficient? If perſons under ſuch claims could ſhare, there would be no end to diſpute; no captor would know what he was about, whether in every prize he made, there might not be ſome one fifty leagues diſtant, working very hard to come up, and even acting under the authority of the admiralty to co-operate with him: in ſerving his country every captor would be left in uncertainty, whether ſome perſon whom he never ſaw, and whom the enemy never ſaw, might not be entitled to ſhare with him in the rewards of his labour. The great intent of prize is to ſtimulate the preſent conteſt, and to encourage men to encounter preſent fatigue and preſent danger, an effect which would be infinitely weakened, if it were known that there might be thoſe not preſent, and not concerned in the danger, who could entitle themſelves to ſhare.

On theſe conſiderations I muſt ever hold, that the principle of mere common enterpriſe alone will not be ſufficient: it is not ſufficiently ſpecific, it muſt be more limited, — and a limitation is here attempted; it is ſaid that the *Veſtal* was detached on a ſervice *immediately connected* with the object of capture; this would have been much ſtronger, if the primary intention on which this ſhip was detached

had been *abſolutely* to join Admiral *Duncan*; but looking at the letter of Captain *Trollop*, I find the directions were, "you are to proceed to the firſt port of *England* if you do not meet Admiral *Duncan*, which you are to uſe your beſt endeavours to do on your way, &c." By fair conſtruction then, ſhe was not to go out of her way, ſhe was to go to *England*, that was the miſſion, the other purpoſe was ſecondary and collateral, and I cannot think that this ſhip is to be conſidered as ſo much connected with Admiral *Duncan*, as ſhe would have been, if ſhe had been ſent immediately to join him. But I would aſk again, Is there any authority from adjudged caſes, or from principles ſufficiently eſtabliſhed, to ſhew that ſhips detached from the ſquadron on views immediately connected with the main enterpriſe are entitled to ſhare? Many caſes might be put, in which that poſition could not be maintained. Suppoſe a fleet going to beſiege a place, and one ſhip detached to procure proviſions and ſtores, which does not come up and join the fleet till the place is taken; it would be very ſtrong to maintain, that ſuch a veſſel, neither preſent at the commencement, nor at the concluſion of the enterpriſe, could be entitled to ſhare; it has, I apprehend, been decided in practice, that ſhe would not; and the diſtinction taken was this, that if the ſhip was ſent off for common neceſſaries, after the operations had begun, or if ſhe returned before the object was accompliſhed, ſhe ſhould be permitted to ſhare, and not otherwiſe, though her abſence was occaſioned ſolely for the purpoſe of procuring neceſſaries for the ſervice. Then the limitation ingrafted on the firſt principle, namely, that the detachment is made for an object immediately connected

The VRYHEID.

June 19th, 1799.

The Vestal. June 19th, 1799.

connected with the ſervice is not ſufficient, ſomething more muſt be added, and that muſt be the being in ſight:

Then the whole turns on this queſtion, Whether the being in ſight at the beginning of the chaſe, in the manner in which that fact is alleged in this caſe, and in addition to the other circumſtance, of being detached on a neceſſary ſervice, will be ſufficient to entitle the parties, as joint captors? I muſt inquire then what being in ſight is neceſſary? for it is perfectly clear that being in ſight in all caſes is not ſufficient. What is the real and true criterion? The being in ſight, or ſeeing the enemy's fleet accidentally a day or two before, will not be ſufficient; it muſt be at the commencement of the engagement, either in the act of chaſing, or in preparations for chaſe, or afterwards during its continuance. If a ſhip was detached in ſight of the enemy, and under preparations for chaſe, I ſhould have no heſitation in ſaying that ſhe ought to ſhare: but if ſhe was ſent away after the enemy had been deſcried, but before any preparations for chaſe, or any hoſtile movements had taken place, I think it would be otherwiſe; there muſt be ſome actual contribution of endeavour as well as a general intention. Then the queſtion comes to this, Was the *Veſtal* in ſight at the commencement of the chaſe before ſhe ſeparated? if ſo, it will clearly do; if not, I think as clearly it will not do. On this point, I am of opinion that it cannot be conſidered as a chaſe till Admiral *Duncan*'s fleet came up; Captain *Trollop* dogged the enemy for the purpoſe of reconnoitring, but he is to be conſidered rather as the party chaſed, than as the chaſer; with all the gallantry that is to be aſcribed to him and the

the other gentlemen with him, he could not be expected to cope with the whole *Dutch* fleet, and engage in such an unequal contest: When Admiral *Duncan* came up with the body of the *British* fleet, then the chase began, and that is in my estimation to be considered as the true point of commencement of actual engagement in this case. Here then is only a general intention on the part of the *Vestal;* she conveyed no terror to the enemy, nor encouragement to the friend at the time when the rival fleets must be said to have first met each other. It is said the Court will not judge by events, but I think the events of a case like this are the facts of the case; the facts of this case in my apprehension prove that the *Vestal* was not in fight at the time of the commencement of the chace, and therefore that she is not in law entitled to share in this capture.

The Vestal. June 19th, 1799.

THE PRINCESSA, ZAVALA Master, and LA REINE ELIZABETH.

July 2d, 1799.

Demand of interest against a Commissioner of appraisement and sale, *not sustained.*

THIS was a case arising on two *Spanish* vessels taken by His Majesty's ship the *Sea Horse*, Captain *Oakes*, *September* 17, 1796, before the Order of Council for General Reprisals against *Spain*, which did not issue till the month of *November* in that year. The ships and cargoes consisting of large quantities of bullion and other articles, (condemnable to the Crown as taken before *Spanish* hostilities,) had not originally been taken into the possession of the Crown, but

The PRINCESSA and LA REINE ELIZABETH.

July 2d, 1799.

but were left in the hands of the captor, Captain *Oakes*, who put them under the care of his private agent Mr. *Marſh*; Condemnation paſſed to the Crown on the 3d of *Auguſt* 1797, and the property was put into the hands of commiſſioners appointed by the Court, on the recommendation of the Crown, to ſuperintend the appraiſement and ſale, Mr. *Marſh* the private agent of the captor being one: the commiſſions iſſued on the 23d of *Auguſt* 1797, and were made returnable on the firſt ſeſſion of *Michaelmas* term following: but the firſt payment had not been made till the 4th of *April* 1798, and the whole payment was not concluded till the 15th of *Auguſt* in that year. The preſent queſtion aroſe on an application of the Crown-officers, that Mr. *Marſh*, in whoſe hands the bullion had been originally placed by Captain *Oakes*, might be directed to account for intereſt thereof, upon information conveyed in the report of the other commiſſioner.

JUDGMENT.

Sir *William Scott* — This is a matter which has been depending a conſiderable time before the Court, and, in my opinion, much longer than a buſineſs of this kind ought to have depended; for ſuch things as the execution of commiſſions of appraiſement and ſale, ought to be proceeded on with all poſſible diſpatch, and brought to a concluſion without delay; and the Court is particularly indiſpoſed to ſuffer ſuits to be engrafted on diſputes between its own officers, to the delay and diſadvantage of the parties intereſted in the principal cauſe; at the ſame time it is impoſſible to ſay that occaſions may not ariſe in which

it

The PRINCESSA and LA REINE ELIZABETH.

July 2d, 1799.

it may be neceſſary for the commiſſioners to ſtop ſhort, in order to apply to the Court for inſtructions; the application when neceſſary, ſhould be ſummary in ſuch a caſe, and the directions will be given ſummarily; I need not add that returns to commiſſions muſt themſelves be ſhort, and ſimple, and unembarraſſed with foreign and inſignificant matter; they are merely to give the Court information of the neceſſary facts, upon which the Court will exerciſe its judgment, if any queſtion ſhould ariſe out of them: Both commiſſioners are neceſſarily before the Court, and therefore to talk of the *intervention* of a commiſſioner, in objection to the report of the other, or for any other purpoſe, is improper. An objection has been made to the return of one commiſſioner in this caſe; and I have allowed an act or ſtatement to be drawn, and that commiſſioner to be heard by his counſel; but this merely for my own convenience, in conſidering the nature and effect of the objection taken to his return; and not as a matter of right by any means, nor as a thing to be admitted into the ordinary practice of the Court. When they have made their returns they are *functi officio;* if the Court wants explanation it will require it of them; but they have no right to preſs arguments upon the Court, nor to form a regular ſuit, which is to hang up the intereſts of thoſe who are really concerned in the property.

Having premiſed theſe obſervations, I will ſay a few words; firſt, Upon the authority of commiſſioners; ſecondly, Upon the intereſts of commiſſioners; and thirdly, Upon their duty. I think I can ſee a neceſſity for taking ſome notice of theſe points, upon the preſent occaſion. With regard to their authority, I

The PRINCESSA and LA REINE ELIZABETH.

July 2d, 1799.

consider them merely as the ministerial officers of this Court, deriving all their authority from this Court, and from no other source; and I have been the rather led to mention this, because, I think I observe, a notion has been picked up, that they are the agents of the persons that recommended them; and therefore in this case the agents of the Crown, immediately for its interests, *crown officers, and public trustees:* The whole of this notion is unfounded according to my apprehension; they are appointed by the Court to perform those functions of the Court in which it cannot act for itself; they represent the Court in the same manner as the commissioners for taking examinations or for any other purpose: The Court may accept the recommendation of parties, for its own convenience, in the same manner as the Bishop usually accepts the creditor who has obtained a judgment to be the actual sequestrator, though in no degree bound so to do; it is a matter in the voluntary discretion of the Court: no party can have a right in such a matter, for this simple reason, that no person can have a right to appoint a representative for another: it is the Court which delegates its functions; it is at the option of the Court, whether it will grant any commission or not, and to whom it will grant it; It may revoke commissioners though approved by the party; It may continue a commissioner in office, though against the *approbation* of the party; they are in all cases to account to the Court, and not to the persons that recommended them; there can be no doubt but that the Court will, with the most reverential deference, be disposed to appoint any person recommended

mended by the Crown, for the care of its intereſts, but the Court would be guilty of no miſfeaſance if it granted no commiſſion at all; and when they are appointed, they ſtand on the ſame ground as other commiſſioners, and are to look to this Court for their proper diſcharge.

In the next place, what is the intereſt of commiſſioners? I have no doubt that the Court might, in the firſt inſtance, aſſign the proportion of payment at the time of appointment, and might enlarge or otherwiſe alter it afterwards as it ſhould think proper, according to the circumſtances of the caſe; by courteſy it has been uſually otherwiſe; and to prevent diſputes, and to ſuit the general convenience and wiſhes of the parties, it has been uſually left to them to agree on their own terms, uſually a *per centage*; but when that agreement has been made, I hold the parties are ſtrictly bound by it, and that the commiſſioners are not allowed to make a ſixpence advantage, beyond that *per centage*, which is ſettled in the agreement. To employ the proceeds for themſelves, or for their friends, to ſell ſubordinate offices, or to carve employments out of them, would be irregularities, and abuſes, and breaches of that purity, with which their truſt ſhould be exerciſed; ſuch advantages may be taken in fact, and I fear ſometimes are, but they will not be tolerated by the Court, when they are brought to its notice; and commiſſioners muſt underſtand, that if they ſend out that money, which relatively to them is the money of the Court, either for the benefit of themſelves or for the benefit of their friends, the Court will not hold them guiltleſs, or repute them to have rendered a due execution of their truſt; and

The PRINCESSA and LA REINE ELIZABETH. July 2d, 1799.

I desire to lay this down as a rule for the conduct of all commissioners, that the only advantage which they can legally make, is that which is allotted to them by the Court, or is settled in agreement between the parties and them.

I come now to the duties of commissioners; — they are, according to the terms of their appointment, "to reduce into writing a full, true, and perfect inventory of the ship and cargo, and to choose two good and lawful men, well experienced in such affairs, and swear them faithfully and justly to appraise the same according to their true values, and to cause the aforesaid ship and cargo to be exposed to public sale, and to sell or cause the same to be sold to the best bidder, and to bring, or cause to be brought the produce money arising from such sale, into the Registry of the Court before a certain day."

This is the simple line of their duty: it is possible, undoubtedly, that difficulties may arise in the execution of their office, but then to whom are they to resort? To the Court their constituent, whose officers they are, and whose functions they execute; this is their resort; and they mistake their way, if they go to private persons, here, or elsewhere, to be informed in what manner this Court expects its own commissions to be executed. As to any thing that concerns the interests of the Crown, in such commissions, they have the assistance and advice of the King's Advocate, the Advocate of the Admiralty, the King's Proctor, or the Proctor of the Admiralty, according to the particular course of their business. It is the duty of commissioners for the Crown to apply to them, and to act under their direction with respect to the Crown's

The PRINCESSA and LA REINE ELISABETH.

July 2d, 1799.

Crown's property; if thoſe officers ſee a neceſſity for an application to the Court, it will be made; if not, the commiſſioners will be ſafe in following their inſtructions; if an application is neceſſary to be made to the Court, it ſhould be made in due time, and whilſt the difficulty is pending and capable of cure; and not be left to a late period, to rip up the whole proceedings of the commiſſion, after every thing is finiſhed. Thus, if one commiſſioner thinks the other incroaches or uſurps too much authority, he ſhould apply to the Court in an early ſtage, and not wait till the buſineſs is concluded, and then call on the Court to travel over the whole again in order to ſet that matter right; and as to intereſt of money, I can hardly conceive that any diſpute can with propriety ariſe on that ground between commiſſioners, neither of them being entitled to make a ſixpence, more than the *per centage* which is given by the agreement under which they ſet out; and as to the principal parties if an application is neceſſary to obtain the uſe of the money, it ſhould be made to the Court, whilſt it is in its power to prevent the miſchief. Intereſt is a ſubject on which the juriſdiction of this Court has always been very tenderly exerciſed; it will, on that account be more deſirous to prevent the queſtion from ariſing, by preventing intereſt from accumulating; and therefore it is extremely neceſſary that the matter ſhould be brought before the Court, for the prompt payment of the money whilſt it is capable of that eaſy and natural remedy; and that it ſhould not be ſuffered to go on, with the hope of bringing up a queſtion of intereſt, when it may be very difficult for the Court to enforce an order, that will be effectual

The Princessa and La Reine Elizabeth.

July 2d, 1799.

for a remedy of that ſpecies: I ſay the more on this ſubject, becauſe it does appear that the whole of this unpleaſant buſineſs has ariſen, from an inattention to that proper method of proceeding in ſuch a caſe. The commiſſion that has iſſued in this caſe was made returnable in *ſix weeks*, yet no return was made by either commiſſioner for ſixteen months; and I underſtand that a practice has prevailed, by ſome accident or other of making no payment till the whole money can be paid in; ſo that it may happen that 50,000*l.* ready to be paid in, at the end of *the firſt month*, ſhall be kept *for ſixteen months*, till 1000*l.* more outſtanding, can be brought to account. One peculiar incongruity produced by delay in this caſe, is, that the beneficial intereſt has very much ſhifted hands during its pendency; for the Crown, which had originally the whole intereſt, has retired into a corner of the caſe, having granted away two-thirds of the proceeds; and yet here is the Crown praying intereſt on the whole ſum, although the party entitled to two-thirds, both principal and intereſt, if any intereſt is due, is totally quieſcent.

I come now to ſtate the facts of the caſe: it ariſes on two *Spaniſh* ſhips captured, with a quantity of bullion, before *Spaniſh* hoſtilities, by Captain *Oakes*, who is ſince dead. In the critical ſtate of affairs between the two countries at that period, the Crown declined to take the property into its own hands, or to inſtitute any proceedings againſt it. It was ſome time doubtful whether it would not be entirely reſtored; for it was the ſubject of long negociations, to my knowledge, whether all the property, taken on both ſides during that time of ſuſpended hoſtilities,

The PRINCESSA and LA REINE ELIZABETH. July 2d, 1799.

should not be mutually reſtored; it however did not take place: — Captain *Oakes* was left in poſſeſſion of theſe valuable cargoes, either as the agent or ſteward of the Crown, or as a perſon left to act according to his own diſcretion. — He landed the bullion; — if this had been done in the ordinary courſe of prize, and whilſt any cauſe was depending on it, it would have been a great irregularity; but I am not to apply the ordinary proceedings of the Prize Court, to a tranſaction which at that time was not decidedly in the nature of prize. The bullion was landed, and very properly depoſited in the Bank; it was then converted into ſpecie by the order of Captain *Oakes*; irregularly again, if a cauſe had been depending; but ſtill with the beſt intentions, and, as the event has proved, advantageouſly for all parties: Under theſe circumſtances, I can by no means conſider Captain *Oakes*, or his Agent as *malæ fidei* poſſeſſors. Captain *Oakes* had a juſt title to the original poſſeſſion, by a capture which has been confirmed by a ſentence of condemnation; during the intermediate time he was continued in the poſſeſſion; as I conceive the Crown uſually leaves the poſſeſſion of ſuch property (although it is legally entitled,) in the hands of the captors or their agents. The converſion which took place during this time, was done upon the beſt motives, and to the beſt actual advantage; there was nothing therefore to change the *bonæ fidei* poſſeſſion; and therefore I muſt pronounce them acquitted of any malfeazance in this proceeding.

The caſe divides itſelf into two periods; and it is argued, firſt, that the Court will decree intereſt againſt the commiſſioner, from the time of the converſion

The PRINCESSA and LA REINE ELIZABETH.

July 20, 1799.

into ſpecie; but againſt this I think I ſee many deciſive objections. In the firſt place, againſt whom muſt I decree it? If againſt any body it muſt be againſt the captors themſelves; Mr. *Marſh* was not at that time a ſervant of the Court, nor a known prize agent recognized by this Court; for no war exiſting with *Spain*, he was not a public agent, under any prize act applying to *Spaniſh* hoſtilities; he was a mere private agent of Captain *Oakes*, and as ſuch he might be anſwerable to his employers; but I have nothing to do with that; my demand muſt be againſt Captain *Oakes*, for his private agent's poſſeſſion:—But I ſhould be glad to know if any inſtance can be bound, in which the Court has called on captors to pay intereſt for money, which the Crown has choſen to leave in their poſſeſſion; and more particularly in a caſe like this, in which the Crown has granted away two-thirds of the principal ſum out of its hands, and to thoſe very captors;—and ſuppoſe the Court was ever ſo well diſpoſed to decree intereſt upon the particular circumſtances, it would be utterly impoſſible for the Court, to travel back beyond the date of the commiſſion: On a petition merely reſpecting a commiſſion of appraiſement and ſale, I could not direct intereſt, on this part of the caſe upon the preſent application; therefore I lay that entirely out of conſideration. It is then ſaid, ſecondly, That intereſt muſt be obtained for the time ſubſequent to the grant of the commiſſion. The commiſſion iſſued; What was then the duty of the commiſſioners? I muſt ſay, that if one commiſſioner was poſſeſſed of 40,000*l.* or any conſiderable ſum, it was his duty to have brought that circumſtance to the knowledge of the Crown officers; it might be too much

The PRINCESSA and LA REINE ELIZABETH.

July 2d, 1799.

much to expect him to bring it in voluntarily, whilſt there was no order upon him to that effect; but if the Crown officers had been aware at the time of iſſuing the commiſſion, that ſuch a ſum was in his hands, and they had intimated, as they undoubtedly would, that he ſhould immediately pay it in, he ſhould have given immediate compliance with that demand; that he was abſolutely bound to communicate the poſſeſſion of it to the other commiſſioner, I do not know that I am legally entitled to ſay; for if it had even been money which had come to his hands under the commiſſion; ſtill the commiſſion, in its terms, empowers them to execute the buſineſs "jointly and ſeverally;" and though the Court, to prevent confuſion and embarraſſment that might ariſe from ſeparate actings, and likewiſe to encreaſe the ſecurity of the property, would always require that they ſhould proceed hand in hand; yet I do not know that a legal obligation exiſts, independent of any order made by the Court, for the one commiſſioner neceſſarily to divide the poſſeſſion of every ſum of money he has received with the other: but certainly that obligation exiſts leſs, in a caſe where he was in poſſeſſion of that ſum of money, not by virtue of the commiſſion, but by virtue of his having been many months before the private agent of a private perſon, the actual captor, who had placed it in his hands when the Crown declined meddling with it; long before the inſtitution of any ſuit reſpecting it. However, an intimation ought to have been given to the Crown officers—it was not done; and if I had reaſon to conclude this was fraudulently omitted, the Court would ſtrain hard to make the commiſſioner anſwerable if any loſs had occurred.

I will

The PRINCESSA and LA REINE ELIZABETH.

July 2d, 1799.

I will ſtate my reaſons why I do *not* hold him anſwerable. The commiſſion was granted on the 23d of *Auguſt*, and made returnable on the firſt ſeſſion of *Michaelmas* term 1797. No return was made by the commiſſioner, nor was any application made to get the proceeds paid in: *there* was an error, and a moſt material error it has been in ſubſtance; for to my own knowledge, the whole intention and deſign of granting the commiſſion in this particular form, has been in ſome meaſure counteracted by it: The buſineſs might have been tranſacted by commiſſioners immediately appointed by the Treaſury; but it was thought more expedient to put it into this form of commiſſioners from the Court of Admiralty, in order that the proceſs of it might be immediately and conſtantly within the view of the Court till the concluſion; and that concluſion might be accelerated as much as poſſible, without leaving the hazard of any after-reckoning, to be adjuſted between the Treaſury and the commiſſioners; and it certainly was hoped, that a very ſhort time would have ſufficed for theſe purpoſes; whereas, it has taken up ſixteen months before any return whatever was made by either commiſſioner: This is an error, material likewiſe in its conſequences; becauſe if the returns had been made at the time preſcribed by the commiſſion, it would have appeared that a very large proportion of proceeds had already been received by one of them, and of courſe would have been then ordered into the Regiſtry of the Court, there to await an order for the diſtribution. What prevented the report of the then King's Advocate, upon the application of Captain *Oakes*'s family? The ignorance of the value of the proceeds, in conſe-

quence

quence of no return having been made. What ſtopped the diſtribution? The very ſame cauſe. Whereas, if the return had been made, and the proceeds ordered in, that gallant officer would have died, with the ſatisfaction of knowing that the difficulties with which his family was for ſome time oppreſſed, would be ſpeedily relieved, by the liberality of the Crown, in the grant and diſtribution of a conſiderable part of this property. It is impoſſible therefore to ſay, that it is not extremely to be wiſhed that the matter had been otherwiſe conducted in this reſpect—Whether it has been *ſo* miſconducted, as to ſubject the party to any penalty, is another conſideration: if any penalty is due, the mere payment of intereſt is as ſlight a one, as could be applied. But before I go ſo far as to apply it, the Court muſt be ſatisfied on two or three points: It muſt know that it has authority to direct intereſt to be paid; for unleſs that is ſhewn, all ſpeculations on the propriety of directing it, will be ſuperfluous and idle. Now it is a pretty ſtrong argument againſt this authority, that no inſtance has occurred, either in this Court or in the Court of Appeals, in which the demand of intereſt, even againſt an agent, has been entertained. In Mr. *Ker*'s caſe, the application was for the payment, not of the intereſt, but of the principal; and Lord *Camden* ſaid, that if he had authority, he would order intereſt; that was againſt the agent of the party: This caſe, is the caſe of a commiſſioner; and if no caſe can be produced, in which the Court has decided on the liability of a commiſſioner to pay intereſt, it does, I think, go far to prove that the Court has *not* the power, as occaſions probably have occurred for ſuch an order.

It

The Princessa and La Reine Elisabeth.

July 2d, 1799.

It must then be a strong case, that would induce the Court to make the experiment; for I will not say that the Court would, in no case, entertain and attempt to enforce the demand. I can suppose a case, of a commissioner, fraudulently, and pertinaciously, detaining money, and resisting the order of the Court to bring it in; then indeed the Court might be induced to take the opinion of another jurisdiction upon such a decree; but it would not do this, on slighter grounds than a clear case of misconduct; It would not exercise this questionable jurisdiction, where there is no such clear imputation on the person.

Then how stands the case as to misconduct? Looking abstractedly to the facts, I might think there had been some misconduct; but looking to the relaxed practice of the Court, and finding that the practice had been ordinarily the same, How does it stand then? Suppose a gentleman to come to the exercise of his commission, without any particular knowledge of the rules of practice of this Court; suppose him to come, not as a lawyer but as a person merely used to the employment and management of money; the persons whom he might naturally have consulted, would probably have told him, that it was not at all necessary to pay in the money till the whole was liquidated, for that such was the ordinary practice of the Court: looking at the character of the gentleman concerned, and supposing him to have received such information, I think it would be too much, to expect such a person to decide for himself, that this practice was wrong; and that he would not be safe in conforming to it. However disposed I may be to censure this practice and correct it in future, it would seem too hard

The PRINCESSA and LA REINE ELIZABETH. July 2d, 1799.

hard to lay down, that here was ſpecial delinquency that called for penalties; it is a bad ſort of reformation, which begins by an act of vindictive juſtice, on a perſon, who has been acting only as every other perſon has been permitted to act, under ſuch circumſtances. In this, I cannot be underſtood to throw the ſlighteſt reflexion on the learned Perſons, who have had the management and direction of this Court before me. I am ſure that that honorable Perſon, who immediately preceded me, would have expreſſed himſelf as I have done, if the fact had come to his knowledge. But the truth is, that ſuch things do not ordinarily come to the knowledge of the Court. I have practiſed in theſe Courts above twenty years; and though I may appear to betray great inattention, I profeſs I never was aware, that commiſſions were not returned at the time appointed; and I might have ſat here, above twenty years longer, in the ſame ignorance, if this particular caſe had not made it my duty to remark, and to correct ſuch a practice in future (*a*). On the ground of particular delinquency then, I ſee no reaſon to charge this gentleman with intereſt; I cannot ſay, referring to the common current of practice, that there has been a fraudulent withholding of the principal: but it is ſaid, that although he is not held to be *penally liable* to pay intereſt, yet intereſt is to be computed as part of the proceeds, and therefore ought to be paid. Now it is, I think, firſt neceſſary to ſhew that intereſt was made by him; it is ſaid, that he placed it in a banking-houſe, of which he was a partner; and that the inference is, that it was not ſleeping or lying dead there. But ſuppoſe he had put it into any other

(*a*) See the Order of Court, vol. i. p. 187.

houſe,

The Princessa and La Reine Elizabeth.

July 2d, 1799.

houſe, would he have been liable in that caſe? In Chancery I preſume he would; for as it is the practice of that Court, to put monies depending in it, out to intereſt; a perſon preventing that intereſt from accruing, might be required to pay without proof that he had perſonally made intereſt, and even if he could prove, that he had made none. But it has never been the practice of this Court, to order the money of ſuitors to be put out at intereſt, except upon their joint application and conſent. The money is paid into the Regiſtry, to wait the order of the Court, and therefore I ſhould think it impoſſible to decree intereſt, unleſs intereſt was actually proved to have been received.

If I am right in that matter, the commiſſioner can be anſwerable only in his collateral character of a banker; but in that capacity, how could I order him to pay more than his own particular ſhare? His partners would ſtand, in this caſe, as any other bankers to whom he or any other commiſſioner had confided it: And how is this Court to aſcertain, what that ſhare is, whether a moiety or a thirty-ſecond part only? I ſhould in ſuch an attempt travel much out of the uſual province and occupation of this Court. Adverting to all theſe conſiderations, is it proper that the Court ſhould call on him for that ſhare? The Court muſt again be firſt clearly convinced of its authority; for it would not proceed to exerciſe a dubious authority, unleſs on very ſtrong grounds, and more eſpecially, unleſs it appeared that the party calling for it was well entitled: The only party appearing before the Court to call for intereſt is the Crown officer: Has the Crown the title to this intereſt, if the Court could decree it? Only to one third of it; for the two-thirds, if received, have been already granted out to the captors;

captors; who do not join in this application, but are content, (as far as their conduct ſpeaks,) that if any ſuch advantage has been made, it ſhall remain with the commiſſioner who was their original agent or manager. What then would be the whole effect? That, if the Court could comply with the prayer, the Crown would be entitled to one third of that intereſt, which muſt be deemed (if it can be aſcertained) the particular ſhare of this commiſſioner's intereſt, — received by him, as one of the partners of this banking-houſe — after the time, when the commiſſion ought regularly to have been returned.

Upon this ſtatement of the caſe, although the application has been made with great propriety by the Crown officers, I ſhall not attempt to exerciſe a new and queſtionable authority, in a caſe where the party poſſeſſing double the quantity of beneficial intereſt which the Crown has retained, declines to join in the application; where the reſult of advantage to the Crown can be but inconſiderable; and where the aid of the Court might have been called in with effect, in an earlier ſtage of the buſineſs, in the ſimple and natural proceſs of compelling a return.

On theſe ſeveral grounds, I decline to ſuſtain the demand for intereſt on the part of the Crown officers: With reſpect to any diſpute between the commiſſioners, upon the matter of their claim to the benefit of intereſt, I have nothing to do with that: whether any other court would ſuſtain a demand on the part of one of them, againſt the other, for a participation of intereſt, when neither is entitled to any intereſt at all; is more than I am able to ſay; and more than I am called upon to conjecture. This is my deciſion; and the uſe which I ſhall make of the whole proceeding (and a very

The PRINCESSA and LA REINE ELIZABETH.

July 26, 1799.

a very important one it is) will be to prevent ſuch a grievance from occurring again. It is high time that this abuſe, of not returning commiſſions at the proper time, ſhould be corrected: — I mean no imputation on any individual; every body knows how abuſes inſinuate themſelves at firſt, and creep on by degrees: they begin uſually in ſome act of accommodation and kindneſs, which we can hardly diſapprove in the particular inſtance; the ſame facility is practiſed in a ſecond inſtance, on little other ground than the precedent of the firſt: an irregularity, which was hardly cenſurable, ripens into ſettled abuſe; new men come into office, and they find it become an ancient eſtabliſhed practice, with all the ſanction of grey hairs upon it; one abuſe begets another, (for it is a prolific family,) till at laſt attention is awakened, and thoſe who have authority, are loudly called upon by duty to correct them. They are memorable words of Lord *Bacon* upon ſuch ſubjects, "That time is the greateſt innovator; and if time always alters things for the worſe, and wiſdom and counſel do not ſometimes alter them for the better, what ſhall be the end thereof?" In making theſe neceſſary alterations, I know I ſhall have the aſſiſtance of the Crown officers in this Court, as far as the property of the Crown is concerned; and in reſpect to private property, the Court may in general rely on the vigilance of the parties themſelves, ſtimulating their agents to the performance of their duty, by the aid of the proceſs, which ſhall at all times be readily imparted: And if ſuch conſequences follow, it may be fortunate for the public that ſuch a caſe has ariſen, though ſome unpleaſant circumſtances may have attended the diſcuſſion.

in the *Princeſſa, Zavala,*

Auguſt 30th, 1799.

A Claim of a *Britiſh* merchant for dollars, *documented as Spaniſh property*, on board a *Spaniſh* ſhip from *Buenos Ayres* to *Spain*, not admitted.

A ſecond queſtion aroſe on a ſubſequent day on the claim of a *Britiſh* merchant, for a quantity of dollars ſhipped at *Buenos Ayres*, by his aſſerted agent, and for his account, but *oſtenſibly* entered in *Spaniſh* names, on board a *Spaniſh* ſhip, and bound to *Corunna* in *Old Spain*. The Affidavit of the Claimant ſet forth the following circumſtances:

Sworn 31ſt *May* 1797.

'That ſome time in the years 1790 or 1791, one 'of the partners of his houſe being at *Madrid*, 'purchaſed from a *Portugueſe* merchant, an order 'on the Treaſury of His *Spaniſh* Majeſty at *Buenos* '*Ayres*, for the number of 6000 hard dollars; which 'the ſaid merchant had recovered from the Crown 'on account of an unjuſt ſeizure that had been made 'of his property: that the Appearer's ſaid houſe ap-'pointed *Ramon Ramon Dias*, a merchant at *Buenos* '*Ayres*, their attorney, to receive the money, who, 'as this Appearer has been informed, and believes, 'received the ſame from the Treaſury in virtue 'of the ſaid power of attorney and order; but inſtead 'of remitting the ſame to this Appearer's houſe, 'appropriated the ſame to his own uſe: that this 'Appearer's ſaid houſe, in conſequence, through 'their correſpondent at *Corunna*, Don *Felippe Gon-'zalez Pola*, appointed Don *Antonio de la Cajigas*, 'merchant at *Buenos Ayres*, their attorney, to 'recover the ſaid 6000 dollars with intereſt from 'the ſaid *Ramon Ramon Diaz*: that on or about 'the 14th of *July* 1796, this Appearer's ſaid houſe

The PRINCESSA.

August 30th, 1799.

'received from the said Don *Antonio de la Cajigas*, a 'letter dated *Buenos Ayres* the 3d of *March* preceding, informing them of his having, through their aforesaid correspondent at *Corunna*, received their power of attorney for the purpose aforesaid; that he had procured from the said *Ramon Ramon Diaz* 2000 hard dollars in part payment of the said debt, and laden 1000 dollars on board the *Rey*, and 1000 dollars on board the *Cortes*, being two packets, for their account, consigned to their said correspondent at *Corunna*: that on or about the 1st day of *August* in the said year 1796, they received a second letter from the said Don *Antonio de la Cajigas*, dated at *Buenos Ayres* the 28th *April* preceding, which was forwarded to *Corunna* by the packet *Alcudia*, confirming the former letter, and advising them that 2000 more dollars were laden on board the said packet for their account, consigned as aforesaid; and further advising them, that he could consider the whole as recovered, which he hoped would be verified by the next packet *La Princessa*: that in consequence of such advice, this Appearer's said house caused an insurance to be made at *Lloyd*'s to the amount of 2000 hard dollars on board a packet or packets from *Buenos Ayres* to *Corunna*: that on or about ——— last past this Appearer's said house received a letter from the said Don *Felippe Gonzalez Pola*, dated *Corunna*, —— *March* preceding [1797], informing them that he had received advice from the said Don *Antonio de la Cajigas*, that 2000 dollars had been laden for them on board the packet *La Princessa*, which had been taken as prize, and carried to *Portsmouth*: and this Appearer

'further

'further ſays, that 2000 hard dollars laden, and on 'board the ſaid packet *La Princeſſa*, at the time when, 'in the proſecution of her ſaid voyage from *Buenos* '*Ayres* to *Corunna*, ſhe was taken and ſeized as prize, 'did belong to him, &c. &c.'

The PRINCESSA. *Auguſt* 30th, 1799.

JUDGMENT.

Sir *William Scott*. — This caſe ſtood over, for the judgment of the Court, on the claim of Mr. *Dubois*, a merchant of this town, for a quantity of dollars put on board a *Spaniſh* ſhip at *Buenos Ayres*, and to be landed at *Corunna* in *Old Spain*. The account given is, that a partner of the ſaid houſe had, in the year 1791, purchaſed an order of the King of *Spain* on the treaſury of *Buenos Ayres*, which had been received there, and detained by the agent of the claimant; but being recovered by a ſpecial application, this was a remittance of part of the ſum. On looking into the papers, it appears by the manifeſt that the money was put on board, as the property, and for the account and riſk, of a merchant in *Spain*; and the maſter verified the papers as true and fair, and ſwore "that they contained a real repreſentation of the property." By the papers therefore, it appeared as *Spaniſh* property, and as confiſcable to the King, being ſeized before hoſtilities with *Spain*; but it is argued, that, notwithſtanding theſe appearances, it would be very hard that the property of a *Britiſh* ſubject ſhould be condemned upon them; the ſhipper at *Buenos Ayres* being ignorant of the real tranſaction, and of the ſtate in which the real intereſt ſtood, knowing nothing of the real owner, and looking only to the conſignee at *Corunna*; and it is ſaid that there

The PRINCESSA. August 30th, 1799.

have been cases in which the Court has allowed an averment, and a claim to be set up, in opposition to the original papers: It is said also that this is not a register ship, but a mere private ship, with private papers; but I think it does appear, that if it is not a register ship, yet it is so nearly of that description, as to be exclusively appropriated to *Spanish* trade: It is a *Spanish* frigate employed as a packet of the King of *Spain*, to bring bullion and specie from *South America* to *Old Spain*; and I think the presumption is most strong, that none but *Spanish* subjects are entitled to the privilege of having money brought from that colony to *Spain*. I have looked carefully through the manifest, and I perceive there is not one shipment but in the name of *Spaniards*; therefore it appears that this is not an ordinary trade; and I must take this to be property, which must have been considered as *Spanish*, and which could not have been exported in any other character. It has been decided by the Lords in several cases, (that are so well known, that without naming them it will be sufficient to advert to the general principle,) that the property of *British* merchants, even shipped before the war, yet if in *a Spanish character*, and in a trade so exclusively peculiar to *Spanish* subjects as that no foreign name could appear in it, must take the consequences of that character, and be considered as *Spanish* property; and I think I may safely go the length of considering this ship, under the description which I have given of it, as coming under the operation of that principle.

But if it was an ordinary trade, with an ordinary bill of lading; and taking it on a more lax principle,

it

it would be impoſſible to pronounce on this affidavit and claim, that it is the property of the perſon for whom it is claimed: It is ſaid that the ſhipper was ignorant of the perſon ſtanding behind the *Spaniſh* conſignee; but how can this be maintained conſiſtently with what is ſtated in the affidavit? the tranſaction aroſe on an authority given to recover the amount of an order on the Treaſury of *Buenos Ayres*, purchaſed in *Spain*, and the firſt agent delegates his authority to another; but there muſt have been an intercourſe between the original and the ſubſtituted agent; and the ſhipper at *Buenos Ayres* muſt have been appriſed that the debt was due to *Britiſh* merchants, and that the perſons at *Corunna* were merely agents for them; the foundation of that ſolution then totally fails; he was a correſpondent, and the continuance of the correſpondence ſhews that the ſhipment could not have been made in this form through ignorance. Mr. *Dubois* farther ſtates, "that he had received advice of ſhipments of part of the money owing to him on board other packets; and that 2000 more dollars *would be ſhipped in* this packet for his account." It appears from this paſſage that there was not a ſingle dollar ſhipped on this account otherwiſe than in packets; and this ſtrongly confirms me, in conſidering this trade as an excluſive and appropriate trade. The letters are not produced; but the affidavit ſtates "that the correſpondent informed him, *that he hoped to ſettle* the account by the *Princeſſa*;" and all that he is able to ſtate, is, "that he had received an account that 2000 dollars *would come* on board the *Princeſſa*." The *Princeſſa* is taken—and the inference is, that he had received no intimation

The PRINCESSA. August 30th, 1799.

mation of the actual ſhipment till after the ſhip was known to have been captured, and then it comes not from the ſhipper, but from the merchant at *Corunna*, in whoſe name it was ſhipped.

Now is there any paper on board to ſhew that it was in ſatisfaction of a *Britiſh* debt? Every paper points to *Gonzalez* at *Corunna* as the owner. And what is there to ſhew that this perſon who recommended the agent to Mr. *Dubois*, might not have concerns of his own, and ſhipments made for him, through the hands of that agent? I think there is reaſon to ſuppoſe that Mr. *Gonzalez* endeavoured to ſhift off the intereſt in the money captured on Mr. *Dubois*; and I therefore think there is no more reaſon to convince me that the property belonged to Mr. *Dubois*, than there is authority to ſatisfy me on the point of law. I am under the neceſſity of condemning this property; but as captured before *Spaniſh* hoſtilities it will be condemned to the Crown; to whoſe liberality Mr. *Dubois* may ſtill reſort, if he can make out his claim; but I feel myſelf bound to add, that unleſs Mr. *Dubois* can give better proof, than he has made before me, he can have no great right, as far as I am capable of judging, to expect the recommendation of thoſe perſons whom the Crown uſually conſults, in ſupport of his claim.

THE DORDRECHT, Admiral LUCAS.

July 9th, 1799.

A claim of *joint capture*, on the part of Land Forces, asserting to have co-operated in the capture of the *Dutch* fleet in *Saldanah Bay*, rejected.

THIS was the flag ſhip of a *Dutch* ſquadron, captured by Admiral *Elphinſtone* in *Saldanah Bay*, *Auguſt* the 17th, 1796. The cauſe came on, to determine the queſtion of joint capture between the *Britiſh* fleet, and the land forces from the *Cape of Good Hope*, aſſerting, to have co-operated in the capture.

The ſubſtance of the ſeveral articles of the allegations on the part of the army having been opened,

The *King's Advocate*.—It may perhaps ſave much time to ſtate at firſt, as the opening on the part of the navy, the grounds on which it is intended to reſiſt this claim. The navy is, we ſubmit, alone entitled to the benefit of this capture on theſe grounds: It is a capture of a ſhip at ſea, in no degree protected by any land forces; it is made by a fleet at ſea, and, as ſuch, is to be conſidered as a pure naval prize. The claim on the part of the army is unprecedented; no inſtance can be produced of a ſimilar claim. To ſupport the principle of joint capture between the army and navy, it is always required that ſome direct and actual aſſiſtance ſhall be ſhewn to have been given, not merely for the purpoſe of preventing deſtruction, but for the purpoſe of compelling the ſurrender. There is no ſuch aſſiſtance afforded in this caſe by the army, nor is it proved that they contributed in any degree, even to prevent the deſtruction of the *Dutch* fleet; it is pleaded for the army that there was a pre-concert, but no ſuch

The Dorrechts. July 9th 1799.

thing is eſtabliſhed in proof; there was ſome communication of intelligence, but ſuch, as being unfounded, rather retarded than facilitated the conqueſt. On the 12th of *Auguſt* there was a letter from Mr. *Trail* to Admiral *Elphinſtone*, informing him that the *Dutch* were in *Saldanah Bay*; but that gentleman received his intelligence from *a naval officer*, and from that day till after the ſurrender, there was not only no pre-concert, but no communication between the Admiral and General *Craig*. It is material to advert to the ſituation of the *Dutch* fleet; the *Bellona* and the *Havic*, two frigates, were placed nearer in towards the ſhore, for the purpoſe of watering; and ſome ſhots were exchanged between theſe and the advanced guard of the army, but the reſt of the ſquadron were at too great a diſtance to be annoyed by the army. Admiral *Lucas* ſays, "That if the *Engliſh* fleet had not been there, he ſhould have placed his ſquadron quite out of the reach of the ſhore." Admiral *Lucas* received the firſt ſummons about eight o'clock in the evening of the 16th of *Auguſt*: there is no alluſion to the army either in that, or in the anſwer of the *Dutch* Admiral: on the night of the 16th a council of war was held; and it is material to aſcertain the time of the arrival of General *Craig*'s letter, becauſe it is ſaid that it arrived before the capitulation; it appears that it reached Admiral *Lucas* about ten o'clock on the morning of the 17th; but, according to the evidence of Admiral *Lucas*'s ſecretary, "The white flag was flying early in the morning, and a *Dutch* officer was ſent to Admiral *Elphinſtone* about an hour or two before General *Craig*'s letter arrived." Admiral *Lucas* ſtates, "that he was informed by Admiral

miral *Elphinſtone* that he had concerted meaſures with General *Craig*; but that muſt be a miſtake, for General *Craig*'s letter to Admiral *Lucas* begins, "Although I have had no communication with Admiral *Elphinſtone*, yet from ſignals I am induced to believe that a negociation is going on between you." Admiral *Lucas* ſtates the wind to have blown a heavy gale from the South, the army was poſted to windward, ſo that it would have been impoſſible to have run the fleet on ſhore in that place; and it is further ſtated that juſt where the army lay, there were ſand banks which would have prevented the meaſure: in a caſe of this ſort, where the chief reliance of the gentlemen on the other ſide, is on the intimidation which they aſſert to have been produced in the *Dutch* fleet by the preſence of the army, it will be material to ſhew the impreſſion of the captured. It appears on the ninth article, of the allegation, that Captain *Rymbende* thus addreſſed his crew: "My lads, we have taken care of your wives and children, and you ſhall be ſent home: We have been obliged to capitulate becauſe the *Engliſh* fleet is too ſtrong for us:" nothing is here mentioned as a cauſe of the ſurrender but the ſuperiority of force; and it is only neceſſary to advert to their comparative force, to ſhew that every other conſideration was unneceſſary; the *Dutch* had nine ſhips, three only being of the line: the *Engliſh* fourteen, of which eight were of the line. In addition to this ſuperiority, it is ſaid by Admiral *Lucas*, "That one inducement to ſurrender aroſe from the mutinous diſpoſition of the *Dutch* crew, who declared they would not fight the *Engliſh* ſquadron." Theſe are the grounds on which we mean to contend, that in fact

The DORDRECHT. July 9th, 1799.

fact the ſurrender was to the *Britiſh* fleet alone; that the *Britiſh* fleet was abundantly competent to enforce the ſurrender; that the army did not, and could not have annoyed the fleet; that the inducement ariſing from intimidation from the army is a mere afterthought: and that therefore taking the whole of theſe facts, together with the principle of law which governs joint capture, the army have not entitled themſelves to be conſidered as joint captors in the preſent caſe.

For the army, *Arnold* and *Swabey*.—In arguing this caſe on the part of the army, it may perhaps be convenient to ſtate diſtinctly at firſt, ſome points which it is not meant to conteſt: In the firſt place, it is not contended, that the army could, of its own force, alone have taken poſſeſſion of the *Dutch* ſquadron: it is not denied, that the *Britiſh* fleet was of itſelf fully ſufficient to have made the capture; neither is it denied, that the actual and formal ſurrender was made to the Admiral, without any mention in the articles of capitulation, of the General, or of the troops under his command. But the fact on which it is intended to rely is, that the army contributed to the intimidation of the enemy, that the capture was occaſioned partly by that intimidation, and therefore that the army are entitled, in virtue of that effective aſſiſtance, to be conſidered as joint captors. To prove the facts on which this claim is to be ſuſtained, no better evidence can be produced than that of the captured perſons; they are witneſſes without bias, of intereſt, or partiality, or prejudice, towards either of the parties; they are uſually conſidered as the moſt credible witneſſes in all caſes of this kind, becauſe they are called to ſpeak to

The DORDRECHT. July 9th, 1799.

facts which were the objects of their own ſenſes, and to explain the impreſſion of their own minds; they are called to ſay, whether the force which claims a ſhare in the capture, was actually within their ſight at the time of capture, what effect their preſence produced, and how far it made a part of their inducement to ſurrender. Theſe are facts to which theſe perſons are not only the beſt witneſſes, but they are the only witneſſes which can be produced; no man can ſpeak of the impreſſions of another's mind, nor of his motives; they are therefore the only witneſſes that can give ſatisfactory information on thoſe points: In reſpect to the preparatory meaſures which were taken, there is the evidence of ſome officers in the army who have releaſed their intereſt, and are therefore competent to give teſtimony in this cauſe. From the evidence of theſe gentlemen it will appear, that it being generally underſtood at the *Cape of Good Hope* that a *Dutch* ſquadron would ſoon arrive in thoſe ſeas, preparations were made, by the eſtabliſhment of poſts and of relays of cavalry, to communicate the intelligence of their appearance as quickly as poſſible; by theſe means the intelligence was received where the Admiral and the General both were: And the Admiral ſet ſail in queſt of them; although he did not at that time fall in with them: In the mean time more particular information was received by the General, that the Enemy were in *Saldanah Bay*; it is proved that General *Craig* made every exertion to communicate this intelligence to the Admiral; and that he ſent a ſignal, which he deſired him to make on entering the Bay, and another which he promiſed to return in anſwer to it, from the heights.

It

The DORDRECHT. July 9th, 1799.

It is proved, therefore, that in this reſpect he took thoſe ſteps which were moſt likely to conduce to the capture: He beſides made preparations to co-operate with the fleet, and ſent in the firſt inſtance a ſmall detachment, who were not idle ſpectators, but communicated the intelligence to *Cape Town*, and haraſſed the enemy in their operations: It appears, that this party prevented the enemy from receiving ſupplies of cattle, which were actually driven down to the beach for their ſervice; and beſides, that they prevented that communication between the fleet and the ſhore, which muſt have afforded information to the enemy, that an *Engliſh* fleet of ſuperior force was expected, and muſt by that means have given them an opportunity of making their eſcape. In this reſpect, therefore, the precautions taken by General *Craig* were eſſentially contributing to the ſucceſs of this capture. But a much larger force arrived ſoon after; and it is proved that they arrived with two field pieces, and two howitzers, about eleven o'clock in the morning of the 16th of *Auguſt*, ſome time before the fleet; the effect of their arrival was immediately felt by the enemy; for it is proved, that the parties which were ſent on ſhore for the purpoſe of watering, were immediately obliged to return. There was alſo a cannonading between the advanced guard of the army and the *Bellona*, from which ſhe received conſiderable damage, and it is the opinion of the *Dutch* Admiral and ſeveral other witneſſes, that it was in the power of the army to have deſtroyed her.

Theſe are the only offenſive operations which took place during the whole time; and it appears that they contributed very materially to the capture; for immediately

mediately on the arrival of Admiral *Elphinſtone*, he ſent to ſummon the *Dutch* Admiral to ſurrender; and not receiving an explicit anſwer in the firſt inſtance, he made it a peremptory condition, on granting further time, that no damage ſhould be done to their ſhips—this promiſe was given, according to Admiral *Lucas*'s evidence, merely becauſe he perceived from the ſituation of the *Engliſh* army, that it would be impoſſible to run the ſhips on ſhore, without expoſing the crew to certain deſtruction from the army: It was under this impreſſion only that the promiſe was made: for although the articles of capitulation were propoſed by the *Dutch*, it is expreſsly ſworn by Captain *Rynbende*, that they were propoſed only to gain time, and not with any view of acceding to an actual ſurrender. The ſituation of the *Dutch* fleet was one of the moſt diſtreſſing in which brave men could be placed; they could have no great hope of ſucceſs, in daring an engagement with a ſuperior fleet; and from the poſition of our army, they found themſelves cut off from the performance of that next duty which their country demanded of them—to diminiſh the benefit of the victory to the enemy, as much as poſſible, by deſtroying their ſhips; in this perplexed ſituation, they received a letter from General *Craig*, which convinced them that their apprehenſions from the army were not groundleſs; it was a letter announcing to them "that if they attempted to run their ſhips on ſhore they would receive no quarter." From this moment their meaſures were decided, and they immediately acceded to the terms which Admiral *Elphinſtone* had propoſed.

The Dordrecht. July 9th, 1797.

In this inſtance, therefore, General *Craig* appears to have co-operated with the fleet in the moſt effectual

The DORDRECHT. July 9th, 1799.

tual manner; no engagement took place on either part; the force on the part of the navy, was a force of intimidation only; it was a force which was only repreſented and diſplayed: the force of the army was diſplayed likewiſe, and with effect, in this denunciation; and it is acknowledged by Admiral *Lucas* and the other *Dutch* officers, that it was from their apprehenſion of the army, in a great meaſure, that the council of war, held on board the Admiral's ſhip, were induced to ſubmit to a ſurrender: it is pretended that the expedient of running on ſhore was not practicable, owing to the ſurf which ran there, and on account of the ſand banks at that point. But with reſpect to theſe, it is obvious that they were attended with danger, rather to the ſhips, than to the crews; and that danger was preciſely the deſtruction, which the council of war meditated, if they had not been prevented, by the apprehenſion of perſonal danger to themſelves. It is ſaid alſo, that another material inducement to ſurrender aroſe, independently of any conſideration of the army, from the mutinous diſpoſition of the *Dutch* crew; but on this point there is the evidence of one of the *Dutch* captains, "that the crew were ſufficiently well diſpoſed to run the ſhips on ſhore, and that they would have done ſo, had it not been from the appearance of the army." In this very plea, therefore, the army were materially inſtrumental, in producing what is ſtated to have been a chief cauſe of the ſurrender.

The Hoogkarſpee—Lords, June 30, 1786.

In regard to precedent, perhaps there is no caſe exactly ſimilar to the preſent; the caſe of Commodore *Johnſon* on the ſame ſpot ſome years ago, is perhaps that which comes neareſt to it; there, although poſſeſſion was taken by the fleet, yet an army operating by

by their preſence on ſhore were conſidered as part of the capturing force, and allowed to ſhare: But if no precedent can be produced, this caſe can be determined only on the general principle; and the great principle of joint capture, it is ſubmitted, is ſimply this, that thoſe who are preſent, and contributing to the ſurrender, although they do not concur in the act of ſeizure, are yet to be conſidered as joint captors; on theſe grounds it is contended that the army under General *Craig* are entitled to ſhare in this capture.

The Dordrecht. July 9th, 1799.

JUDGMENT.

Sir William Scott. — I have now heard the evidence in this caſe, and an elaborate argument for the army with much attention; and it may perhaps be convenient for me, in this ſtage to expreſs the impreſſion which the whole of what I have heard has made upon my mind, for the purpoſe of ſaving time; as the great preſſure of buſineſs on the Court, makes it extremely deſirable, that we ſhould employ as little time as poſſible on unneceſſary diſcuſſions. I ſhall ſtill, however, be ready to hear the Counſel for the fleet, and alſo the reply on the other ſide, if the Gentlemen ſhall think it neceſſary; but at preſent I muſt ſay, that no obſervations that I have heard, nor any conſiderations which I have been able to give the matter, have in any degree ſhaken the firſt impreſſion of my mind on this buſineſs.

The queſtion is, Whether ſuch a caſe has been made out, on the part of the army, as will ſupport their claim to be conſidered as joint captors? In the firſt place, it is not pretended that it is a caſe which comes within the proviſions of the Act of Parliament which

Prize Act, 33 G. III. c. 16.

The DORDRECHT. July 9th, 1799.

which directs the army to ſhare, in ſome caſes, in conjunction with the fleet; there are, it is well known, ſeveral deſcriptions of ſuch caſes, which I need not now advert to, as it is not pretended, that this caſe comes under any one of them. In the next place, it is not argued, that this is a caſe of concerted operations: That the army and navy might have ſimilar views is not conteſted, but whatever was done, was done ſeparately, and without concert or communication. Thirdly, It cannot be denied, that it lies upon the army to make out a caſe of joint capture, and to ſhew a co-operation on their part, aſſiſting to produce the ſurrender; for the ſurrender was made to the fleet alone; Poſſeſſion was taken by the fleet, the army could not take it; therefore the *onus probandi* lies on them, to prove that there was an *actual co-operation* on their part; for it is, I think, eſtabliſhed by decided authority, and particularly in the late caſe of *Jaggernaickporam*, before the Lords of Appeal, that much more is neceſſary than a mere *being in ſight*, to entitle an army to ſhare jointly with the navy, in the capture of an enemy's fleet. The mere preſence, or being in ſight of different parties of naval force, is, with few exceptions, ſufficient to entitle them to be joint captors; becauſe they are always conceived to have that privity of purpoſe which may conſtitute a community of intereſts; but between land and ſea forces, acting independently of each other, and for different purpoſes, there can be no ſuch privity preſumed; and therefore to eſtabliſh a claim of joint capture between them, there muſt be a contribution of actual aſſiſtance, and the mere preſence, or being in ſight, will not be ſufficient. Fourthly, I am ſtrongly inclined to hold, that

Lords—Jan. 26, 1799.

when

The DORDRECHT. July 9th, 1799.

when there is no pre-concert, it muſt be not a ſlight ſervice, nor an aſſiſtance merely rendering the capture more eaſy or convenient, but ſome very material ſervice, that will be deemed neceſſary to entitle an army to the benefit of joint capture; where there is pre-concert, it is not of ſo much conſequence that the ſervice ſhould be material, becauſe then each party performs the ſervice that is previouſly aſſigned to him, and whether that is important or not, it is not ſo material; the part is performed, and that is all that was expected: But where there is no ſuch privity of deſign, and where one of the parties is of force equal to the work, and does not aſk aſſiſtance, it is not the interpoſing of a ſlight aid, inſignificant perhaps, and not neceſſary, that will entitle another party to ſhare. Suppoſe an engagement at ſea, in which a part of the enemy's crews being diſpoſed to fly to ſhore ſhould be prevented from landing by an armed force, and ſhould therefore be induced to ſurrender with the main fleet; or ſuppoſe this body of armed men on ſhore ſhould have prevented the fleet from obtaining ſupplies, two or three days previous to the action, theſe would be very remote ſervices, and ſuch as would not induce me to pronounce for a joint capture: The ſervices which I ſhould require, muſt be ſuch as were directly or materially influencing the capture, ſo that the capture could not have been made without ſuch aſſiſtance, or at leaſt, *not certainly*, and without great hazard. It is further expected that the evidence by which ſuch a claim is ſupported ſhould be clear and conſiſtent, becauſe it lies on thoſe ſetting up an intereſt of joint capture to make out their caſe; the preſumption is on the ſide of the actual captor: Their evidence therefore muſt be

The DORRECHT. July 9th, 1799.

be ſatisfactory, for if not, or if it is left at all doubtful, it is the duty of the Court to adhere to the intereſts of the actual captor.

Theſe being the principles, let us ſee what are the facts of the preſent caſe, and the amount of the claim grounded upon them. As to pre-concert, that has been totally abandoned on the part of the army. That the army did every thing that could be done cannot be made a queſtion; on this point I need ſay no more than that it was a *Britiſh* army; as far as ſpirit, and courage, and patriotic, and gallant exertions of every kind could entitle them to be conſidered as joint captors, their claims would be readily allowed; but this is not the view of the ſubject which the Court is at liberty to take: The queſtion is only, Whether in the ſituation in which they were, they did, or could do any thing which can entitle them, under the known rules of this Court, to be legally conſidered as joint captors? It ſeems there was a very general expectation at the *Cape of Good Hope* that a *Dutch* force would ſoon arrive in thoſe ſeas, but as all pre-concert is given up, I do not hold it to be incumbent on me to ſtate every meaſure that was taken by the naval and military commanders ſeparately, to reach thoſe parts where it was expected the *Dutch* fleet would firſt make its appearance; the only fact alleged on the part of the army before the arrival of the main body on the 16th, is, that Captain *M'Nabb* was ſtationed with a ſmall body of not more than forty men near *Saldanah Bay*; it is impoſſible that ſuch a force could do more than act as a party of obſervation; againſt the *Dutch* fleet, conſiſting of 2500 men, they could effect no other purpoſe; and I need only advert to the ſmall-

neſs

neſs of their number to ſhew, that it was impoſſible that they could even prevent the crews from ſupplying themſelves with water and other proviſions from the ſhore.

It appears in the evidence of one of the *Dutch* witneſſes, "That on his arrival on the anchorage ground, he did not perceive any troops poſted on the heights, and that it was not till noon of the 16th of *Auguſt*, that they were hindered in their watering parties." With reſpect to other ſupplies it is ſaid, that, in one inſtance, twenty-five head of cattle being brought down to the ſhore by the country people, the *Dutch* butchers who had come on ſhore to take them off, were obliged by the appearance of ſome of theſe troops to leave their work, and go on board: This is the only inſtance in which they appear to have met with any interruption, and on this point what Admiral *Lucas* ſays is deciſive; he ſays, "That he was not prevented by any of our poſts from watering or communicating with the country."

General *Craig*'s own letter is alſo ſtrong evidence to the ſame effect; where he ſays, "The *Dutch* fleet were near *Schappen Iſland* watering and ſetting their rigging, as if they meant to ſtay ſome time;" and with regard to the force of the troops in the ſame letter he ſays, "*King*, with the light infantry, is pretty cloſe to them, but the reſt of the troops cannot reach it theſe four days at leaſt: I think, if you can anchor below them, it may be a bloodleſs, but not leſs glorious action:" From theſe repreſentations I think it is pretty clear, that there was nothing to interrupt their quiet anchorage in the Bay, nor to cut off their communication with the country, except in one or two

The DORDRECHT.

July 9th, 1799.

trifling inſtances; therefore I cannot accede to what has been advanced, that material ſervice had been performed before the 16th of *Auguſt*; prior to that day nothing was done by this party, which did, in the moſt remote degree, contribute to effect the capture. Indeed if they had done this ſervice in a much more effectual manner than they had an opportunity of doing, if they had every day prevented the *Dutch* from watering, as they did in one inſtance drive them from their ſupplies of cattle, or if they had been able to prevent them from communicating with the people of the country, I ſhould have found it very difficult to ſay that ſuch ſervices as theſe could entitle them to claim as joint captors. Suppoſe an enemy's fleet to be in the *Downs*, and that they ſhould be prevented from landing by the garriſon of *Dover* Caſtle; if they were afterwards compelled to ſurrender to our fleet, I ſhould not hold the garriſon to be in any way entitled to be admitted as joint captors. If that be ſo, the whole matter is reduced to the 16th of *Auguſt*, and if the ſervices of that day will not be ſufficient to ſuſtain their claims, the preparatory ſervices which have been relied on will, I think, not help them: Then what was done on that day? The preponderance of the evidence ſeems to be with the army in reſpect to the time of their appearance; it is, I think, proved that they were in ſight of the *Dutch* ſquadron ſome few hours before our fleet arrived. But what was done? The watering parties withdrew, and nothing more; they retired unmoleſted, and the troops had no means of annoying them; mention is made of a cannonading which took place againſt a *Dutch* frigate that was ſtationed nearer to the ſhore for the purpoſe

The DORDRECHT.

July 9th, 1799.

purpoſe of watering: But the nature of this attack ſeems very doubtful; ſome witneſſes ſay it did conſiderable damage, others ſay very little; ſome ſay "the army could have deſtroyed her," others ſay "not without throwing ſhells." I own it appears to me very improbable, that it ſhould have been in the power of the army to take or diſable her, before it would have been fully in her power to ſheer off; however that is not material, as it is admitted the firing ceaſed, leaving the frigate in the poſſeſſion of the *Dutch*, and without having ſuſtained any material injury. No offenſive operations took place between the army and the *Dutch* fleet; it is ſaid indeed in the evidence of Mr. *Ferguſon*, "That as ſoon as the advanced corps became viſible to the *Bellona*, ſhe cannonaded them, and that one of the ſhot ſtruck ſome ſtands of arms belonging to the corps, and damaged them; that the corps on gaining the heights returned the fire with four light field-pieces, and having brought up an howitzer, ſeveral ſhells were thrown at the veſſel; that having another howitzer ready to be got up, it would have been in the power of the ſaid corps to have entirely deſtroyed the frigate, and that, by marching down to the beach, they might have reached every other ſhip of the *Dutch* ſquadron." But I cannot but look on that as a very doubtful fact, for other witneſſes ſay, "They could not have reached them;" as, at any rate, without quitting the Bay, they might have taken another ſtation at ſuch a diſtance as to have been in perfect ſafety from the army:" I cannot therefore help thinking, that it muſt have been a very unfounded perſuaſion that this witneſs has expreſſed, of the power which the land forces

The DORDRECHT. July 9th, 1799.

could have had of annoying the *Dutch* fleet, and I do not think it is ſupported by the general effect of evidence. The whole amount then of the co-operation of the army on the 16th is, that a watering party of the enemy was compelled to withdraw, and that a few ſhots were exchanged between the advanced corps and a *Dutch* frigate; this, with the addition of one or two other circumſtances which I ſhall preſently advert to, makes the whole amount of the ſervices which are pretended to have been rendered by the army on the 16th of *Auguſt*. In a few hours the *Engliſh* fleet made its appearance; and what was then the ſituation of the *Dutch* fleet relative to the two forces ſeparately? With reſpect to the army, the army could not take them, nor even annoy them. Relatively to the fleet alone, no one can doubt for a moment but that, from the firſt appearance of the *Engliſh* fleet, the *Dutch* ſquadron was an object of certain capture or certain deſtruction; the utmoſt of the argument on that ſide is, that the *Dutch* might have deſtroyed their veſſels; there was no hope of eſcape, much leſs was there any chance of making effectual reſiſtance; an engagement was hopeleſs in regard to the ſuperiority of the *Engliſh* fleet, and in other reſpects the crews of the *Dutch* veſſels ſhewed no diſpoſition to fight, being, in every ſhip, more or leſs in a ſtate of mutiny, as we learn from Admiral *Lucas* himſelf.

But it is ſaid, they might have choſen the deſtruction of their ſhips, and that the preſence of the army prevented them from reſorting to this expedient, and therefore that they are to be conſidered as joint captors. It has been allowed that no ſuch caſe of joint capture as the preſent ever occurred before; that alone is an unfavourable

unfavourable circumſtance, becauſe the Court would not be diſpoſed to carry this doctrine farther than it has already gone, unleſs ſome clear principle could be ſhewn to warrant the extenſion. The principle of terror to ſupport this claim muſt be, of terror operating not mediately and with remote effect, but directly and immediately influencing the capture. I will not ſay that a caſe might not, under poſſible circumſtances, ariſe, in which troops on ſhore might be allowed to ſhare in a capture made in the firſt inſtance by a fleet. I will put this caſe: Suppoſe a fleet ſhould come into a hoſtile bay with a deſign of capturing an hoſtile fleet lying there, and a fleet of tranſports ſhould alſo accidentally arrive with ſoldiers on board; ſuppoſe theſe ſoldiers made good their landing, and gained poſſeſſion of the hoſtile ſhore, and by that means ſhould prevent the enemy from running on ſhore, and from landing, and thereby influenced them to ſurrender; I will not ſay that troops in ſuch a ſituation might not entitle themſelves to ſhare, although the ſurrender had been made actually to the fleet. But ſuppoſe the troops to land on a coaſt not hoſtile, but on their own coaſt, I do not apprehend that the poſſeſſion of ſuch a ſhore would draw the ſame conſequences after it: For what difference would it make whether there were troops on ſhore or not? The enemy muſt know, that in a day or two the landing on a ſhore to them hoſtile, muſt be followed by ſure and certain captivity, whether there was a party of military or not: What additional terror does an army hold out? The conſequences of captivity would be the ſame in either caſe, and unleſs there had been a notice and denunciation of particular ſeverity, I do

The Dordrecht. July 9th, 1799.

not underſtand that by the laws of war they would be expoſed to more than a rigorous impriſonment. Then, what is the difference between the caſe which I have juſt ſtated, and the preſent caſe? It is ſaid that the country was diſaffected towards the *Britiſh*, being but a recent conqueſt; but it appears to me that the affections of the *Dutch* were of a very mixed nature; the crews of the *Dutch* ſhips were mutinous from their attachment to the *Engliſh*, and ſwore "They would blow out the brains of any one who ſhould fire on the *Engliſh*;" and with reſpect to the people of the coaſt, it by no means appears that they were unanimous in their diſaffection; it is no proof, that becauſe they ſupplied the *Dutch* fleet with proviſions they were adverſe to the *Britiſh*: We know that Lord *St. Vincent* has in this war been ſupplied with freſh proviſions from the *Spaniſh* coaſts? and it is well known in hiſtory, that when *Louis* the Fourteenth was marching againſt *Holland*, he was ſupplied with proviſions by *Dutch* merchants, not from enmity or diſaffection to their own country, but from the mere natural affection for gain. No ſtreſs therefore can be laid on that circumſtance, and it appears certain to me, that if the *Dutch* had attempted to deſtroy their ſhips, and to effect a landing on ſhore, they muſt in a few days have been hunted down, and have become, in the ordinary courſe of things, priſoners of war; the appearance of a military force therefore, in my opinion, made no difference; it conveyed no additional terror, or at leaſt no ſuch ſpecial intimidation, as could entitle them to be conſidered as joint captors. This is my view of the caſe, ſuppoſing there had been no ſpecial denunciation that a ſevere military execution would be

be exerciſed upon them if they ran their ſhips on ſhore; but it is argued, that ſuch a denunciation did take place, with a view to bring them to a ſurrender; that it did produce that effect, and that without ſuch an intimation they would have perſiſted to run their ſhips on ſhore. There is a great deal of evidence on this point; there is a great deal to prove that they could not have run their ſhips on ſhore where the army was ſtationed, but that they could have run them on ſhore at another place; there is however much evidence that the *Engliſh* fleet could have prevented them at that ſpot; and there is alſo much evidence that the *Dutch* crews would not have conſented to ſuch a meaſure.

I need not enter into a minute detail of this evidence, as I think I do not ſtate it too ſtrongly when I ſay that the fact is at leaſt queſtionable, and remains at leaſt a matter of doubt, whether this meaſure could have taken place or not. It is in itſelf highly improbable that they ſhould wiſh to encounter the danger and difficulty of running on ſhore on an unfriendly coaſt, and it is not pretended that they had come to any deciſive reſolution on the ſubject; it is ſpoken of as being a matter of deliberation amongſt them, and they are rightly deſcribed as being in a ſtate of perplexity and diſtreſs. Some ſpeak of it as a thing judged proper to be done in a Council of War; but all agree that it was to be diſcuſſed again, and that they had not come to any final determination on the meaſure. When the *Engliſh* fleet came in ſight, it appears, that Admiral *Elphinſtone* ſent to ſummon them to ſurrender; a verbal anſwer was returned: Admiral

Elphinſtone

The Dominicaet. July 9th, 1799.

Elphinſtone ſent a ſecond ſummons, and demanded an anſwer in writing: A Council of War was held, and the reſult was (for they decline ſtating particularly what paſſed at the conſultation,) that they propoſed terms of ſurrender. I think the evidence is, that they were ſtrongly inclined at that time to come to a ſurrender. But it is ſaid that they did not expect the terms would be acceded to, but ſent them only with a view of gaining time: The evidence of Admiral *Lucas*'s Captain is to the following effect: he ſtates, "That if the army had not been preſent on the ſhore, Admiral *Lucas* would not, in his opinion, have engaged the *Britiſh* fleet, owing to the mutinous behaviour of a great part of the *Dutch* crews; but notwithſtanding there were enow to be depended upon to run the ſhips on ſhore and burn them, as it was the Admiral's intention to do, if he had not received a letter from General *Craig*, informing him if he attempted ſo raſh a meaſure no quarter would be given by the troops to any individual that ſhould land; that on the appearance of the *Britiſh* fleet, Admiral *Elphinſtone* ſent to ſummon them to ſurrender; that a verbal anſwer was returned by Admiral *Lucas*, that he ſhould call a Council of War that night, and would ſend the reſult of their conſultation to Admiral *Elphinſtone* the next morning; that in about three hours afterwards, another letter was brought from Admiral *Elphinſtone* requiring an anſwer in writing, and a promiſe that no damage ſhould be done to the ſhips during the night; that ſuch promiſe was accordingly ſent by Admiral *Lucas*; that the conſultation took place during the night, and at ten o'clock on the next morning, the 17th of *Auguſt*, propoſals of capitulation were ſent;"

and then he ſtates, "That theſe were ſent only to gain time."

The DORDRECHT.

July 9th, 1799.

Now they had paſſed their word of honour that no damage ſhould be done during the night, and Admiral *Lucas* ſays, "That having given his word, he conſidered himſelf bound to do no injury to the ſhips during the night." I cannot help thinking therefore, that if the gentlemen had ever thought of running their ſhips on ſhore, they muſt very ſoon have abandoned it, becauſe, that they ſhould bind themſelves not to do it that night when it would be moſt eaſy, and reſort to it afterwards, is not very likely. Beſides, I do not ſee that their propoſals were rejected except on one article: an alteration was propoſed by Admiral *Elphinſtone*, "That inſtead of a *Dutch* frigate other proper veſſels ſhould be appointed to carry the *Dutch* officers to *Europe*;" and this alteration was immediately acceded to on their part.

The only circumſtance that could make any difference in reſpect to the claims of the army between the time of the propoſal and the time of the capitulation is, "That General *Craig*'s letter is ſaid to have been brought whilſt they were under deliberation." It is rather difficult I think to conceive how this meſſage could have been conveyed: it is ſaid by a watering boat; but there ſeems to be no ſmall difficulty to underſtand how the knowledge of this matter came afterwards to General *Craig*; however, with reſpect to the arrival of the letter, there is a very material difference in the evidence, and the exact point is left very diſputable; one of the witneſſes ſays that he cannot ſay whether it came before or after the deciſion.

Now

The Dordrecht. July 9th, 1799.

Now under this evidence, and looking at all the facts together; conſidering the great doubt which exiſts, whether ſuch a reſolution was ever made, or could have been executed; recollecting that the account of the *Dutch* officers is in ſome meaſure a vindication of their own conduct, (although I do not ſee that any apology was neceſſary,) and conceiving that under their feelings as gentlemen for the misfortunes of their country, they may have expreſſed their ſenſe of their obligation to deſtroy their veſſels, perhaps rather more highly than could be juſtified by the fact; I cannot ſay that it is proved to me that the meaſure was reſolved upon; or if reſolved on, could have been executed; or if actually reſorted to, that it could not have been executed without incurring any immediate danger from the army.

Under theſe circumſtances, I am of opinion that the claim of the army is not ſupported on any principle, on which either this Court or the Court of Appeal has pronounced for an intereſt of joint capture: Even allowing the denunciation to have been made; if ſuch principle of intimidation would be ſufficient, how could I ſay that a crowd of the inhabitants of the coaſt would not be entitled alſo if they had threatened, as they would probably do, to knock thoſe on the head who attempted to eſcape on ſhore after deſtroying the ſhips.

As to the former caſe of the *Saldanah Bay*, which has been cited, it is materially diſtinguiſhable from the preſent caſe by this circumſtance, that there the fleet was cloſe on its own ſhore, and the ſoldiers were landed from the fleet upon a hoſtile coaſt; there was pre-concert and co-operation of the moſt effectual kind;

kind; and therefore it is not applicable to this caſe. Theſe are the impreſſions which this caſe has made on my mind. I ſhall be very glad to hear any additional obſervations from the Counſel for the Army, if they have any thing farther to offer; but I have paid great attention to the evidence and to the arguments which I have heard, and I confeſs the impreſſion of mind, as I have ſtated it, is ſtrong and deciſive, that the claim of the army in this caſe cannot be ſuſtained.

The Dorrekeun.

July 9th, 1799.

THE WALSINGHAM PACKET, Bell Maſter.

July 10th, 1799.

Trading on board a *Britiſh* packet illegal: Effect of that illegality in the Prize Court to bar the claimant.

THIS was a caſe of a *Britiſh* packet, re-taken from the enemy, in which a claim was given for the cargo as the property of *Britiſh* and *Portugueſe* merchants, and reſiſted on the part of the captors on the ground of the illegality of ſuch a trade under the ſtat. 13 & 14 *Ch.* 2. cap. 11. ſect. 22.

For the captors, the *King's Adv.* and *Laurence.*—There is no diſpute about the facts in this caſe, as it is allowed that the ſhip was a *Britiſh* packet, taken with a large quantity of merchandiſe on board; On our part it may be admitted, for argument, that theſe goods are *Britiſh* property, or belonging to *Portugueſe* ſubjects, as ſuggeſted in the claim. That they are deſcribed as private adventures can make no difference: The quantity of theſe goods but ill accords with the ordinary extent of ſuch intereſts; but were it

The WALSINGHAM PACKET.

July 10th, 1799.

it in point of fact true, all traffic on board these vessels is equally prohibited. The stat. 13 & 14 *Ch.* 2. cap. 11. sect. 22., enacts, "that no ship, vessel, or boat appointed, and employed ordinarily for the carriage of letters and packets, shall, unless it be in such cases as shall be allowed by the said person or persons which are or shall be appointed to manage His Majesty's customs or officers aforesaid, import or export any goods or merchandize into, or out of, the parts beyond the sea, upon the penalty of the forfeiture of 100*l.* to be paid by the master of the said vessel or boat, with the loss of his place; and all goods and merchandize that shall be found on board any such ship, vessel, or boat, shall be forfeited and lost." The policy of this regulation is, at first sight, obviously, to prevent vessels engaged in this important public service from being encumbered with cargoes, which must retard their sailing, and make them a more easy prey to cruizers; and at the same time excite a greater vigilance in the enemy to intercept them; It is a trade, therefore, expressly declared illegal by act of parliament; and although it is not specified who shall be entitled to the penalty, and although it may be supposed therefore to be reserved to the King, it is not material in this case; as the way in which the act must operate on this claim is, by making the whole transaction illegal, to disable any persons from appearing in a Court of Justice to maintain a title to property taken in such an illegal traffic. The recaptors stand indisputably before the Court as *bonæ fidei* possessors of this cargo, having taken it out of the hands of the enemy; and till any persons can shew a legal title to demand it from them, they are entitled

to

to the full benefit of the capture; as it has been already determined before the Lords in the case of the *Eliza, Worsely*,* in which a claim of a *British* subject for property taken in a trade carried on in violation of the Charter of the *East India* Company was rejected, and the property condemned to the captor.

The Walsingham Packet. July 10th, 1799.

* Admiralty—*Feb.* 6, 1794. Lords—*July* 13, 1798.

The *Court* suggesting, that in a question of this nature it would be proper that some appearance should be given for the Crown,

The *King's Proctor* appeared and prayed—That the question of law, as to the interest in the penalty, might be reserved.

For the claim, the *Adv.* of the *Admiralty* and *Sewell*; for other parties *Arnold* and *Croke*.—The act of parliament, which has been relied on, does not apply to the circumstances of the present case. If the whole act is considered together, it will appear that the chief object of the Legislature was to prevent frauds and abuses in the customs, as the act is particularly intitled; and with that view it was thought necessary to put certain restrictions on the trade carried on by ships of war, and in the present clause by packets. But this is done only in a special manner; not by declaring it to be an *illegal* trade, and a trade in all cases necessarily incurring the penalty of the law, but by subjecting it to the controul of the officers of the customs, and by enacting directly in opposition to the present seizure, in the 15th section, "That no seizure should be made but by the person or persons who are or shall be appointed by His Majesty to manage his Customs, or officers of His Majesty's Customs for the time being, or such other person or persons as shall be deputed and authorized thereunto

The WALSINGHAM RACKET.

July 10th, 1799.

thereunto by warrant from the Lord Treaſurer or Under Treaſurer, or by ſpecial commiſſion from his Majeſty under the great or privy ſeal, and if any ſeizure ſhall hereafter be made by any other perſon or perſons whatſoever, for any the cauſes aforeſaid, ſuch ſeizure ſhall be void and of none effect; any ſtatute, law, act, or proviſion to the contrary in anywiſe notwithſtanding." Suppoſe a ſeizure had been made then in this caſe by any perſon not competent to ſeize, and the matter had been brought forward in the way of an information; would it not have been a ſufficient plea to have ſhewn that the ſeizor had not a *perſona ſtandi in judicio?* It muſt evidently be ſo — for no proceedings can be inſtituted, but under the act; and therefore it is, in the firſt inſtance, neceſſary to be ſhewn that the proceedings are according to the directions of the act. The caſe of a ſeizure by prize is very different from the ſeizure directed by the act; and when it is recollected how ſtrong and general the terms are, "that a ſeizure by *any other perſons* whatever ſhall be void and of none effect, any ſtatute, act, or proviſion to the contrary notwithſtanding;" it cannot be doubted that this ſeizure is one of thoſe expreſsly diſcouraged by the act: The object of the act was to haraſs trade as little as poſſible, in the way of general informations, but to ſubmit the expediency or inexpediency of allowing this particular mode of trade, to the officers of the Cuſtoms. In the preſent caſe it may reaſonably be contended that the trade has paſſed under their inſpection, and received their permiſſion and tacit aſſent at leaſt, although no expreſs licence can be produced. The goods in queſtion were all taken from the quay, and

and all entered at the Cuſtom-houſe for exportation; and the very notoriety of the ſhipment of ſuch a cargo at a place like *Falmouth*, where it could not be overlooked, is ſufficient to entitle the claimants to ſay, that as far as the conſent of the Officers of the Cuſtom-houſe can protect them, they are protected.

The Wilhelmina Packet. July 10th, 1799.

The Court aſked, Whether the goods were entered for exportation *on board a packet?* no anſwer being returned—the Court aſked, Whether it was contended that the ſubordinate Cuſtom-houſe officers were empowered to give this conſent, ſuppoſing that the circumſtances of notoriety were ſufficient to raiſe a preſumption of knowledge of the fact in them?

It was ſaid that "the perſons aforefaid," mentioned in the 22d clauſe, as being empowered to grant the allowance, were in fair conſtruction the ſame perſons as thoſe mentioned in the 15th clauſe, to whom the right of ſeizure was confined?

In reply, the King's Advocate contended — That no tacit aſſent or connivance could be pleaded to diſpenſe with the regulations of an Act of Parliament; that whatever might be the circumſtances of notoriety under the view of officers on the quay at *Falmouth*, they were not the perſons in whom the power of giving allowance was lodged; that "the perſon or perſons aforeſaid," in the 21ſt clauſe, referred to thoſe named in the very next preceding clauſe, in which the caſe of goods landed by permiſſion was provided for, and the words of which were, "That all foreign goods and merchandize, which by the perſon or perſons which are or ſhall be appointed by His Majeſty for the managing the cuſtoms, and the Cuſtomer, Collector, and Comptrollor, ſhall be permitted, &c. &c."

The Walsingham Packet.

July 10th, 1799.

evidently reserving so important a discretion in the hands of those superior officers;—and that the permission alluded to in the 2nd clause, could only refer to the direct allowance under the authority of these officers.

JUDGMENT.

Sir *Wm. Scott*.—This is a case, as it has been truly observed, of a very different complexion from those which generally occupy the attention of this Court; it turns upon a principle which the Court of Appeals has sanctioned, in respect to the power of a Court of this nature, to take cognizance indirectly of breaches of the municipal law of this country. This Court is properly and directly a Court of the law of nations, and I am not aware that any case had occured before the present war, in which the Court had acted on the principle on which it certainly did act in the case alluded to, I mean the case of the *Eliza*. It was the case of a ship and cargo, in which the claimant being a *British* subject appeared to have been engaged in trafficking with that cargo in direct violation of *British* Acts of Parliament. It occurred to those who were entrusted with the concerns of the captor, that a resistance to such a claim might be sustained, upon a ground which had not been occupied in any other case that had occurred, *viz*.—That although this Court is properly and directly a Court of the law of nations only, and not intended to carry into effect the municipal laws of this or any other country; and although it was in the habit of declining to take notice of the private laws of other countries; yet it was an inquiry worth pursuing, Whether a *British* Court of Admiralty, fitting

The Walsingham Packet. July 19th 1799.

ting here, armed with its power from this country, and carrying all its process into effect by the authority of the *British* Parliament, was not so far a *British* Court as to be bound to take notice of *British* Acts of Parliament, and the flagrant breach of our municipal laws, with respect to the transactions of our own subjects coming incidentally before it. In that case, the Court of Admiralty did not sustain the objection to the extent in which I have now stated it; My predecessor condemned the cargo, but generally as *French* property. The cause went up to the superior Court, where it was most elaborately argued; perhaps no case ever underwent a fuller discussion; there, the principle was affirmed and established, that a *British* Court of Admiralty was bound to take notice of a violation of an Act of Parliament, appearing on the face of the claim, and that a *British* claimant could not entitle himself in such a Court, to a restitution of that property, happening to fall by accident into the hands of a *British* captor, which by his own shewing, appeared to have been employed in an illegal trade.

That this decision has removed all difficulties on this question I will not assert; it is a good moral and legal principle unquestionably, that a man must come into a court of justice with clean hands, and that the law will not lend its aid to persons setting up a violation of law, on the face of his claim. It is a sound maxim, to which the courts of the law of the land have always attended; and whether the penalty is great or small, or whether there be no penalty at all, yet if the act is reprobated, a man will not be allowed to claim a right founded on it: But cases had not occurred

THE WASHINGTON PACKET. July 14th, 1799.

in which the Court of Admiralty had met with occaſion to apply ſuch a principle, except in caſes of *Britiſh* property taken in a trade with the King's enemies; but in ſuch caſes the exception is not to be conſidered as ariſing, from municipal law, but from the principle of allegiance, which is a general principle of the law of nations. It was in the caſe of the *Elſa*, that it was firſt decided, that the Court of Admiralty was bound to take notice of an illegal practice, evidently appearing in the conduct of a *Britiſh* ſubject; though the illegality aroſe from a violation of ſome law merely municipal; and that it was bound to reject the claim of any *Britiſh* ſubject, whoſe property had found its way into the hands of a *Britiſh* captor, if the tranſaction in which that property had been employed, was a tranſaction contrary to *Britiſh* law. The queſtion is ſtill not relieved from all its difficulties, and the obſervations which have been made today, only revive the objections which were made before; it was ſaid, (and cannot be denied,) that ſuch a practice might carry the intereſt in a very different courſe, from what the Act of Parliament which had been violated, directs. In the *Elſa*, which was a caſe of traffic illegally carried on in violation of the charter of the *Eaſt India* Company, the intereſt has gone to the private captor, whilſt the penalty by the Act of Parliament is given to the Company as a compenſation for the damages ariſing to them from ſuch illegal trade. In the *Enterprize*, the courſe has been the ſame: But in the *Etruſco*, a later caſe, it has been queſtioned, whether thoſe deciſions were right as to the conveyance of the forfeiture, and whether the penalty ſhould not go to the King, as the perſon in-

Lords— November 26, 1798.

jured

The Warrington Packet. July 10th, 1797.

jured by every violation of the law, where no ſpecific appropriation of the property was directed; and this queſtion ſtill remains ſubject to further deliberation; on that part of the caſe, therefore, I ſhall not think of deciding till that queſtion is diſpoſed of.

As to the facts of this caſe they are pretty clear; the veſſel is a *Britiſh* packet, and by the ſtat. 13 & 14 *Ch.* 2. c. 11. ſ. 22. the carrying of all merchandize on board a packet is prohibited, except under ſpecial allowance there deſcribed; the amount of the articles is immaterial, except in a very minute degree, which the revenue laws themſelves have ſpecified; the quality alſo is altogether immaterial; neither does it make any difference whether the owners are on board or not, or whether the lading is called a cargo or a private adventure; the prohibition is general, againſt the carrying *any merchandize*. With the policy of the act I have nothing to do, as the law has determined it; but the reaſons pointed out by the King's Advocate are obvious, that a cargo muſt be a hinderance and obſtruction to diſpatch and expedition; and if it is ſaid, the crew would defend themſelves, and fight the better for a cargo; it is to be remembered at the ſame time, that it holds out a greater lure to the enemy. Theſe goods are admitted to have been put on board for *Liſbon* for the purpoſes of trade, and the only queſtion is, Whether they come under the allowance of the Act of Parliament? The exception is, "Unleſs it be in ſuch caſes as ſhall be allowed by the ſaid perſon or perſons which are or ſhall be appointed to manage His Majeſty's Cuſtoms or officers aforeſaid." Then who are the perſons inveſted with this diſcretion? I think, by fair conſtruction of the

The Walsingham Packet. July 15th, 1799.

act, they must be those mentioned in the clause immediately preceding, in the 21st section, the Collector and the Comptroller of the Customs; on any other explanation, every tide-waiter would be competent to grant this indulgence, which is an interpretation the Court would not willingly admit, unless absolutely forced upon it. In the next place, What sort of allowance would be held sufficient? It has been argued that a tacit permission would be sufficient, that it would be enough if a practice had grown up by connivance; but I cannot accede to that argument, nor can I consider that to be the permission which the statute recognizes; it must be a full, distinct allowance, and expressed in such a manner as to be capable of proof: If it were proved to have been practised in twenty instances, it would avail nothing; it would only shew that the due vigilance had been laid asleep; but it could amount to nothing as a legal dispensation, nor be considered as any legal allowance which the Court can receive. Then how stand the facts? The claimants appear before the Court as persons trading contrary to law; it is said, there can be no seizure but by the Custom-house officer—I admit it; but this is not a case of seizure. It is said that no forfeiture can attach but in a particular manner directed by the statute; and it is true; but this is not a forfeiture—although to the parties it has certainly much the same effect. The question is, What will be the effect in a Court of Prize? Whether a party can be admitted in this Court to say, "True it is, I have been engaged in an illegal trade, but the property is mine, give it me, and let me go?" It has been decided by the superior Court, that he shall not. In the Exchequer, the seizing

seizing officer is put to make out *his* case; but here it is different; the claimant must support his title, and if the Court of Appeal has determined that such a person is stopped *in limine*, it matters not to him what becomes of the property; he can have no right to moot difficulties in this Court, as to the final disposition of it: looking on the decisions of the Lords on this point, as undisturbed decisions, I must apply the principle to this case, which, I am of opinion, comes fairly within it; but as I am aware of the doubts which have arisen on the judgment of the Lords of Appeal in the case of the *Etrusco*, and as I know that Court feels it to be a question of weight, I shall direct this case to stand over as to that point, to await their final decision. A mistake has run through the whole of this argument; the gentlemen have argued to bind me down to this particular act, and then the difficulties arising from it are pointed out; but that is not the state of the case. The question is, Whether I am to apply the general principle? The Act of Parliament is used only as a medium of proof, to shew that what has been done is illegal, and then the principle applies, as a great moral, and legal principle, adopted in a very great extent in the jurisprudence of this country, and particularly sanctioned and introduced into the practice of this Court, by those decisions to which I have alluded.

The Walsingham Packet. July 10th, 1799.

Claim rejected—Question reserved, to whom the Property is to be condemned?

July 11th, 1799.

THE KINDERS KINDER, HAYSEN, Master.

Claim *admitted* on behalf of the *Daniſh* government for *Algerine property* taken under the *Daniſh* flag, the Dey having exacted payment from the *Daniſh* conſul.

THIS was a caſe of a claim given on the part of the *Daniſh* College of Commerce, praying to be admitted in the place of *Algerine* ſubjects, whoſe property had been captured on board a *Daniſh* ſhip, and for which the Dey of *Algiers* had exacted immediate compenſation from the *Daniſh* Conſul.

JUDGMENT.

Sir *Wm. Scott.*—This is a very ſingular caſe, in which the Court has certainly conſiderable difficulties to encounter, and one in which it may perhaps be impoſſible to decide in any way that may not be liable to ſome fair objection. However, the Court muſt find its way as well as it can, and can hardly undertake to do more than to give what the law terms a *ruſticum judicium*, or a coarſe ſort of equitable arbitration. It is certainly the duty of captors, in all caſes, to carry their prizes to places where they can be put into a courſe of legal inquiry; but in captures made on the property of *Oriental* ſubjects, a more than ordinary caution, and regularity of proceeding ſhould be obſerved, becauſe it is very much the practice of thoſe countries, under a law of nations now peculiar to themſelves, to reſort immediately to a very ſummary juſtice, and to redreſs themſelves for what they conſider as an unjuſt capture, by demanding compenſation from the countrymen of the aggreſſors. *Britiſh* ſubjects reſident amongſt them may be expoſed to very alarming difficulties and danger for acts

acts of other perſons, if thoſe acts are not guarded with the moſt ſcrupulous care.

The KINDERS KINDER.

July 11th, 1799.

At the time when this capture was made, the King's naval officers in the *Mediterranean* ſtation were acting in a very critical ſituation of affairs; the exigencies of the moment are the beſt excuſe for what was done, or neglected to be done, irregularly in theſe proceedings. The cargo conſiſted of corn, ſugar, and cotton, laden at *Algiers* on board a *Daniſh* ſhip, and deſtined oſtenſibly to *Leghorn*, but, according to a ſecond charter-party, and, as I think, *really* to *Marſeilles;* immediately on hearing of the capture, the Dey of *Algiers* ſent for the *Daniſh Conſul*, and with an emphaſis which the *Daniſh* Conſul did not perhaps think it prudent to reſiſt, demanded of him to refund the value of the cargo taken on board the *Daniſh* ſhip; alleging that the *Daniſh* flag ought to have protected the cargo, and that if it did not, the *Daniſh* Government and its public agents were anſwerable; the *Daniſh* agent paid the money under this demand, and on a repreſentation of all the circumſtances to the *Daniſh* government, they reimburſed *him*, and the application now made is, that the *Daniſh* government may be permitted to claim in the place of the original proprietors.

All civilized governments have a common intereſt in paying great attention to each other in their proceedings with the *Barbary* ſtates; and the Court would certainly be very glad to have it in its power, to aid ſubſtantial juſtice in the dealings of all *European* ſubjects with them. At the ſame time it muſt be underſtood, that if ſubjects of a neutral country ſubmit to any flagrant act of violence, as for inſtance, if the

Dey

The KINDERS KINDERS. July 11th, 1799.

Dey of *Algiers* ſhould ſtep forward to claim a cargo, evidently *French*, and they ſubmit to refund the value of the property, I ſhould certainly not permit their acquieſcence to defeat the right which a *Britiſh* captor had gained in ſuch a cargo. But in a doubtful caſe, the Court would incline to ſupport an act done for the prevention of miſchief, and although the tranſaction might not be ſtrictly correct, if it appear to have a ſolid foundation of juſtice at the bottom, the Court would be ſtrongly inclined to uphold it in its full extent.

With reſpect to the evidence in this caſe, the papers have been twice tranſlated—firſt from *Arabic* into *Italian*, and then from *Italian* into *Engliſh*; what ſort *of a tranſit* they have had into *Italian* I cannot ſay, being not acquainted with their original language the *Arabic*; but to be ſure the Court could not have had a worſe medium of information than theſe *Engliſh* tranſlations. From the many inaccuracies which are obvious, I am convinced that, were they to be cloſely examined, they would be found to contain no repreſentation at all of the *Italian* letters.

On reading the different letters however, I am ſtrongly impreſſed with an opinion, that the Dey, in ſpeaking of the property *as his own*, ſpoke as ſovereigns are apt to ſpeak, connecting the intereſts of their ſubjects *with their own*; the letters ſtrongly point to an intereſt in this cargo as being *not* in the Dey, but in ſome *Algerine merchants*, his ſubjects; and I underſtand him therefore as interpoſing rather to protect the intereſt of *his ſubjects*, than to aſſert any private intereſts of *his own*. But if it is ſo, it would be too much to ſay that, becauſe the real proprietors

applied

The KINDER KINDER. July 14th, 1799.

applied to their own government in the first instance instead of applying here, they should therefore forfeit that redress, which they might have had by pursuing it here originally in the regular mode: the *Americans* we know did the same; they applied to their government, and desired their claims to be put in adjustment between the two countries. The Dey has his *mode of adjustment*, but it would be hard that therefore his subjects should forfeit the redress, which they might have received here in the first instance if they had proceeded in the regular manner. They have had compensation, it is true, by means of the Dey's requisition made upon the *Danes;* but if this has been done to prevent innocent subjects of *Denmark* from suffering, I think that the Court is bound to give the *Danes* the benefit of all the equity that could have belonged to the *Algerine* claims, if they had been brought forward: the captors suffer nothing by this measure, for they could have no right to detain what belonged to *Algerines*, and if the *Algerines* have received payment from the *Danes*, still that can convey no interest to the *British* captors. Under these considerations I shall not call for particular claims to be given for the private proprietors of the property, claimed generally as the Dey's own, but I will endeavour to assign, as well as I can, *crassiore tela*, in a coarse kind of way, what appears upon the evidence to be the respective interests of the different individuals, and shall restore or condemn as those individuals, would have been entitled, if they had stood before the Court.

Mr. *Busnac*, I think appears to be interested to a considerable amount—in one third of the cotton clearly

The KINDERS, KINDER.

July 11th, 1799.

clearly that I ſhall reſtore to him as an inhabitant of *Algiers*: he ſeems alſo to have been a proprietor of one-third of the 2069 *meaſures of corn*, and alſo a part owner of that laden at *Teideles*; for I think from the manifeſt that quantity muſt have been on board this veſſel; I reſtore therefore a third of theſe parcels.

There is next a parcel mentioned in the letter as being *for our account*: the queſtion is, Who are the individuals compoſing this firm? *J. Bacri* the broker, reſident at *Algiers*, muſt clearly be one, and I think his brother reſident at *Leghorn* muſt be another; I ſhall reſtore their ſhares.

Another ſhare, muſt, I think belong to a perſon, another brother, reſident at *Marſeilles*; the letters, in the whole tenor and ſtyle of them, point to ſuch an intereſt. *His* ſhare I ſhall *condemn*, the reſt I reſtore, and direct it to be paid to the *Daniſh* government. I am ſorry that the *Daniſh* Government ſhould ſuffer *any loſs* in this affair, but I have the ſatisfaction of thinking that it is not owing to the injuſtice of this country; it is an inconvenience to which all *European* ſtates are liable in tranſactions of this nature where the *Barbary* ſtates happen to become parties.

April 7th, 1800.

THE FORTUNE, SMITH Maſter (*a*).

Claim on behalf of the *American* government for *Algerine* property *not admitted*, owing to the manner in which the *American* flag had been aſſumed.

THIS was a caſe of a claim given on the part of the *American* Government, praying to be received to ſtand in the place of *African* merchants; in reſpect

(*a*) This caſe is here reported without regard to the date, on account of its connection with the preceding caſe.

to

to a ſhip and cargo, taken 5th *January* 1797, on a voyage from *Bona* to *Marſeilles*, ſailing under *American* colours, and for which the Dey of *Algiers* had forcibly exacted compenſation from the *American* Conſul.

The FORTUNE. *April* 7th, 1800.

JUDGMENT.

Sir Wm. Scott. — This is a caſe of a ſhip and cargo claimed on behalf of the government of the United States, and of Meſſrs. *Buſnah* and *Bacri Algerine* merchants, ſubjects of the Dey of *Algiers*. The affidavit of claim repreſents, "That in the month of *July* 1796, *Joel Barlow*, Eſq. the *American* Conſul at *Algiers*, having procured the liberation of the *American* priſoners then in confinement at *Algiers*, (the ſtate of the plague at that time rendering it dangerous for them to remain longer in that place,) he was deſirous of conveying them to *Marſeilles*, but that there was no veſſel on which they could embark, except the ſhip *Fortune*, which then belonged, as this deponent is informed and believes, to Meſſrs. *Michael Buſnah* and *Joſeph Coen Bacri*, *Algerine* merchants and ſubjects; and that the *Algerines* being at war with *Genoa* and *Tuſcany*, it was thought inconvenient for the *American* paſſengers that the veſſel ſhould ſail under the *Algerine* flag; that the aforeſaid *American* Conſul therefore, to prevent an interruption by capture of his humane purpoſe, took a bill of ſale for the ſhip in his own name, and gave her the *American* flag, and appointed —— *Calder* to the command, directing him to deſtroy the ſaid bill of ſale when he had reached his port of deſtination; and this deponent ſaith, that he is informed and believes that the ſaid ſhip arrived ſafe with the aforementioned *Americans* at

The FORTUNA

April 7th, 1800.

at *Marſeilles*, ſtill continuing to be the ſole and entire property of the ſaid Meſſrs. *Buſnah* and *Bacri*; and that *Michael Smith*, an *American* citizen, there took upon himſelf the command of the ſaid ſhip under the directions of the ſaid owners, and ſet ſail with her, namely, on or about the 17th *November* 1796, in ballaſt, bound to *Bona* on the coaſt of *Barbary*, where the ſhip arrived in or about the month of *January* 1797, and was immediately laden with a cargo of wheat, to be delivered at *Marſeilles*, though ſpecified in the bills of lading as deſtined for *Genoa*; that the ſaid cargo was ſhipped by *Michael Buſnah* aforeſaid, for account and riſk of the ſaid ſhipper and of his partner the aforeſaid *Joſeph Coen Bacri*, *Algarine* merchants and ſubjects as aforeſaid; and this deponent further ſaith, that he hath been informed and believes that the ſaid ſhip was proceeding on her ſaid voyage, when, on the 5th of *February* following, ſhe was captured and ſeized as prize; that the Dey of *Algiers*, upon receiving information of ſuch capture, cauſed a demand of indemnification to be made upon the aforementioned *Joel Barlow* the *American* Conſul at *Algiers*, upon the ground that the cargo had been put on board a veſſel ſailing under the *American* flag, and which the *American* government, and not the Dey, was bound to ſupport; and that to prevent any diſpute or miſunderſtanding with the ſaid Dey, the ſaid *American* Conſul thereupon drew bills upon the *American* Agent for 40,387$\frac{2}{7}$ dollars, the ſum demanded as the value of the ſhip and cargo to be paid, within ſix months in *Algiers*, and if not then paid, giving the Dey a right to draw at three months ſight on the *American* government, payable in *Philadelphia*; and he alſo ſaith, that from the circumſtances herein-

before

before ſtated, he is adviſed and believes that the *American* government or the ſaid Meſſrs. *Buſnah* and *Bacri*, the ſaid owners of the ſaid ſhip and cargo, will be the only loſers by a ſentence of condemnation of the ſaid ſhip and cargo."

The *American* government therefore comes in not as proprietors, but as perſons *finally* concerned in the property, on whom the loſs will fall if condemnation takes place. The caſe has been compared in all its circumſtances to the *Kinders Kinder*, in which a claim was admitted on the part of the *Daniſh* government, and in which the Court did find its way in a coarſe ſort of manner, to what it conſidered to be the ſubſtantial juſtice of the caſe; to reſtore thoſe parts which appeared to be the property of *Algerine* ſubjects, and to condemn thoſe parts in which there appeared to have been *French* intereſts; but, I cannot but think, that the two governments here ſtand on very different grounds: In that caſe the ſhip was an undoubted *Daniſh* veſſel, there was no queſtion on that point; but the Dey had ſet up his principle of the law of nations, "that the national flag was to give ſecurity to all the property on board," and he had acted on that notion, ſo far as to exact from the *Daniſh* Conſul a compenſation for all the property, on board the veſſel, which was claimed by his ſubjects; the *Daniſh* government not chooſing to conteſt the right, and finding it to be for their convenience, as any other *European* government would, paid the money; and if this was a caſe reſembling that, or if the reaſon for wearing the *American* flag in this caſe, could be ſatisfactorily made out, as it is ſtated, this Court would hold itſelf bound to go the ſame length, and give the ſame

The FORTUNE. April 7th, 1800.

ſame aid, that it gave the *Daniſh* government in the former inſtance; but it is admitted here, that it was not an *American* veſſel, but a veſſel that had aſſumed the *American* flag, in the firſt inſtance, for the laudable purpoſe of giving more effectual ſecurity to the tranſporting ſome *American* ſubjects from ſlavery, and if ſhe had been taken in that employment, I ſhould have held her well entitled to all the protection that could be given to her. But the preſent is no ſuch voyage; as ſoon as that office was diſcharged, the *American* character ought to have been diſcarded—to continue the national flag afterwards, for views of private intereſt, was, I think, in a conſiderable degree reprehenſible. — Were thoſe who repreſent the *American* government privy to this? I cannot but think that the paper No. 2, which is a letter written by Mr. *Barlow* to Captain *Smith*, does ſtrongly indicate an intention of navigating this ſhip as an *American* veſſel, though having no connection with *America*. "The Jews who own the ſhip, wiſh you to take the command of the veſſel after the *Americans* leave her, I wiſh you to keep this a ſecret for the preſent;" Was he to take her as an *Algerine* veſſel; The fact has proved that ſhe was to be navigated as an *American*; there is a bill of ſale from *J. Bacri*, deſcribing himſelf to act by order of Mr. *Barlow*. "*J. Bacri*, (acting by order, and for account of Mr. *J. Barlow*,) has ſold and ceded to Captain *Smith*, the intereſt in this veſſel, for Mr. *Donaldſon*." Is the Court to ſuppoſe that the name of *Barlow* was uſed on this occaſion without his knowledge? That, I think, is highly improbable; there occurs beſides, the name of another agent of the *American* government in this matter,

The FORTUNE. April 7th, 1800.

matter, that of Mr. *Cathaban* the *American* Conſul at *Marſeilles*; the bill of ſale is ſigned by him, and certified and atteſted by him jointly with the maſter, they both deſcribing the ſhip as an *American* veſſel. Can the Court ſuppoſe that he was ignorant of the real property, and of the tranſaction in *Barbary*? Here is a veſſel coming on a public ſervice to *Marſeilles*, in a ſingular character, with *American* priſoners, and dreſſed up in *American* colours by the Conſul at *Algiers*; am I to ſuppoſe that all this could have been done unknown to the *American* Conſul at *Marſeilles*? I cannot but think that Mr. *Cathaban* muſt have known that the veſſel was not the property of *Donaldſon*, but of *Buſnah* and *Baeri*, and that whatever might be the motive of the miſrepreſentation, the two agents entruſted with the powers of the *American* government in thoſe parts could be no ſtrangers to the fact. Now whether it was done fraudulently againſt this country, with a view of perplexing the enquiry of our cruizers, or of this Court, I think it is not very material; if it was done againſt the *Swedes* or *Danes*, it was ſtill a voluntary interpoſition of theſe public characters, to diſguiſe this ſhip and make her appear what ſhe was not; and ſuppoſing it to be done without any fraudulent deſign, there is ſtill that which ought not to appear, more eſpecially from public perſons, an attempt to miſrepreſent the national character of the veſſel; the inconvenience of ſuch a conduct will appear from what followed; the conſequence has been, that on the capture of this veſſel the Dey falls back on the *American* government, and demands an indemnification for the property of his ſubjects taken under the protection of an *American* flag. How came ſhe to be ſailing

The FORTUNE.

April 7th, 1800.

under that flag? Did it belong to her? Certainly not, it was aſſumed under the direction of the *American* Conſuls, and I cannot but think that the *American* government would not, in ſtrict juſtice, be bound to indemnify their agents acting in this buſineſs, not only in a manner which their inſtructions did not authorize, but alſo in a manner which, if ſtrictly conſidered, was inconſiſtent with the duties of the public functions which they were intruſted to exerciſe: if they are diſpoſed to indemnify them it is an act of liberality to which no perſon can object, they may be uſeful ſervants of the *American* government, they may have merits in other parts of their public conduct very proper to be remembered by their government; and to entitle them to its protection, even where they had committed a miſtake or an indiſcretion; but conſiderations of liberality of that kind will not found a demand againſt third parties. In this reſpect then, I think, the *Daniſh* and the *American* governments ſtand on very different grounds, in the *Daniſh* caſe there was no queſtion of the property of the ſhip, no *Daniſh* agent had interpoſed irregularly, but in this caſe we have two *American* Conſuls interpoſing in this irregular manner to give a colourable appearance and character to this veſſel; this is not an *American* ſhip at all, it is a ſhip of another country, and has no pretenſion to an *American* character. The reſult will be, that I am to conſider this caſe as if the *American* government had not appeared in it, and to look to what the proofs are, as between the *Britiſh* captor and the *Algerine*, without any mixture of tenderneſs for *American* intereſts, which I ſhould certainly have felt it my duty equally to reſpect, if, in truth, ſuch intereſts had been involved in this caſe,

on

The FORTUNE.

April 7th, 1800.

on the ſame footing on which *Daniſh* intereſts had been introduced into the other.

Conſidering this caſe as merely between the *Britiſh* captors and *Algerine* claimants, I do not, at the ſame time, mean to apply to ſuch claimants the exact rigour of the law of nations as underſtood and practiſed amongſt the civilized ſtates of *Europe;* it would be to try them by a law not familiar to any law or practice of theirs, and therefore, though the ſhip appears to have been a prize taken from the *Britiſh* by the *Spaniards*, yet having been transferred to theſe ſubjects of *Barbary*, I ſhould not be anxious to enquire whether ſhe had ever been regularly carried into a *Spaniſh* port, though the fact, I think, does ſufficiently appear that ſhe had been in ſuch a port; neither ſhould I preſs to the uttermoſt extent in this caſe that other principle, (though in itſelf moſt rational,) that where a perſon has been detected in a fraud in the particular tranſaction, he ſhall not be admitted to the benefit of a further proof; for we muſt pay ſome attention to the rules of morality and law that prevail amongſt ſuch people.

As to the evidence of the property of the ſhip, it is not clearly proved to whom it belongs, but collecting it as well as I am able, I ſhould ſay, that the ſtrongeſt preſumption is, that it belongs to *Jacob Bacri* of *Marſeilles;* for although the papers are full of contradictions as to the national character, as to the deſtination, and alſo as to the property, yet I think the greater number do point to him as the proprietor of this veſſel: as to the cargo it is not ſo ſtrong; perhaps the preponderance of agency and management relative to it lies on the ſide of perſons in *Algiers;* but ſtill there is great doubt to whom the property belongs, the papers being full of contradic-

The FORTUNE.

April 7th, 1800.

tions alſo on that point. The queſtion is then, Shall the Court, being willing to relax its rules in ſome degree, ſo far relax them as to admit farther proof? No one can doubt that if it was an *European* caſe it could not be allowed; looking at the ſeries of falſehoods, at the falſe property, falſe deſtination, and falſe deſcription of the national character, the Court would ſay, "You ſhall not be let in to give further proof." But ſuppoſing that I was inclined to relax the rule, Have I any proſpect of obtaining ſatisfaction from farther proof? Can any perſon concerned for the claimant ſay, that I have any chance of obtaining from *Algiers* a true diſtinction of the actual intereſts? I ſee little proſpect of it; the *Algerines* have already got their money, and I have no reaſon to ſuppoſe that they would trouble themſelves about the matter; but if they did, Can I be ſo ſanguine as to hope that there would be a fair diſcloſure? In the other *Daniſh* caſe the property could, in ſome degree, be diſtinguiſhed by the papers before the Court: in this caſe it is admitted that it cannot. This being the ſtate of things, I am at a loſs to ſee what ſatisfaction could be derived if I was diſpoſed to allow ſuch an extraordinary indulgence. Being of this opinion, and not thinking that there is any privilege due on account of the *American* flag ſo irregularly employed, I find myſelf under the neceſſity of determining on the preſent evidence. That is allowed to be not ſo ſufficient as that I can reſtore upon it; the conſequence is, that I muſt pronounce this ſhip and cargo ſubject to condemnation.

The circumſtances that gave riſe to the two preceding caſes, remind us of what *Bynkerſhoek* ſays of the *African* ſtates, "*Sed his magiſtris in jure publico, nemo facile utetur.*" *Q. J. P. l.* i. *c.* 15.

THE REBECCA, MOORE Maſter.

July 12th, 1799.

Freight refuſed between the colonies and mother country of the enemy.

THIS was a caſe of an *American* ſhip taken on a voyage from *Surinam* to *Amſterdam*, (22d *April* 1796,) with a cargo of colonial produce; the ſhip had been reſtored by conſent, reſerving the queſtion of freight and expences; ſome parts of the cargo had been condemned as unclaimed, 19th *June* 1798; farther proof was directed to be made of other parts claimed for *American* citizens.—On motion for an allowance of freight to the neutral ſhip—

Court.—Certainly not; I ſhall in no caſe of this ſort, of direct trade between the colony and the mother country, give freight, until I am inſtructed ſo to do by the Superior Court.

In the *Emanual Soderſtrom*, vide ſupra, vol. i. p. 296. the Court refuſed to give freight to neutral veſſels carrying a cargo between different ports of the enemy's country. In the *Wilhelmina*, *Carlſon*, 23d *July* 1799, which was a *Daniſh* ſhip taken on a voyage from *Havre* to *Amſterdam*—on motion for freight,

The *Court*—In the caſe of neutral ſhips engaged in the coaſting trade of the enemy, this Court does not give freight: But I think this rule has not been applied to voyages from the port of one enemy to the port of another. There have been caſes in which the Court has given freight on ſuch voyages, where there have not appeared any fraudulent or falſe proceedings in the conduct of the ſhip; and I think that voyages of this kind are very diſtinguiſhable from the other,—in thoſe the freight is refuſed, becauſe the parties have engaged in the coaſting trade of the enemy, which was peculiarly and excluſively his own. This ſort of traffic, from one of his ports to the ports of another country, has always been open, and is, in its own nature, ſubject to the uſes of all mankind, who are not in a ſtate of hoſtility with him. The *Dane* has a perfect right, in time of profound peace, to trade between *Holland* and *France* to the utmoſt advantage he can make of ſuch a navigation; and there is no ground upon which any of its advantages can be with-held from him in time of war.

Freight and expences given.

July 16th, 1799.

THE CONCORDIA, BAYZARD Maſter.

Reſtitution in value of a cargo found deficient.

THIS was a caſe of a petition to the Court, to allow a compenſation for an embezzlement, ſaid to have been committed by the captors in goods which had been decreed to be reſtored on a former day.

For the Claimant, *Swabey* ſubmitted—That the claimant was entitled, under a decree of reſtitution, to receive the goods as *per* invoice: that although it was ſworn in the preparatory examinations that bulk had not been broken, it was found, on attending to receive reſtitution, that in two packages there was a deficiency in the number of bales of linen, there being in one a deficiency of 17, in the other there being found 22 only inſtead of 52; it was prayed that it might be referred to the Regiſtrar and merchants to eſtimate the value of the things miſſing, and that it might be charged on the captors, as the perſons againſt whom the claimant was entitled to reſort.

For the Captor, *the King's Advocate* ſubmitted—That it was neceſſary to prove the goods were actually on board, that the bill of lading only mentioned the two caſes without ſpecifying their contents, that the invoice was not verified, nor on board, and not produced till the time of reſtitution, and therefore that there was not a ſufficient conſtat that it contained the true repreſentation.

Court.—There is an affidavit of the lader ſtating the quantity, and there is alſo an affidavit of the Mate of the *American* veſſel, in which he ſwears that the Prize-Maſter demanded the keys and forced open the packages.

The CONCORDIA. July 16th, 1799.

The King's Advocate then ſubmitted—That the prize had been delivered up to the *Dutch* Commiſſioners, that if it was meant to affect the captors, there ſhould be ſome affidavit relative to the warehouſe account of the Commiſſioners.

Swabey.—The *captor* is liable by law.

Court. — The claimant muſt have his compenſation in ſome way, either againſt the captor, or againſt the *Dutch* Commiſſioners; I think he has made out his caſe as to the deficiency, and it is not proper, that having ſo done, he ſhould be obliged to come repeatedly before the Court to recover property taken from him. Are the Captors or the *Dutch* Commiſſioners in poſſeſſion? (It being anſwered by the King's Proctor that the *Dutch* Commiſſioners were,) Then I ſhall direct a monition againſt them, *to ſhew cauſe* why ſhould they not make up the alledged deficiencies; for it appears to me to have been rather incumbent upon them to have ſet the matter right with the claimant in the firſt inſtance. If the original captor was in fault as to the embezzlement, I ſhould have attended to any complaint made and ſupported by the Commiſſioners againſt him. But if the government, by its commiſſioners, take the property out of the hands of the captors, I ſhall not ſend the claimants in the firſt inſtance to hunt after theſe captors for a full reſtitution; but thoſe who are in poſſeſſion muſt make the reſtitution, and then call upon the captors to make good the deficiences, of embezzlements happening whilſt the cargo continued in their hands. It is not a thing becoming the juſtice of this country, that the ſubjects of other ſtates ſhould be put to inconvenience about the recovery

The CONCORDIA.

July 16th, 1799.

of their property, merely because it has been taken out of the hands of the ſeizors to anſwer purpoſes of *Britiſh* convenience.

July 16th, 1799.

THE RISING SUN, WILKYE Maſter.

Proof of property; effect of ſpoliation of papers as to farther proof.

THIS was a caſe of an *American* veſſel taken, 10th *June* 1796, on a voyage from a *French* port *oſtenſibly* to *Altona*, but in reality bound to *Guerniſey*; the ſhip had been reſtored 24th *June*, reſerving the queſtion of freight, demurrage, and expences.

The cauſe now came on, upon the property of the cargo, in which a queſtion aroſe reſpecting the effect of a ſpoliation of papers.

JUDGMENT.

Sir *Wm. Scott*.—This is the caſe of a cargo of conſiderable value on board a ſhip that has been reſtored as an *American* veſſel; a claim has been given for the greateſt part as the property of the maſter; a ſmall part has been claimed for the owner of the veſſel, and a part for Mr. *Walter Seaman*, a paſſenger on board; on the claim I muſt obſerve, that it is given in at a late period, and in very general terms; it might have been expected that the maſter, being ſo large a proprietor, would have claimed for himſelf, and in a ſpecific proportion; but the claim is given generally "for the owner and the maſter," without diſtinguiſhing their reſpective ſhares. The Court was left to ſuppoſe they were claimants of undivided ſhares; in that caſe the claim would have been proper; but where the proprietors are not partners, it is certainly not

The RISING SUN. July 16th, 1799.

not proper to claim in that manner, but the reſpective intereſt ſhould be ſpecifically ſet forth. The witneſſes in this caſe are, the maſter, Mr. *Walter Seaman*, and two others; many particulars have peen pointed out as affecting the credit of the maſter, which do not make any very great impreſſion on me. He ſays, "That part of the cargo was laden by himſelf," whereas the bill of lading deſcribes other perſons as the laders, but he might mean that it was done by his orders, and I ſhould not conſider that as materially impeaching his credit. The deſtination is alſo very inaccurately expreſſed, ſome of the papers deſcribing it to have been to *Charleſton*, others ſtating it to have been to *Altona*, whereas the true deſtination was to *Guernſey;* but as they are both neutral ports, I do not think there is much in that, more eſpecially as it is the general practice not to allow a veſſel to clear out for an enemy's port; but there is one fact, which does, I think, go very much to his diſcredit, and that is the ſpoliation of papers. It is admitted that there was a ſpoliation of papers; and the parties in that act were the maſter and Mr. *Walter Seaman*.

The maſter ſays to the 16th, "That there were eight or nine letters under the care of *Seaman*, but that he took them from him on the appearance of the chaſing veſſel, which he ſuppoſed to be a *French* veſſel as it came from the *French* coaſt;" from which I am led to ſuppoſe, that they were letters which he had confided to *Seaman*, but took them from him on the apprehenſion of being chaſed by a *French* cruizer: but *Seaman* does not give a very ingenuous account of this matter: he ſays, "That he took the letters in port," not ſaying from whom he received them, therefore

The Rising Sun. July 16th, 1799.

therefore I muſt infer that he received them from the maſter; there is no reaſon given for deſtroying them, and it has been juſtly obſerved, that if this is *American* property, and the letters applied to that, they would have been preſerved as the beſt evidence to protect the cargo as *American* property; but that if the property belonged to merchants at *Guernſey*, or to *Britiſh* merchants, there might then be good reaſon for ſuch a ſuppreſſion. It has been ſaid in explanation, that they might be deſtroyed, that no contradiction might ariſe to the oſtenſible deſtination; but it is well known that although it is the ordinary form of clearing out from a belligerent country to bear an oſtenſible deſtination to a neutral port, yet no one imputes that as a fraud, nor is it conſidered as ſuch an act as would juſtly ſubject neutral property, on board neutral ſhips, to be moleſted on that account; here then 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 of Admiralty, 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 farther proof, if farther proof is neceſſary. Let us look then to the hiſtory of the caſe; the maſter came from *America* not long before in this ſhip, a veſſel of about 200 tons, but without a cargo; he brought a letter of introduction from his owners, and inſtructions from them, but there is not the ſlighteſt trace of any fund for himſelf; there are two letters ſhewing that the *American* owners truſted to his

The Rising Sun. July 16th, 1799.

his diſcretion to obtain freight, and that he was directed to receive monies, due to them, from the *French* government, and if he failed in that, he had a letter of credit to a houſe in *London*, which was to aſſiſt him in managing his plans; but there is not the ſlighteſt intimation that he was to turn merchant on his own account; the ſhip came from *America* to *London* with rice; ſhe then went to *Amſterdam*, and from *Amſterdam* to *Bourdeaux*, and from *Bourdeaux* with cotton to *Guernſey*, which ſhe delivered to merchants there as the agents of perſons in *London*; the merchant at *Guernſey* paid his freight, and they gave him beſides 4431*l.* with a power to draw on merchants at *Hamburgh* for 12 or 15,000 livres, which he was to diſpoſe of as he pleaſed on his own account; ſo that there is about 6000*l.* the greateſt part in actual ſpecie, with which they entruſted this man expoſed to the riſks of the ſea, and to be employed as he ſhould think fit: he went to *Bourdeaux* and took on board this cargo of brandy; and he further ſays, "That if he had reached *Guernſey*, he was to have conſigned the cargo to thoſe merchants, and to have given them the commiſſion, that they were to have taken 5 *per cent.* on the amount, and paid themſelves out of the proceeds." Now this is ſo utterly incredible, that the Court muſt have the faith of ten men to believe it on the original evidence; the ſtory is ſo exceſſively improbable, that nothing but the cleareſt caſe, in point of evidence, could induce me to reſtore the great part of this cargo which is claimed as the maſter's property; but when I find that all this has been connected with a ſpoliation of papers, and a ſpoliation by this man, and that there is not a

ſcrap

The Rising Sun.

July 16th, 1799.

ſcrap of paper on board ſhewing his correſpondence with the perſons at *Guernſey*; theſe circumſtances connected with the other improbabilities are deciſive, and do, I think, fully juſtify me to reject this claim.

With reſpect to the property of the owners, it would be going too far to ſay that they are precluded from farther proof. It appears that they are perſons of property; the maſter was to receive the profits of ſome former freights in *France*; and it appears alſo, that he had made ſeveral freights for them, and that he was to have credit in *London*, with which he was to purchaſe wines at *Bourdeaux*; all theſe circumſtances give a fair foundation to this part of the caſe. It would, I think, be too hard to hold them concluded by this man's miſconduct; the evidence of their property is not at preſent ſufficient, but it may be reſtored on farther proof, and I ſhall direct farther proof to be made of their property.

With reſpect to Mr. *Walter Seaman*, I obſerve his claim is of ſmall amount; and I ſhould be unwilling to give him much trouble about it; but as he was in ſome degree concerned in this ſpoliation, and conſidering that he went on board at *Guernſey*, and that he appears not to have been ſo ſhort a time in *Europe* as he repreſents, I think theſe are circumſtances that require farther explanation; I ſhall direct farther proof to be made of his property.

It was ſubmitted by the King's Advocate that as far as freight was concerned, the owners were legally bound by the miſconduct of the maſter, by the ſpoliation of papers.

Court.—It is certainly the general rule.

Arnold.

Arnold.—This is a caſe in which the owners were at a great diſtance, and no way privy to this act. The Rising Sun. July 16th, 1799.

Court.—It may be hard in many caſes, but men muſt abide the conſequences of their own miſplaced confidence. Freight refuſed.

THE VROW JOHANNA, Okhen Maſter. July 18th, 1799.

This was a caſe of a ſhip taken 16th *December* 1799, and proceeded againſt for a breach of the blockade of *Amſterdam*, having ſailed from *Peterſburgh* for that port, *November* 6, 1798. Blockade of *Amſterdam.*

Court.—The caſes alluded to of the blockade, ſet up by the *Dutch* in the wars of the laſt century, have no immediate application to this caſe: that was a blockade of the whole coaſt of their enemy, the preſent caſe ſtands on the queſtion of a blockade of *Amſterdam*, and not of the coaſt. It is not denied that if a veſſel ſail for a blockaded port after having received notification of the blockade, the act of ſailing is to be conſidered as a breach of the blockade. The only queſtion is then, Whether the blockade notified on the 11th *June*, and not revoked, is to be conſidered as continuing at this time? ſhe ſailed on the 6th of *November*. Am I to preſume that the blockade ſo notified not not exiſt? I cannot preſume it, nor could thoſe concerned in diſpatching the ſhip have entertained ſuch a preſumption. I hold it to be the duty of a country notifying a blockade, to notify the revocation alſo; there had been no ſuch revocation notified,

The VROW JOHANNA.

July 18th, 1799.

fied, and therefore I muſt preſume that it was ſtill exiſting. I hold, that a ſhip and cargo ſailing for *Amſterdam* at that time are liable to condemnation.

Condemned.

On application of the agent for the cargo, that the Sentence reſpecting that might ſtand over for ſome inquiry, it was allowed.

July 18th, 1799.

THE NEPTUNUS, HEMPEL Maſter.

Blockade of *Havre.*

THIS was a caſe of a veſſel ſailing on a voyage from *Dantzick* to *Havre*, 26th *October* 1798, and taken in attempting to enter that port on 26th *November.*

For the Captors, the *King's Advocate* ſtated—That the ſhip was taken in attempting to enter a blockaded port in purſuance of her original deſtination, and was therefore liable to confiſcation, unleſs ſome ſufficient ground of juſtification could be ſhewn. That the maſter's averment of a general ignorance could not be received, in the caſe of a blockade notified by public declaration. That as to the particular information which the maſter pretended to have received from a *Britiſh* frigate in the *North Seas*, "That *Havre* was not blockaded," it was immaterial, as it came too late to diſcharge the penalty, which had been incurred by the act of ſailing, and for which the veſſel might have been ſeized by the frigate; that her courſe had not been altered in conſequence of the information, and therefore that ſhe

ſtood

ſtood exactly in the ſame ſituation as if ſhe had never received it.

JUDGMENT.

Sir *Wm. Scott.*—This is a caſe of a ſhip and cargo ſeized in the act of entering the port of *Havre* in purſuance of the original intention under which the voyage began. The notification of the blockade of that port was made on the 23d *February* 1798, and this tranſaction happened in *November* in that year; the effect of a notification to any foreign government (*a*) would clearly be to include all the individuals

(*a*) Reſpecting the effect of notification as to the ſubjects of thoſe ſtates to whom it was not directly made:

Auguſt 22, 1799. In the caſe of the *Adelaide*, *Roſe*, a *Bremen* ſhip, which had ſailed into *Amſterdam* from *America*, *September* 1798, and was captured in her voyage outward in *April* 1799, it was contended that the penalty did not attach; that by the maſter's evidence it appeared that he was ignorant of the fact; that he ſailed in *September* from a diſtant country, without ſeeing any blockading force; that at the time of ſailing outward he met with only that one ſhip, which ſeized him; that no notification had been made to the *Hans Towns*, and therefore as to them, it was a blockade exiſting *de facto* only, of which the maſter might be allowed to plead his ignorance; that the penal conſequences of a notification given *to one power*, did not affect the ſubjects of another ſtate that had not received any notification;—it was prayed that the claimant might be allowed to prove the *bona fide* ignorance of the maſter, and that no notification had been made of the blockade of *Amſterdam* to the *Hans Towns*.

Court.—This ſhip is proceeded againſt on account of having broken the blockade of *Amſterdam*. The Court has often decided that egreſs is as much a breach of blockade as ingreſs, if it be done fraudulently. The notification was made to different governments of *Europe* on the 11th of *June* 1798; this ſhip ſailed in from *America* in *September* of that year ignorant of the fact; but

The NEPTUNUS. July 18th. 1799.

viduals of that nation; it would be the moſt nugatory thing in the world, if individuals were allowed to plead their ignorance of it; it is the duty of foreign govern-

but it by no means follows from that circumſtance that the blockade was raiſed, as it might be ſuſpended by accidents which would not make it legally ceaſe to exiſt: She proceeded to take in a cargo in the months of *November* and *December*, and ſails on the 24th of *April* 1799: The offence is, therefore, in the egreſs. That no notification was made to the *Hans Towns* is a ſuggeſtion of counſel, which makes no part of the affidavit. I will go ſo far as to accede to the poſition that the notification would not affect ſuch a caſe from the ſame time, and in the ſame manner, as it would affect the ſubjects of thoſe ſtates to whom it was directly made. But that it does not affect at any time is going too far; becauſe if a notification is made to the principal States of *Europe*, I think a time would come when it would affect the reſt; not ſo much *proprio vigore*, or by virtue of the direct act, as in the way of evidence. It is the duty of a ſtate to make the notification as general as poſſible. But I muſt think, that a time would come when a notification to neighbouring powers would affect thoſe to whom it was not directly made: From the moment that a notification is made to a government, it binds the ſubjects of that ſtate; becauſe it is ſuppoſed to circulate through the whole country. But ſuppoſe a notification is made to *Sweden* and *Denmark*, it would become the general topic of converſation; and it would be ſcarcely poſſible that it ſhould not have travelled to the ears of a *Bremen* man; and although it might not be ſo early known to him, as to the ſubjects of the ſtates to which it was immediately addreſſed, yet, in proceſs of time it muſt reach him: and muſt be conſidered to impoſe the ſame obſervance of it on him: It would ſtrongly affect him with the knowledge of *the fact*, that the blockade was *de facto* exiſting: Therefore, on theſe grounds, I ſhould hold that although a notification does not *proprio vigore* bind any country but that to which it is addreſſed, yet, in a reaſonable time, it muſt affect neighbouring ſtates with knowledge, as a reaſonable ground of evidence; and I think I do not ſtrain the matter in laying down this rule. As to the circumſtances of this particular caſe, at *Amſterdam*, it muſt have

governments to communicate the information to their subjects, whose interests they are bound to protect. I shall hold therefore that a neutral master can never be heard to aver against a notification of blockade, that he is ignorant of it. If he is really ignorant of it, it may be a subject of representation to his own government, and may raise a claim of compensation from them, but it can be no plea in the Court of a belligerent. In the case of a blockade *de facto* only, it may be otherwise, but this is the case of a blockade by notification; another distinction between a notified blockade and a blockade existing *de facto* only, is that in the former, the act of sailing to a blockaded place

The NEPTUNUS. July 13th, 1799.

---

have been a subject of general notoriety, that the port was legally considered by the *English* in a state of blockade; and it is impossible that it should not have come to the knowledge of this man after he came in; it is not to be said by any person "although I know a blockade exists, yet, because it has not been notified to my Court, I will carry out a cargo." I cannot but think that it would have been a very fraudulent omission to take no notice of what was a subject of general notoriety in the place. If it was known to every *Dane* and *Swede*, it is impossible that it should not be known to this man. It is not more likely to have been unknown to this vessel, from the circumstance of its being a *Bremen* ship, when we consider the particular relation which *Bremen* bears to the Sovereign of this Country. As to the affidavit of the master, I should receive that with great distrust. Masters have a direct interest to raise the blockade as soon as possible; therefore their affidavits come with a dead weight about them, that must very much sink their credit whenever they are produced. I hold that the master must have known of the blockade, notwithstanding he and his men swear they did not, and therefore that the ship is penally liable to confiscation.

Ship condemned—Cargo ordered to stand over—Master's private Adventure restored.

The Neptunus. July 18th, 1799.

is ſufficient to conſtitute the offence. It is to be preſumed that the notification will be formally revoked, and that due notice will be given of it; till that is done, the port is to be conſidered as cloſed up, and from the moment of quitting port to ſail on ſuch a deſtination, the offence of violating the blockade is complete, and the property engaged in it ſubject to confiſcation: it may be different in a blockade exiſting *de facto* only; there no preſumption ariſes as to the continuance, and the ignorance of the party may be admitted as an excuſe, for ſailing on a doubtful and proviſional deſtination. But this is a caſe of a veſſel from *Dantzick* after the notification, and the maſter cannot be heard to aver his ignorance of it. He ſails:—till the moment of meeting Admiral *Duncan*'s fleet, I ſhould have no heſitation in ſaying, that, if he had been taken, he would have been taken *in delicto*, and have ſubjected his veſſel to confiſcation; but he meets Admiral *Duncan*'s fleet, and is examined, and liberated by the Captain of an *Engliſh* frigate belonging to that fleet, who told him that he might proceed on his deſtination, and who, on being aſked, Whether *Havre* was under a blockade? ſaid "It was not blockaded," and wiſhed him a good voyage. The queſtion is, In what light he is to be conſidered after receiving this information? That it was *bona fide* given cannot be doubted, as they would otherwiſe have ſeized the veſſel; the fleet muſt have been ignorant of the fact; and I have to lament that they were ſo: When a blockade is laid on, it ought by ſome kind of communication to be made known not only to foreign governments, but to the King's ſubjects, and particularly to the King's cruizers;

The NEPTUNUS. July 18th, 1799.

cruizers; not only to thoſe ſtationed at the blockaded port, but to others, and eſpecially conſiderable fleets, that are ſtationed *in itinere*, to ſuch a port from the different trading countries that may be ſuppoſed to have an intercourſe with it. Perhaps it would have been ſafer in the *Engliſh* captain to have anſwered, that he could not ſay any thing of the ſituation of *Havre;* but the fact is, (and it has not been contradicted,) that the *Britiſh* officer told the maſter "that *Havre* was not blockaded." Under theſe circumſtances I think, that after this information he is not taken *in delicto.* I do not mean to ſay that the fleet could give the man any authority to go to a blockaded port; it is not ſet up as an authority, but as intelligence affording a reaſonable ground of belief; as it could not be ſuppoſed, that ſuch a fleet as that was, would be ignorant of the fact.

From that time I conſider that a ſtate of innocence commences; the man was not only in ignorance, but had received poſitive information that *Havre* was not blockaded. Under theſe circumſtances, I think it would be a little too hard to preſs the former offence againſt him; it would be to preſs a pretty ſtrong principle rather too ſtrongly; I think I cannot look retroſpectively to the ſtate in which he ſtood before the meeting with the *Britiſh* fleet, and therefore I ſhall direct this veſſel *and cargo* to be reſtored.

July 18th, 1799.

THE JUNO, BEARD Maſter.

Blockade of *Amſterdam*. Effect of terms of a licence *to the ports of the Vlie*, &c.

THIS was a caſe reſpecting the meaning and effect of a licence, granted to an *American* ſhip *to go to the ports of the Vlie.*

JUDGMENT.

Sir *Wm. Scott.*—This is a caſe ariſing out of the blockade of *Amſterdam;* it is the caſe of an *American* veſſel coming from *America* without any knowledge of the blockade of *Amſterdam*, and bringing a cargo for that port; ſhe came to *Falmouth*, and then, finding that the port of *Amſterdam* was under blockade, ſhe petitioned for a licence, and obtained one from this government, and, as I underſtand the maſter through the whole of his depoſitions, "*a licence to go to Amſterdam.*" This he ſtates in ſtating his difficulties, and the means he took to relieve himſelf. The application was "for leave to export to the *Vlie*, *Embden*, or *Rotterdam;*" but the terms of the permiſſion are an enlargement of his petition, for they are "to the ports of the *Vlie*, *Embden*, *Rotterdam*, *or elſewhere.*" Whether the petition was an impoſition, and framed with a deſign of deceiving government, will appear on the enquiry which has been directed to be made. If the petition was in the uſual form, and if the licence was underſtood by thoſe who granted it to permit exportation to *Amſterdam*, it will clear up that part of the caſe; as to any opinion that I can form, I own, that although the licence is expreſſed in this general way, "the ports of the *Vlie*," I cannot but think that it muſt have included *Amſterdam*, which is one of thoſe ports; for it is not to be ſuppoſed but that they would

The JUNO.

July 18th, 1799.

intend to grant the licence in a natural and intelligible form, and not ſo as to keep the parties in the dark as to its extent. But, it is argued, that, allowing it to have been properly obtained, it was not properly uſed; becauſe it was at any rate a licence to go to *Amſterdam* through the *Vlie paſſage*, whereas this veſſel was taken entering the *Texel;* and that there might be many reaſons for making the diſtinction in the licence, and therefore that it ought to be ſtrictly obſerved. Now having heard it conſtantly argued, and having myſelf adopted the interpretation, that the blockade extended to one paſſage as well as to the other, and that the whole *Zuyder Zee* was ſhut up; I ſhall not go back again and reſtrict this interpretation, and ſay it is confined to one paſſage only. I ſhall hold *e converſo*, that if a licence is given to go through the *Vlie*, it is not ſubſtantially violated by going through another paſſage, unleſs it is ſhewn to me that it contained ſome ſpecific prohibition as to other paſſages: ſuppoſing it to have been honeſtly obtained for *Amſterdam* through the *Vlie*, I ſhall not hold it to have been a material deviation to go another way, unleſs ſome ſpecial prohibition, or unleſs ſome ſpecial inconvenience is ſhewn, which the party was bound to take notice of.

It has been truly ſaid, that a licence is a thing *ſtricti juris* a *privilegium*, which a man does not poſſeſs by his own right, but that it is conceded to him as an indulgence, and therefore, that it is to be ſtrictly obſerved. At the ſame time, I am to remember, that this is a licence to relax a right which bears pretty hardly, though juſtly, on other countries. To ſhut up the ports of a country, and exclude neutrals from all commerce with it, is a great inconvenience

The Juno. July 18th, 1799.

upon them, although it is one to which they are bound to ſubmit; for there is no one principle of the law of nations better eſtabliſhed, than that a belligerent has a right to impoſe a blockade on the ports of his enemy; it may be incommodious to others, but, if there is any ſuch thing as a law of nations, I hold this principle to be as firmly eſtabliſhed from the earlieſt times, and by the general practice of mankind, as any one law whatever: it is, however, a harſh right, and though a licence is a privilege, I am not diſpoſed to apply that expoſition in the ſtricteſt manner to a blockade, but rather think that licences in ſuch a caſe are to be favourably regarded, and that it imports the good faith and honour of the government which grants them not to preſs the letter too rigorouſly. I will go farther, and ſay that if I was convinced that there had been an honeſt miſtake on ſuch a matter; if there appeared nothing inſidious, nothing more than a miſapprehenſion on the part of the neutral maſter, I ſhould not apply too ſtrictly, the maxim *ignorantia juris non excuſat*, againſt a foreigner miſtaking the exact meaning of a licence of another country; and in ſo doing ſhould perſuade myſelf that I did no more than what an equitable regard to the honour of the country which granted ſuch a licence muſt be ſuppoſed to require.

The licence is, "To carry a cargo to the ports of the *Vlie* or elſewhere," with ſeveral proviſions, amongſt which there certainly is no proviſo that ſhe ſhall come out again; but that is a benefit incidental to the licence, and inſeparable from it; for it cannot be imagined that ſhe was to go there, and be ſhut up and incarcerated, and become herſelf an object of the blockade. A ſhip that has entered previous to the blockade may retire

The JUNO. July 18th, 1799.

retire in ballaſt, or taking a cargo that had been put on board before the blockade; this is the diſtinction which I have held, and ſhall hold, till I am corrected by a Superior Court. The licence is ſilent on that point; but having ſaid, that if I was convinced the party acted under an honeſt application of his licence, though erroneouſly, I ſhould think him entitled to the moſt liberal interpretation, it will be proper for me to conſider what the man did, that I may ſee, ſuppoſing that there has been a miſtake, whether it was a miſtake of honeſt conduct, purely erroneous and innocent; thinking, that, if it is ſo, it would be ſufficient for the preſent caſe. The maſter takes the returned cargo on board, and comes to a port of this kingdom, and ſolicits the protection of a convoy, acting as openly and with as little concealment as poſſible; there is nothing in the *res geſta* on which the imputation of fraud can be fixed. Is there any thing in the licence to inſtruct him, that he was not at liberty to take a cargo, or to act as if the blockade was in regard to him entirely relaxed? If ſo, he would be bound to take notice of it; but I ſee this diſtinction, which might reaſonably affect the mind of a man going in under ſuch a licence;—he goes in under the direct authority of the belligerent, and might ſuppoſe his privilege more extenſive than that of a neutral veſſel previouſly there. A neutral has no right to ſay, I am here accidentally, and therefore I have a right to take out a cargo notwithſtanding the blockade; but this man goes in with a permiſſion, which takes off, as to him, the firſt and primary object of the blockade, the prohibition of taking in a cargo; and I think he might conceive himſelf to be entitled to be diſtin-

The JUNO.

July 18th, 1799.

guiſhed from the ordinary caſe of other neutrals previouſly there. If any inconvenience is likely to ariſe from this; if government did not mean that his licence ſhould have this effect, it might have been diſtinctly expreſſed; the proviſo might have been inſerted, that he ſhould not bring a cargo away; and then all perſons would ſee a clear path before them, and know how to conduct themſelves in this very delicate ſituation.

On the legal effect of ſuch a licence, it is not neceſſary for me to determine. I ſee no fraud in the interpretation of this licence, and if it turns out that this was the form in which licences were uſually granted, I ſhall not think myſelf warranted to ſay that this man was guilty (if guilty at all,) of any thing more than an innocent miſapprehenſion; and in a matter, in which I ſhall hold ſuch a miſapprehenſion to carry no conſequences of penalty after it.

July 24th, 1799. This caſe having ſtood for inquiry, as to the uſual form of granting licences, the King's Advocate ſaid, he had obtained no particular information, but that after what had fallen from the Court he did not mean to preſs the matter any farther.

Ship reſtored.

July 25th, 1799.

Verification of papers by carrier-maſters, in what degree required.

In the ſame Caſe.

On the hearing as to the cargo, *July* 25, 1799, the *King's Advocate* contended—That it muſt go to farther proof, unleſs all the rules of practice were broken down; that goods ſhipped in the enemy's country were

were to be conſidered *prima facie*, as the property of the enemy, and could only be taken out of that preſumption by fair and unbiaſſed evidence, and not from evidence ſupplied only from the enemy: That the bills of lading and atteſtation in this caſe were of the latter deſcription, put on board by the enemy ſhipper; whilſt the maſter, who was always expected to verify his papers, to the 12th interrogatory ſays only, "that the laders of the cargo were *Hollanders*; and farther he cannot depoſe."

On the part of the claimant, *Laurence* argued—That if farther proof was to be required in this caſe it would be impoſſible for owners of cargoes put on board carrier ſhips, to obtain reſtitution in any caſe on the original evidence; as a carrier maſter could not be ſo particularly acquainted with the ſeveral owners, or know any thing of their courſe of trading, ſo as to enable him to ſwear to their property; that the bill of lading expreſſed account and riſk, and there was an atteſtation of property on board; and that the maſter, ſwearing to the 13th and 27th interrogatories, "that all his papers were true, and that he knew of nothing to affect their credit," did in effect afford a ſufficient verification.

JUDGMENT.

Sir *Wm. Scott*.—The preſent application to the Court is to diſmiſs a cargo taken on board in *Holland*, on the ground that the proof in the caſe is ſufficient according to the practice, or what ought to be the practice of this Court. I preſume it will not be contended, that no proof is neceſſary in the caſe of a cargo taken on board in the enemy's country; and where

The JUNO, July 25th, 1799.

where there is *no* proof arising from the documents or the depositions,—the Court is not to consider so much what that proof ought to be, as what is required by the practice of the Court; for I sit here, not as a legislator, but to administer the law that I find existing: If a reform is necessary, it must be sought elsewhere: The Court is neither to make law, nor apologise for it.

The rule is, as I have always understood it in the Court of Admiralty, that papers by themselves prove nothing;—they are a mere dead letter, if they are not supported by the oaths of persons in a situation to give them validity. Those who look back to the elaborate exposition of the proceedings of our Courts of Admiralty, in the answer to the *Prussian* memorial, will find this to have been laid down as a fundamental position, "that the master must verify his papers." It is true that, in the case of a carrier master, it may be expected that the verification should be less positive, than where he is himself the agent; but *this* is expected, that he should depose at least that *he believes* the cargo to be as asserted in the claim; less than that I never remember to have been accepted in any case:—and if it were necessary for me to apologise for the rules which I find established in this Court, I think this might be vindicated on every principle of reason and justice. When a cargo is taken on board in an enemy's port, and that port blockaded, (which is a circumstance of some weight, as affording a greater temptation to fraud,) if the master is not required to say even *that he believes* the property to be as claimed, it would open the door to every sort of abuse: But it is said, the master does

go

The JUNO.

July 25th, 1799.

go this length, in ſwearing "that all the papers are true," and that this amounts to a verification of the property;—ſo he does, if you take that part of his depoſition ſubſtantively, and apart from the reſt; but looking to other parts, and finding, that when he is aſked on the 12th interrogatory, what he knows *or believes?* (for he is examined to his belief,) he can depoſe nothing, and that he has no belief, it is impoſſible to ſay that this man's depoſition confirms the papers, in the manner in which it is neceſſary that they ſhould be ſupported. It is ſaid there are other papers which ſupply this defect,—the atteſtations of the laders before the *American* Conſul. What authority has an *American* Conſul to adminiſter an oath to *Dutch* ſubjects? Such papers can hardly be taken as ſworn documents, or if they were, they come only from the *Dutch* ſhippers, the very perſons who, if there is any fraud, have been the contrivers of it. Under ſuch circumſtances, Can it be reaſonably or candidly addreſſed to the Court to reſtore this cargo immediately and without farther proof?—This ſhip goes under licence to a blockaded port, with a cargo addreſſed to one ſet of merchants only—here are various parcels for a variety of different perſons, the maſter evidently knowing nothing of the matter, and there being no proof but from the *Dutch* laders; I muſt ſay that I am not ſatisfied; the rules of the Court require farther proof, and I feel that it is a rule which I could not relax without relaxing the eſſential demands of juſtice.

Arnold prayed freight and expences for the ſhip to be a charge on the cargo.

Court.

The JUNO.

July 25th, 1799.

Court.—I am of opinion that the maſter is entitled to his freight and expences on two grounds; if he had taken no cargo, he would not have been liable to be ſtopped; and ſecondly, having received this cargo ſo improperly documented on board, he would have been liable to have been ſtopped on that account, although he had not been coming from a blockaded port.

Freight and expences given, and to be a charge on the cargo.

July 19th, 1799.

THE HURTIGE HANE, DAHL Maſter.

Breach of blockade of *Amſterdam*: Excuſe, aſſerted diſtreſs; how received.

THIS was a caſe of a *Daniſh* ſhip taken in the act of entering the *Texel*, *April* 1799, having ſailed from a port in *Barbary*, with an aſſerted original deſtination to *Hamburgh*, *February* 15, 1799.

It was prayed that the Court would permit a proteſt of the maſter to be read, in which it would appear, that he was under the neceſſity of going into the *Texel* from diſtreſs and want of water; and that his crew roſe upon him, and inſiſted that he ſhould go into ſome *Dutch* port.

Court.—This ſhip was found in the act of entering the *Texel*, a fact by no means indifferent, but highly criminal, *primâ facie* at leaſt, and requiring a very ſatisfactory explanation. It is uſual to ſet up the want of water and proviſions as an excuſe; and if I was to admit pretences of this ſort, a blockade would be nothing

The HURTIGE HANE.

July 19th, 1799.

nothing more than an idle ceremony. Such pretences are, in the firſt inſtance, extremely diſcredited on two grounds—that the fact is ſtrongly againſt them, and that the explanation is always dubious, and liable to the imputation of coming from an intereſted quarter. I am not deaf to the fair pretenſions of human teſtimony, but, at the ſame time, I cannot ſhut my ſenſes againſt the ordinary courſe of human conduct; I will not ſay that caſes of neceſſity may not occur that would afford a ſufficient juſtification; and I add, that if the party can ſhew that they were under any great neceſſity, and that, for four or five days before, they could get into no other port but the *Texel*, I would certainly admit ſuch an excuſe, ſo ſupported. But if they cannot do this, and unleſs it is proved, that in coming up the *Channel* there was no other port either *Engliſh* or *French*, but the interdicted port of *Amſterdam* into which they could put, I ſhall reject the apology.

The proteſt of the maſter, the mate and cook was admitted to be read, which ſet forth, 'Their 'voyage to *Saffee* in *November*; that, during the time 'they lay there taking in a cargo, they ſuffered much 'by bad weather, and were ſeveral times driven out to 'ſea; that on the 15th of *February* having com-'pleted their lading, the bad weather increaſing, 'they were obliged to cut their cable and proceed 'on their voyage, leaving the anchor buoy and 'cable behind them; that on the 25th the wind 'blew very hard with a heavy ſea; that the ſea broke 'over their veſſel, and forced the ring-bolts from 'out the deck, waſhed away the quarter-boards with 'two water caſks, and did a great deal of other da-'mage;

The Hurtige Hane.

July 19th, 1799.

'mage; that on the 16th day of *March* they met 'with another heavy gale of wind, which obliged 'them to lie to under their lower ſails, that the 'foreſail and ſchooner ſail were blown out of the 'ropes, and they were obliged to cut them away and 'bend new ones; that the ſea was ſo great it made 'a free paſſage over the veſſel, which cauſed her to 'labour and ſtrain very much, and ſhe proved ſo 'leaky, they were obliged to keep the pump con-'tinually at work; that on the 21ſt day of *March* they 'moved the cargo to find out the leak which was at 'the bottom of the ſhip near the foremaſt, and after 'cutting away the inſide planks they fortunately found 'and ſtopt the leak; that on the 23d they ſaw *Scilly*, 'and on the 28th paſſed *Dover*, and next day the 'weather was very bad with ſnow and froſt; that on 'the 2d of *April* they arrived off *Yarmouth* near the 'ſands, the wind then blowing a hard gale at eaſt; 'that they were obliged to ſet all the ſail the veſſel 'could carry, in order to clear the ſands; that on the '5th their topſail was blown away, and the wind was 'ſo violent that they were obliged to cut away the 'jib, and the ſhrouds and deck were covered with 'ſnow and ice, and it was with great difficulty they 'could work the veſſel, and next day all the crew 'came to the maſter and told him, as they were in 'want of proviſions and water, (they having been 'under ſhort allowance for ſome time,) and the ſaid 'veſſel wanted repairing, that they deſired him to 'proceed to the neareſt port, and if he did not they 'would take the command from him; that he was 'under the neceſſity of complying with their requeſt, 'and accordingly ſteered *for Holland.*"

Court.

The HURTIGE HANE.

July 19th, 1799.

Court.—I have now heard the proof brought in, and I am to determine whether it comes up to the teſt which I have laid down, and to which I ſhall certainly adhere, that nothing but an abſolute and unavoidable neceſſity will juſtify the attempt to enter a blockaded port; conſiderations of an inferior nature, ſuch as the avoiding higher fees, or ſlight difficulties, will not be ſufficient—nothing leſs than an unavoidable neceſſity which admits of no compromiſe, and cannot be reſiſted, will be held by me to be a juſtification of this offence.

The maſter ſails under a knowledge of the blockade, being affected with the general notification of the preceding year: on the 28th of *March* they paſſed *Dover*, on the 2d of *April* they were off *Yarmouth;* but although the proteſt is made to juſtify the maſter from barratry and the crew from mutiny, and does therefore, I muſt preſume, contain all facts neceſſary for that purpoſe, I do not ſee that it is ſtated that they were going into *Yarmouth*. If on the 3d of *April* there is ſo much want of water and proviſions as to compel them to go into the interdicted ports of the *Texel*, Why not go to the open and permitted port of *Yarmouth* on the 2d of *April?* It is not alledged that the diſcovery of ſuch a want was firſt made on the 3d—on the next day, the weather becoming more violent, the crew came to the maſter and inſiſted on going into the neareſt port on account of want of water and proviſions; a third excuſe is thrown in, that the ſhip wanted repair; but this is not mentioned in the depoſitions, and it appears not to have been a very preſſing want, as the ſhip came afterwards back to *England* without difficulty; they inſiſted on going into the neareſt

The Hurtige Hane.

July 19th, 1799.

nearest port, saying, that they would otherwise take the command from him. It does not appear where this happened, nor is it stated that the crew insisted on going to *Amsterdam*. The master should have said, "the *Texel* is shut up, I will go to any other port:" He does not seem to have felt this necessity in an equal degree with the rest of the crew; as he represents himself "to have been forced in reluctantly." What was there then to carry him to this one interdicted port only? or what reason was there that he could find no other than this, either a little to the north or south? Is there that inevitable necessity which is required? If such pretences as this were to be admitted, I know very well that no one case would come unprovided with an excuse. I shall condemn this vessel; if the parties think themselves aggrieved, they must take the benefit of another Court.

Ship condemned.

On application for the master's private adventure,

Court.—Strictly speaking, perhaps it ought not to be granted in this case;—but as I wish to shew this description of men every degree of indulgence, I shall recommend it to the captors to consent to it.

July 19th, 1799.

THE WELVAART VAN PILLAW, Botter Master.

Breach of blockade of Amsterdam, a vessel having escaped the blockading force.

THIS was a case of a *Prussian* ship, taken *April* 1799 off *Dungeness*, and proceeded against for a breach of the blockade of *Amsterdam*, having sailed from thence with a cargo in *March*.

For

The WELVAART VAN PILLAW, July 19th, 1799.

For the claimant, *Laurence* said — That there was an affidavit offered by the party, to shew the ignorance of persons at *Amsterdam*, as to the blockade of that port, till the second notification * was published there 12th *April* 1799; but as the Court had determined that it should consider the notification of *June* preceding to be still in force till it is recalled, it was unnecessary to mention that affidavit farther than to form a ground of exception on appeal. It was farther said, that the matter of the affidavit was aided by the circumstance of the capture not having been made by any blockading force, nor near the mouth of the port, which raised a strong presumption that the blockade was not actually kept up; that the rule which the Court had laid down respecting the continuance of a blockade by notification, applied to neutral states and ships going in; that in respect to ships coming out of a blockaded port, the nature of a blockade prevented vessels lying there from having any other notice than the fact; and that, if the actual blockade was not kept up in force, they had no other reason to presume a continuance, and were not *in delicto* for coming out as this vessel did, when there was no ship lying near the port to prevent her.

* Vid. infra p. 131.

JUDGMENT.

Sir *Wm. Scott.* — There seem to be two grounds on which something of an indulgence is claimed in the present case. It is said that it was not a matter of notoriety in *Amsterdam* that the blockade was still continued; that a notification is addressed to neutral states, and therefore that a ship in the blockaded port may plead ignorance. But I am to remember that this is not a *Dutch* ship but a *Prussian*

The WELVAART VAN PILLAW.

July 19th, 1799.

ſhip, and that it was the duty of the *Pruſſian* government, having received the public notification many months before, to have communicated it to their ſubjects in different ports. Another circumſtance on which exemption is prayed, is, that ſhe had eſcaped the interior circumvallation, if I may ſo call it, that ſhe had advanced ſome way on her voyage, and therefore that ſhe had in ſome degree made her eſcape from the penalties. I cannot accede to that argument; if the principle is found, that a neutral veſſel is not at liberty to come out of a blockaded port with a cargo, I know no other natural termination of the offence but the end of that voyage. It would be ridiculous to ſay, if you can but get paſt the blockading force, you are free:—this would be a moſt abſurd application of the principle. If that is found, it muſt be carried to the extent that I have mentioned; for I ſee no other point at which it can be terminated. [Vide *Binkerſ. Q. J. P. lib.* i. *ch.* 11. (*a*)] Being of opinion that the principle is found, I ſhall hold, that if a ſhip, that has broken a blockade, is taken in any part of that voyage, ſhe is taken *in delicto*, and ſubject to confiſcation.

(*a*) *Bynkerſhoek* is commenting on the order of the States General, 1630, in theſe words: In tertia ſanctione eleganter diſtinctum eſt, in quem portum naves exeuntes fuerint compulſæ, ut nempe in ipſo actu deprehenſæ videantur, nam ſi in eum portum in quem deſtinarant pervenerint, abſolutum iter intelligitur, & ceſſat publicatio. Sed ait disjunctim, "*haar eigen of daar de reyſe gedeſtineert was*," de quorum ſenſu, & jure, dubitari poſſet: Sane ſi proprius portus, et in quem deſtinatum erat, iidem ſint, res quidem caret omni dubio: Sed ſi *Anglus*, qui ex *Flandria* deſtinarat in *Daniam*, in portum *Anglicum* compellatur, & enavigans, iter ſuum proſecuturus, deprehendatur, antequam portum *Danicum* ſubierit, mihi quidem in itinere & ipſo actu videretur deprehendi, nec quicquam intereſſe portus proprius ſibi, nec ne, quem ante ſubierat, ſi non iter, quod inſtitutum erat, plane fuerat finitum.

THE JONGE PETRONELLA, KENS Maſter.

July 19th, 1799.

Blockade of the ports of the United Provinces, 21ſt *March* 1799. Time for communication.

THIS was a caſe of a *Daniſh* ſhip which had ſailed from *Rotterdam* on the 28th *March* 1799, and was proceeded againſt for a breach of the blockade of the ports of the United Provinces, notified to foreign miniſters on the 21ſt *March*, and inſerted in the Gazette on the 26th *March* 1799 (*a*).

Court. — There ſeems to be no queſtion made as to the property of the ſhip; I do not think a week is ſufficient time to affect the parties with a legal knowledge of this blockade, I ſhall therefore reſtore this veſſel. Cargo reſerved.

(*a*) *Downing-Street, March* 21, 1799.

"The King has been pleaſed to cauſe it to be ſignified by the Right Honourable Lord Grenville, His Majeſty's Principal Secretary of State for Foreign Affairs, to the Miniſters of Neutral Powers reſiding at this Court, that the neceſſary meaſures having been taken by His Majeſty's commands for the blockade of the ports of the United Provinces, the ſaid ports are declared to be in a ſtate of blockade, and that all veſſels which may attempt to enter any of them after this notice, will be dealt with according to the principles of the law of nations, and to the ſtipulations of ſuch treaties ſubſiſting between His Majeſty and Foreign Powers, as may contain proviſions applicable to the caſes of towns, places, or ports, in a ſtate of blockade."

July 23d, 1799.

THE TWO SUSANNAHS, BRAREN Master.

Proceeds of sale less than amount of original value. Compensation *not allowed*, in case of justified seizure; and conduct *not impeached*.

THIS was a case on a prayer for compensation in value, for a cargo taken on board a *Danish* ship, restored on farther proof 17th *July* 1799, on a suggestion that the amount of the proceeds was considerably less than the original value.

Court. — This is an unfortunate case; the Court is very desirous that full justice should be done to the claimants, but the cargo is not equal to it; there is no question about the seizure, — that is justified by the order for farther proof: The question is then, Whether the captors have acted so irregularly as to make themselves liable? It is said that it was very desirable that the cargo should be brought here, and that it has been exposed to accidents by carrying it elsewhere. It was however carried to *Leghorn*, where there is a standing commission of the Admiralty Court. It is said, that loss has been occasioned by selling it too early. Perhaps it might have been better if they had waited; but there is no suggestion that the sale was made for any sinister purposes, or in any manner injurious to the property. Under these circumstances, I cannot think that the captors are answerable for more than the proceeds, it not being shewn that they have conducted themselves otherwise than with fair intentions.

THE PACKET DE BILBOA,
DEPUCHETA Maſter.

Auguſt 6th, 1799.

THIS was a caſe of a claim of an *Engliſh* houſe, for goods ſhipped on board a *Spaniſh* veſſel, by the order of *Spaniſh* merchants, before *hoſtilities with Spain*, and captured *December* 1796, on a voyage from *London* to *Corunna*.

Shipment at the riſk of conſignor till delivery; allowed—as being made before the war. Particular mode of *Spaniſh* trade.

JUDGMENT.

Sir *Wm. Scott*. — This is a claim of a peculiar nature for goods ſent by *Britiſh* ſubjects to *Spain*, ſhipped before hoſtilities, during the time of that ſituation of the two countries, of which it was unknown, even to our government, what would be the iſſue, between them. There appears to be no ground to ſay, that this contract was influenced by ſpeculations on the proſpect of a war, or that any thing has been ſpecially done to avoid the riſks of war. It is ſworn in the affidavit of the claimant. "That this is the conſtant habit and practice of this trade;" whether it is the practice of the *Spaniſh* trade generally, or only the particular mode of theſe individuals in carrying on commerce together, is not material, as the latter would be quite ſufficient to raiſe the ſubject of this claim. The queſtion is, in whom is the legal title? Becauſe, if I ſhould find that the intereſt was in the *Spaniſh* conſignee, I muſt then condemn, and leave the *Britiſh* party to apply to the Crown for that grace and favor which it is always ready to ſhew; the property being condemnable to the Crown as taken before hoſtilities.

The PACKET DE BILBOA. August 6th, 1799.

The ſtatement of the claim ſets forth, that theſe goods have not been paid for by the *Spaniard*; — that would go but little way, — that alone would not do; there muſt be many caſes in which *Britiſh* merchants ſuffer from capture, by our own cruizers, of goods ſhipped for foreign account before the breaking out of hoſtilities. It goes on to ſtate, "That according to the cuſtom of the trade, a credit of ſix, nine, or twelve months is uſually given, and that it is not the cuſtom to draw on the conſignee till the arrival of the goods; that the ſea riſk in peace as well as war is on the conſignor, that he inſures, and has no remedy againſt the conſignee for any accident that happens during the voyage." Under theſe circumſtances, in whom does the property reſide? 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; but that general contract of the law may be varied by ſpecial agreement, or by a particular prevailing practice, that preſuppoſes an agreement amongſt ſuch a deſcription of merchants. In time of profound peace when there is no proſpect of approaching war, there would unqueſtionably be nothing illegal in contracting, that the whole riſk ſhould fall on the conſignor, till the goods came into poſſeſſion of the conſignee. In 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. 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 con-

The PACKET DE BILBOA.

August 6th, 1799.

signor, 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 all rights of capture; it is therefore considered to be an invalid contract in time of war; or to express it more accurately, it is a contract which, if made in war, has this effect; that the captor has a right to seize it and convert the property to his own use; for he having all the rights that belong to his enemy, is authorised to have his taking possession considered as equivalent to an actual delivery to his enemy; and the shipper who put it on board during a time of war, must be presumed to know the rule, and to secure himself in his agreement with the consignee, against the contingence of any loss to himself that can arise from capture. In other words, he is a mere insurer against sea risk, and he has nothing to do with the case of capture, the loss of which falls entirely on the consignee. If the consignee refuses payment, and throws it upon the shipper, the shipper must be supposed to have guarded his own interests against that hazard, or he has acted improvidently and without caution.

The present contract is not of this sort; it stands as a lawful agreement, being made whilst there was neither war nor prospect of war. The goods are sent at the risk of the shipper: If they had been lost, on whom would the loss have fallen but on him? What surer test of property can there be than this? It is the true criterion of property, that, if you are the person on whom the loss will fall, you are to be considered as the proprietor. The bill of lading very much favors this account. The master binds himself to the

The Packet de Bilboa. April 6th, 1799.

ſhipper, "to deliver for you and in your name," by which it is to be underſtood that the delivery had not been made to the maſter for the conſignee, but that he was to make the delivery in the name of the ſhipper to the conſignee, till which time the inference is, that they were to remain the property of the ſhipper: as to the payment of freight, that is not material, as in the end the purchaſor muſt neceſſarily pay the carriage:—The other conſideration, Who bears the loſs? much outweighs that,—neither does the caſe put ſhew the contrary. The caſe put is—ſuppoſing *Spain* and *England* both neutral, and that theſe goods had been taken by the *French* and ſold to great profit, to whoſe advantage would it have been? The anſwer is, If the goods were to continue the property of the ſhipper till delivery, it muſt have enured to *his* benefit, and not that of the conſignee. To make the loſs fall upon the ſhipper in the caſe of the preſent ſhipment, would be harſh in the extreme. He ſhips his goods in the ordinary courſe of traffic, by an agreement mutually underſtood between the parties, and in nowiſe injurious to the rights of any third party; an event ſubſequently happens which he could in no degree provide againſt. If he is to be the ſufferer, he is a ſufferer without notice, and without the means of ſecuring himſelf; he was not called upon to know that the injuſtice of the other party would produce a war before the delivery of his goods: The conſignee may refuſe payment, referring to the terms of the contract which was made when it was perfectly lawful; and under what circumſtances and on what principles the ſhipper could ever enforce payment againſt the conſignee is not eaſy to diſcover.

The

The goods have never been delivered in *Spain*; they were to have been at the riſk of the ſhipper till delivery, and this under a perfectly fair contract. I muſt conſider the property to reſide ſtill in the *Engliſh* merchant; it is a caſe altogether different from other caſes which have happened on this ſubject *flagrante bello* (*a*). I am of opinion that, on all juſt conſiderations of ownerſhip, the legal property is in the *Britiſh* merchant, that the loſs muſt have fallen on the ſhipper, and the delivery was not to have been made till the laſt ſtage of the buſineſs, till they had actually arrived in *Spain*, and had been put into

The PACKET DE BILBOA.

Auguſt 6th, 1799.

(*a*) In the *Noydt Gedacht*, *Waalrave*, 23d *Auguſt* 1799, which was a ſubſequent caſe of a ſmall *Dutch* fiſhing veſſel, transferred to the neutral claimant under a condition to reconvey at the end of the war.

The Court.—A ſale made by an enemy to neutrals in time of war, muſt be an abſolute unconditional ſale: This transfer is evidently done only to cover the property during the war. The veſſel continues in the old trade, and is in every reſpect a *Dutch* veſſel.—As to the cargo,—The value of the property is very ſmall; and it would be of very little benefit to any party to ſend the caſe to farther proof: I muſt therefore diſpoſe of it according to the preponderancy of the preſent evidence. The maſter, who, I muſt ſay, has ſpoken very ingenuouſly, ſays "that the conſignees reſide at *Dort*; that he believes the laders have an intereſt in the cargo now, but that it would become the property of the conſignees on the arrival at *Dort*; and he gives his reaſon for this belief, that the lader told him ſo,"—on this authority the maſter undertakes to ſwear that he believes it to be property of the perſons for whom it is claimed. It has been ſettled by repeated deciſions that this will not do—that neutrals ſhould take upon themſelves the ſea riſk and danger of the voyage, will not be allowed. In oppoſition to what the maſter ſtates, there are only two certificates, which do not, I think, meet the point. What is there ſworn may be very true; and yet the maſter's account true at the ſame time. I am inclined, therefore, to adhere to the maſter's account; and under it, I muſt condemn this cargo as *Dutch* property.

Ship and Cargo condemned.

the

The MARGARETHA MAGDALENA.

August 15th, 1799.

character, to ſend out articles of this deſcription to the enemy, in direct violation of public treaties, and of the duty which the owners owe to their own government. I ſhould conſider it as an act that would affect the neutral in ſome degree on this returned voyage; for although a ſhip on her return is not liable to confiſcation, for having carried a cargo of contraband on her outward voyage, yet it would be a little too much to ſay that all impreſſion is done away; becauſe, if it appears that the owner had ſent ſuch a cargo under a certificate obtained on a falſe oath, that there was no contraband on board, it could not but affect his credit at leaſt, and induce the Court to look very ſcrupulouſly to all the actions and repreſentations of ſuch a perſon. The maſter ſays, "That there was not more than was neceſſary for the ſhip's uſe;" but this practice is, even with this apology, ſufficiently alarming, becauſe it has appeared that other ſhips have been employed in carrying naval ſtores to *Batavia* in the ſame manner; not as principal cargoes, but in moderate quantities, under pretence of ſtores for the ſhip's own uſe, but which, nevertheleſs, were ſold, as theſe were on their arrival at *Batavia*; it is apparent that the enemy may be ſupplied in this mode to a very great amount.

What the maſter ſays in another place, is rather contradictory to this pretence; he ſays, "That there was not more than would be wanting for another ſhip which he had a deſign of purchaſing at *Batavia*." Now, I muſt ſay that it could by no means be allowed, that neutrals ſhall be at liberty to carry out a larger quantity of articles of this nature than are wanting for their own ſhip's uſe under a ſpeculation of

The MARGARETHA MAGDALENA. August 15th, 1799.

of purchaſing other ſhips, and that when they are there, the ſpeculation ſhall be relinquiſhed, and the contraband articles be then ſold as ſtores in the colonies of the enemy. If the ſpeculation was originally really and *bona fide* entertained, on failure of it, the ſurplus ſhould either be brought back again, or ſold in ſome neutral port of that quarter of the world; for neutrals can have no right to carry out double ſtores of this deſcription for a contingent purpoſe, and then diſpoſe of them to the enemy at their pleaſure. The maſter ſays, "That he was authoriſed to purchaſe a ſhip;" but there is no appearance of ſuch a commiſſion in the papers, nor are there any documents relating to it; the articles were entered in the invoice as being for ſale, and the fact has actually taken place, that they were ſold at *Batavia*. The owner ſwears that there were no prohibited goods deſtined for any of the parties now at war. It is not clear from this expreſſion, whether he meant to ſwear that it was not for the port, or not for the uſe of an enemy; it is a very equivocal term — it was certainly going to an enemy's port, and if it was to be ſold there, in failure of the ſpeculation of purchaſing a ſhip there, it was then for the uſe of the enemy. Upon the whole, I think there was great reaſon to bring this caſe to adjudication; it was a caſe very proper for enquiry. But after all the enquiry that has been made, I am of opinion that the property of the ſhip is ſufficiently clear, and that there is nothing pointing to any other than a *Daniſh* intereſt in the cargo. If I ſaw on board any thing of the nature of what has appeared in ſome other caſes from *Batavia*, I ſhould certainly look a little farther into it;

The MARGARETHA MAGDALENA. August 15th, 1799.

it; but it appears to me that the outward ſhipment from *Copenhagen* was ſent under the management of the maſter to inveſt the proceeds in the produce of *Batavia*. If the general nature of the tranſaction has rendered it liable to ſuſpicion, I can only ſay that it is a trade in which it is the duty of neutrals to obſerve a conduct perfectly circumſpect, and conſiſtent with all obligations of good faith. But I am, under all the circumſtances, ſatisfied that the property is as claimed, and I direct it to be reſtored.

August 16th, 1799.

THE PROVIDENTIA, HINCH Maſter.

Trade from the colonies of the enemy. Produce of *Vera Cruz*, going from that Settlement to *Hamburgh*, the property of neutral merchants, reſtored.

THIS was a caſe of a ſhip and cargo, having been ſtopped in a *Britiſh* port, 17th *March* 1799, on a voyage from *Vera Cruz* to *Hamburg*, and claimed for merchants of *Hamburg*.

For the captor, *King's Advocate*.—This is a claim for a ſhip and a very valuable cargo going from the *Spaniſh* ſettlement of *Vera Cruz* to *Hamburg*, on behalf of merchants of *Hamburg*. In the papers there is nothing appearing to affect the property of the ſhip and cargo; but it is to be conſidered that the claimant in this caſe has been a frequent claimant during the war, and muſt be a gentleman of much experience in the practice of theſe Courts; and therefore it is not to be wondered at, that all the documents are found regularly in order and prepared; there is, however, ſomething in the character and conduct of the maſter in this buſineſs, that does raiſe a very reaſonable ſuſ-

picion

The PROVIDENTIA. August 16th, 1799.

picion on this ground of property. When he was firſt called upon for his papers he refuſed to deliver them up till he had conſulted his correſpondent in town, and the captors were obliged to take out a motition againſt him for the purpoſe of obtaining them: there is, beſides, ſomething peculiar in his character and ſituation; he is a young man of twenty-five years, who appears to have been engaged principally, before this voyage, in travelling into *Spain* and *England*, for the purpoſe of acquiring languages; he then goes to *Hamburg*, and without having handled a rope, for any thing that appears, he is made maſter of this veſſel, and entruſted with this very important commiſſion to the *Spaniſh* colonies,—a trade for which he might have had abundant opportunities of forming ſecret arrangements in *Spain*, and in which he is more likely to have been employed in fact by *Spaniſh* merchants than for theſe gentlemen of *Hamburg*, for whom the preſent claim is given.

Theſe obſervations go to the queſtion of property; but it is perhaps unneceſſary to agitate that queſtion in the preſent caſe, as there is a more important queſtion of law involved, on which, it is ſubmitted, this ſhip and cargo will be liable to confiſcation. It is ſcarcely neceſſary to ſay, that this is the principle of law that was applied to the colonial trade of the enemy in the war of 1756; and which has never ſince been departed from by this country: The principle was not, as it is ſometimes repreſented, founded on the circumſtance of adoption into the enemy's trade by virtue of ſpecial licences or paſſes; but it reſted on the broad ground of interpoſition in the trade of a belligerent, which had not been before open. That this

The PROVIDENTIA. August 16th, 1799.

this is the foundation of the law, appears from this circumstance, that in the course of that war the use of licences was laid aside, yet still the property taken in that course of trade was made subject to condemnation. Another expedient was also resorted to, of sending the produce to *Monte Christi*, in the first instance, and of taking it from thence, without going at all to the *French* islands; but still that was considered as an evasion, and confiscation still followed.

That the trade with the *Spanish* colonies was not an open trade, and that it was an object of great jealousy and monopoly to the *Spanish* government, appears evidently from the instructions to the master in this case: "He is first directed to obtain a special permission from the *Spanish* government to go to *Vera Cruz*; and, if it should be required of him to return back to a *Spanish* port, he is to represent it to be impossible, because in that case they would be taken by the *English*; "and he is to use every means," by presents to the governors, to prevent it; he is to use his utmost endeavours to be allowed to clear out for *Hamburg*, and at worst to pay the *Cadiz* duties." It appears, therefore, that the danger of capture was in view, and an object of chief consideration with all parties; and therefore it is, that this expedient of giving bills on *Hamburg*, conditional on a safe return, is resorted to; it is a case, therefore, that comes expressly under the principles, of the war of 1756. These are found principles and have never been abandoned by this country: Circumstances had occurred to occasion an opening of the *French* colonial trade before the present war; but the *Spanish* colonial trade has ever continued an object of great jealousy, and

The PROVIDENTIA
August 16th 1799

and has never been opened to foreign ships, and therefore as to them the old principle still applies in full force.

For the claimants, *Arnold* and *Laurence* — The refusal of the master to deliver the papers on the first application has been so far explained, that it is allowed to have proceeded from mistake rather than from any consciousness of a fraudulent case; no imputation therefore arises from that circumstance that requires any answer. As little occasion is there to vindicate the character of the man from the suspicions thrown upon the former part of his history; whatever were his engagements in *Spain* it is not probable that they had any connection with this case: The very dates are sufficient to refute such a charge; he lived at *Hamburg* till 1791; his travels into *Spain* took place between that time and 1796 — a period when *Spain* was in alliance with us, and when therefore it was not very likely that fraud should have been concerted against this country. In 1796 he returns again to *Hamburg*, and it was not till two years after his return that he sets out on this voyage — a very tardy execution truly of any fraudulent trade, for which he must be supposed to have made his arrangements long before; there is nothing therefore to impeach the claim, unless the principle of law which has been started, can be maintained as applicable to this case. The practice of the war of 1756 has been relied on; and it is said, that although vessels under a special licence were condemned as vessels adopted into the enemy's trade, it was not solely on the ground of the special licence that this principle was sustained: — but it must be remembered that the principle was first set up, to meet the cases of ships sailing under those special licences, and if it was afterwards extended

The PROVIDENTIA. Aug. 16th, 1799.

to ſhips without licences, or to cargoes taken from *Monte Chriſti*, it was merely in proſecution of the ſame purpoſe, of counteracting the fraudulent trade of the enemy, which had firſt ſhewn itſelf under the contrivance of theſe ſpecial licences, and of which the later practices were but a variation for the purpoſes of evaſion; it did therefore ſtand principally, and in its origin, preciſely on the circumſtance of adoption by means of theſe licences; and this will ſtill farther appear, if it is conſidered that before that period, in the war of 1744, ſhips taken on a voyage from the *French* colonies, were releaſed before the Lords of Appeal.

But if it were granted that the interpoſition in the trade of a belligerent, not before open to foreign trades, made ſome part of the principle of that war; it would not apply to the caſes of this war, for in the late practice of this Court during this war, there have been a variety of caſes from the *French* and *Dutch* colonies, in which the Court has either ordered farther proof, or reſtored in the firſt inſtance, by no means conſidering them, therefore, as concluded by this circumſtance. It is ſaid that this has happened from a variation of facts only, and that circumſtances had occaſioned a general opening of the *French* colonial trade before the war — but that is not correct; for the opening of the *French* trade was not till four days after the declaration of the war by the decree of the Convention; the previous opening having been only occaſional, and under a diſcretionary power granted to the governors, for the purpoſe of obtaining ſupplies, and preventing the danger of famine — a ſort of relaxation directly tending to ſhew, that they were not generally open, and carrying with it a direct refutation of the argument, attempting to raiſe a diſtinction for

the

The PROVIDENTIA.

August 16th, 1799.

the legality of the *French colonial* trade, as arising out of any *previous* alteration in their system. It is said that no such alteration had taken place in *Spain*; — but it certainly had; and though the *Spanish* colonies had not been thrown open so soon as the *French*, yet they were opened before the breaking out of hostilities between this country and *Spain*, as will appear by the order to our cruizers, in which the trade from the *Spanish* colonies is expressly mentioned, being considered evidently, as a trade equally allowable, as the trade from the *Dutch* or *French* colonies, and standing on the same footing, whatever that may be.

January 25, 1798.

But it is said that the evidence in this case affords proof to the contrary; and that it comes within the more strict class of cases which occurred in 1756; as there is that special licence to be found in this case — but there is no such licence on board; the King's Advocate relies on the words of the instructions to the master, but they by no means import such a special licence, nor is there any trace that the persons engaged in this business ever conceived that they were engaging in an unlawful trade. The Court has an opportunity of seeing every thing relative to this vessel, as well with respect to her outward, as to her homeward cargo. The voyage to *Vera Cruz* is not mentioned as a thing uncertain, nor as a matter of experiment; there appears to have been no hesitation or doubt in the parties, whether they should be permitted to go to the *Spanish* colonies or not, it is mentioned in all the papers as an object fully in their own power; the instructions are given in the most unreserved manner, "That if cochineal and indigo were cheap at the *Havannah*, the master was directed to purchase there;" speaking of it

The PROVIDENTIA. August 16th, 1799.

as a trade by no means new to the parties. "But if he could not get any thing but ſugar, for which the veſſel would be too ſmall, he was to get a pilot, and proceed to *Vera Cruz*, taking particular care firſt to obtain the governor's licence;" but this is perhaps a licence neceſſary for *any* ſhip going there, in the nature of a Cuſtom Houſe clearance, and not to be conſidered as a licence, granting a particular exemption from the general reſtrictions of the colonial trade;—the prices and commodities are all ſpecifically mentioned;—ſhewing again, that the accompliſhment of their object was not a matter of contingency, nor of uncertainty and doubt to the parties.

It appears that a general proviſo of *Spaniſh* licences was "to return to a *Spaniſh* port," and that it was a great object with the parties to prevent this condition; all means were to be uſed to obtain a licence for *Hamburg*, and at the worſt the maſter was to pay the *Cadiz* duties. From this it appears what was the motive of this reſtriction — that the permiſſion to go to *Vera Cruz*, is to be taken as a ceremonial to which all foreign veſſels, and perhaps all *Spaniſh* veſſels are ſubject, for the purpoſe of ſecuring to the *Spaniſh* government this duty; in this caſe the maſter had complied, and had obtained a certificate, ſtating in general terms that he had paid the royal duties, and pointing to no ſpecific favor or indulgence. This is the fair import of the licence that is ſpoken of in the inſtructions; but whatever might be its nature, it would not of itſelf be concluſive after the caſe which has occurred in this Court, in which although a bond was found on board obliging the maſter to return to *France*, yet notwithſtanding it appearing in evidence on the maſter's oath that he did not intend to return to *France* but

The PROVIDENTIA.

Auguſt 16th, 1799.

but that he was actually going to *Gottenburg*, that property was reſtored. On theſe grounds, therefore, it is ſubmitted, that this veſſel was found in a trade not unlawful — that the proofs of property are full and ſatisfactory; that there being no ground of detention the parties are entitled to reſtitution; but farther, that as they have ſuſtained great loſs by this ſeizure, a loſs impoſed on them without reaſon and without cauſe on their part—they are entitled to a full indemnification (*a*).

JUDGMENT.

Sir *Wm. Scott.* — This veſſel was ſeized in the harbour of *Penzance* in *Cornwall* on a voyage, not diſputed, from *Vera Cruz* to *Hamburg*. It appears that the maſter ſhewed ſome reluctance in delivering up his papers, or at leaſt in ſubmitting them to inſpection, which has been attended with much inconvenience to himſelf, as it has furniſhed grounds of ſuſpicion and argument againſt him; I do not, however, ſee much ground of accuſation againſt him; it

(*a*) On a ſubſequent day, *Auguſt* 7, 1800, the demand for compenſation for loſs ſuſtained, owing to the low price of ſales, came on to be heard on petition. The principal loſs was ſtated at the difference of the prices of the markets of *Hamburg* and *London*. But it was anſwered, that the original prayer *on the part of the claimants* was to bring the cargo from *Penzance* to *London for ſale*, — that a wiſh was expreſſed by *them* to ſell in a private Manner, rather than by public ſale; and bail was offered to the amount of the invoice price only: — This being not acceded to on the part of captors, the propoſal went off; and the cochineal was ſold at laſt in *London* by the agent, after reſtitution. In the argument a material queſtion was ſtarted, Whether the King, in his office of Admiralty, would be ſubject to coſt or damages? But the Court being of opinion that it was a caſe of juſtifiable ſeizure, and fit to be brought to adjudication, and that the damage which had been ſuſtained was owing to the conduct of the parties themſelves, or their agents, diſmiſſed the petition without entering upon that point of law.

The PROVIDENTIA. August 16th, 1799.

is not the case of a man refusing to submit to a lawful cruizer of this country at sea, but it is a case of a man coming into a port, and there meeting a person claiming as deputy of Lord *Mount Edgecumbe* Vice-Admiral of *Cornwall*, under the sanction of a commission, which a neutral master might not very well understand: that there was any particular reason of disingenuous craft for such a refusal on his part I do not see, as it is admitted that the evidence of the property of the ship and cargo is complete. The destination also is fully proved; there could be no reason, therefore, for withdrawing the papers from inquiry; something has been said respecting the character of the master, that he is a young man, and had lately been travelling in *Spain*, both founding a suspicion that he does not stand in this trade in the character of master of a neutral vessel: but I see no reason why, because he united rather a larger scope of information, he might not also be competently acquainted with the navigation of a vessel: there is no appearance here of that strange animal, a captain of the colours, or captain of the flag, or any character of that kind; he travels previously to the year 1796, but this voyage does not begin till 1798, and I do not think that his travels are likely to have given rise to any fraudulent proceedings in this case; I shall therefore take the case clear of any objection of that sort, and consider it only as a question of law as to the legality of such a trade. Whether a neutral ship can lawfully go from her own port in *Europe* to the colony of an enemy, and there lade a cargo and return with it to her own port?

On this point much has been said on the policy and general reasoning of restricting the trade with the

the colonies of the enemy during a war; this is a wide field, into which I ſhall not enter any farther than is neceſſary; I ſhall look principally to the King's inſtructions to his cruizers as the ſafeſt guide for this Court to follow; all reaſoning on general principles on this ſubject depends much on facts of a very dubious nature, not ſufficiently known here, either to the Counſel or to the Court; and as the ſuperior Court has not given any rule for the direction of this Court, I ſhall think it the ſafeſt method to adhere to the King's inſtructions, and extract from them what I conceive to be the meaning of them.

The PROVIDENTIA. *Auguſt* 16th 1799.

The firſt inſtructions were, to bring in all ſhips which had been trading with any colony of the enemy: but this country afterwards receded from theſe directions; and the ſecond orders were, "to bring in all ſhips laden with the produce of the *Weſt India* iſlands, coming directly from the ports of the ſaid iſlands to any port of *Europe*. I cannot but conſider this as an abandonment of the former law, and I cannot but think that a cruizer taking this inſtruction, in conjunction with thoſe which had been given before, muſt have inferred, that it was no longer the intention of government to bring in, and much leſs to confiſcate, cargoes of *Weſt India* produce, unleſs coming to ſome port in *Europe*: this was followed by inſtructions now in force, which direct the bringing in of all veſſels laden with the produce of the *French* and *Spaniſh* ſettlements coming directly from the ports of ſuch ſettlements to any port of *Europe*, *other than the ports of that country to which the veſſel belongs*. It is certainly not laid down in the negative that they ſhall not bring in ſuch veſſels as are coming from ſuch ſettlements to their own ports; but looking

6th *November* 1793. See Appendix.

8th *January* 1794.

25th *January* 1798.

The PROVIDENTIA. August 16th, 1799.

at the former inſtructions, I think it was a ſtrong admonition to cruizers not to bring in ſuch ſhips, and I believe it has been generally ſo underſtood and acted upon by them; and in this Court, cargoes brought from *Surinam* to ports in *Europe* to which the veſſels belonged, have been uniformly reſtored on proof of the neutrality of the property.

If then this is ſo intended, On what ground is it to be contended, that this ſhip and cargo, being admitted to be going to *Hamburg*, are ſubject to condemnation? The only ground on which it has been argued, is the ſpecial licence from the *Spaniſh* governor; and it is ſaid that It was intended only to allow the trade to ſuch colonies as were generally open, and not to thoſe where a ſpecial paſs is neceſſary. But where do I find that diſtinction in theſe inſtructions? If it was ſo intended, it ought to have been expreſsly inſerted as an exception; there is nothing in the general terms to direct neutrals to ſuch interpretation; it would be, therefore, to operate with ſurpriſe upon them, and to miſlead them into a trade to their own undoing to put ſuch an interpretation upon the King's inſtructions; unleſs it can be ſhewn, that it was the particular meaning of the inſtructions to except veſſels under this licence, I muſt hold, that it is not in the terms of them to inquire whether they are going with a paſs or not—ſo I underſtand them; and till I am inſtructed to the contrary by the ſuperior Court, I ſhall ſo interpret them, as importing a general permiſſion, and as not affected by the ſpecial licence, the law being ſimple and univerſal in its language, and there being nothing to lead me to think that there was any ſuch reſerve in the mind of the legiſlature.

But

The PROVIDENTIA. August 16th, 1799.

But I am no way satisfied, if it were necessary for me to go farther, that there is such a licence in this case; the licence should necessarily be such a one as connected itself with the circumstances of this war, giving permission to a ship to go where she would not be allowed to go in time of peace. If it was only a remission of colonial forms — I do not think it would be such a licence as could support the argument which has been raised upon it in this case. It has, I think, been admitted, and it has appeared in this case and others, that the *Havannah* is generally open, but that *Vera Cruz* is the *sanctum sanctorum* of the *Spanish* settlements, and watched with peculiar jealousy; and I am not sure that even *Spanish* vessels do not require something of a permission from the government to legalize a voyage from one country to another;—the reference to the *Spanish* governor of the *Havannah* seems to have been made as a matter of course in the ordinary conduct of all trade to *Vera Cruz*, as a sort of clearance to authorize the voyage. As to the condition to return to some port of *Spain*, which, from his paying the *Cadiz* duties, it is said might be imposed upon the master, I see nothing in that which will particularly affect him, after the various cases from *Surinam*, in which, although bonds had been given to return to *Holland*, this Court has restored, on the masters' making satisfactory proof that they did not intend to comply with the condition, and intended to submit to the penal forfeiture. I cannot say there is any thing in this circumstance that can subject this cargo to confiscation.

Cases respecting the trade of neutrals with the colonies of the enemy are of considerable delicacy; and therefore I think it has been properly brought before the Court. But I restore both ship and cargo.

August 9th, 1799.

THE CALYPSO, SPECK Master.

A case of property. Effect of an attempt of a neutral to cover enemy's property, as to goods mixed up with it, &c. &c. Fraudulent destination in colonial trade.

THIS was a case of a ship and cargo taken 13th *February* 1799, on an asserted voyage from *Cayenne* to *Hamburg*, and claimed for Mr. *Beckmann*, and Messrs. *Ecchardt* and Co. of *St. Thomas*.

JUDGMENT.

Sir *Wm. Scott*.—The Court has very frequently to lament that its duty often calls upon it to condemn the property of neutral merchants on some strict principle of law. The circumstances of this case most effectually relieve it from such concern; for it is a case that I may safely pronounce to be poisoned with fraud in every vein; and the Court feels a satisfaction in executing that duty which it owes to the general interest of mankind, in reprobating and exposing such practices: The truth of this transaction cannot be better described than in the words of one of the letters found on board: "In short, the most artful tricks that can be devised to elude the enquiries of the *English*, must be put in practice; for they must not discover the real destination to *Cayenne*." That is the text,—and it appears to have been followed up with as much zeal and industry as could possibly be exercised.

The first point that I shall consider is the property of the vessel; on this great doubts arise, by which I mean, not arbitrary doubts, but legal and judicial doubts; such as must make a reasonable impression on every one that attends to the evidence of the case: as a case of simple doubt, it must be a case for further proof. It is an *American* vessel under the name

The CALYPSO.

August 9th, 1799.

name of the *Lady Walterſtorf*, (a ſingular name for an *American* ſhip,) ſaid to have been purchaſed at *New York* by Mr. *Beckmann*, of *St. Thomas*, in 1797; from whom the purchaſe was made does not appear, it is nowhere mentioned in the papers, the maſter knows nothing of it; ſhe might therefore have belonged to a *French* owner, or to one of thoſe colocomotive fugitive perſons, whoſe character, like Mr. *Beckmann's*, it may not be very eaſy to determine. A maſter is put on board, of a character no leſs equivocal, he is repreſented as a *Daniſh* ſubject — but when at home always reſides at *New York*. It may be proper alſo to conſider the character of the aſſerted proprietor Mr. *Beckmann*, who was the firſt purchaſer, but afterwards transferred a part to Mr. *Ecchardt*; according to the maſter's account he reſides at *Hamburg*, but in fact, we find him *every where* but at *Hamburg* — he is at *New York*, at *St. Thomas*, at *Cayenne*, *Paris*, and *Rochelle*; there is no evidence mentioning his connection with *Hamburg*, but the depoſition of the maſter — a perſon certainly not entitled to entire credit, the papers all deſcribe *Beckmann* and *Ecchardt* as *incolæ hujuſce inſulæ, i. e. St. Thomas*, under this contradictory evidence, therefore, ſeeing that in the courſe of this tranſaction he appears at *New York*, *St. Thomas*, *Cayenne*, *Rochelle*, and *Paris*, and nowhere elſe, and that the maſter deſcribes him as reſident at *Hamburg*; it would be impoſſible for me to pronounce him to be a *bona fide* reſident merchant of that place; and the leaſt that the Court could do would be to require farther explanation of the mercantile ſituation of this gentleman; as to the other aſſerted proprietors in this buſineſs, their

national

The CALYPSO. August 9th, 1799.

national character is not impeached — but I cannot go the length contended for, and conſider them as perſons ſo pure and purged of all poſſible *mala fides* as has been repreſented. When I find them appearing before the magiſtrate at *St. Thomas*, 1ſt *Auguſt* 1797, and making oath, "That the deſtination of that voyage was to *Surinam*, and from thence to *Hamburg*," although I am ſatisfied in my own mind, that there never was the leaſt intention of going to *Surinam*, I cannot think them entitled to all the panegyric that has been beſtowed upon them; I have ſaid that there was no intention of going to *Surinam*, and for proof of this I refer to the maſter's anſwer to the 7th interrogatory, where he ſays, "That he went from *New York* to *St. Thomas*, and there took in a cargo for *Surinam*, but was, in the courſe of the voyage, forced to go into *Cayenne* by a mutiny of his crew." But I obſerve that when they are there, the cargo is immediately ſold and by Mr. *Beckmann* the owner, who was on board;—this circumſtance is, in my opinion, ſufficient to prove the falſehood of the aſſerted deſtination to *Surinam*; why a crew going to *Surinam* ſhould chooſe to force their way into *Cayenne* is not very eaſy to conjecture—it is near *Surinam* —a moſt unhealthy place, and what is not in itſelf very attractive, without ſome ſpecial reaſon, to neutrals, a very unſettled *French* colony at this time. But ſuppoſe an owner carried in by mutiny and force; the firſt ſtep would naturally have been for ſuch an owner to have proceeded in ſome way againſt ſuch delinquents. He does nothing of the kind, but immediately ſets about ſelling the cargo with all poſſible compoſure and activity, and acts throughout like a man extremely willing *to ſubmit to the force put upon him.*

There

The CALYPSO. August 9th, 1799.

There is too much reaſon to conclude that the whole was a matter of the ſame contrivance that appears to have been attempted to a like effect in the ſubſequent voyage (*a*).

As to the papers, they are in no degree authenticated, the paſs is not that deſcribed by the maſter, he ſays, "It was obtained on *his* oath." This inſtrument does not ſo deſcribe itſelf, but appears to have been granted on the oaths of *Ecchardt* and *Beckmann*, therefore the papers are by no means duly verified by the maſter; and if they were, it would not be too much to ſay that his evidence could not give effectual aid to any tranſaction whatever; I need not travel back far to find that he has been guilty of direct perjury in his former management of the concerns of this ſhip, and as for the late merit claimed for him from his diſcloſure, I can give him little credit for it conſidering the circumſtances under which he has appeared; when we find him ſtained with perjury in *Auguſt* 1798, to give him credit for pure and unblown integrity in *January* 1799, is neither a moral or legal way of eſtimating the credit of men; the maſter being diſcredited, and the papers unverified, it would of courſe be a caſe of further proof at the beſt, with reſpect to the ſhip, conſidered upon the evidence applying merely to itſelf and independently of any connection with the cargo. But I do not think that the Court is limited to this view of the tranſaction only without conſidering the circumſtances relating to the cargo as they ſtand connected with the character and employment of the veſſel, becauſe the uſe and occupation of a veſſel are

(*a*) In the laſt outward voyage to *Cayenne*: The maſter on 7th interrogatory.

extremely

The CALYPSO.

August 9th, 1799.

extremely proper to be conſidered; for if the whole of the *res geſta* ſhews the parties to have been habitually, and throughout this tranſaction, employing the ſhip in fraudulent purpoſes, it muſt very materially affect their claim to farther proof reſpecting the property of the ſhip. It has been ſaid that falſe papers will not, by the law of this Court, neceſſarily lead to condemnation if the proof of property is clear; and that papers falſe as to the deſtination, will not ſtand in the way of reſtitution, under the practice of the Admiralty of this country. It has been ſaid alſo, and truly, that the evidence reſpecting the cargo does not generally affect the ſhip; as it may frequently happen that the owners of the cargo will, from luſt of gain, put on board falſe papers without the knowledge or privity of the owners of the ſhip: But it is a very different caſe when the ſhip and cargo belong to the ſame perſons; and although I will not ſay that falſe papers would, even in ſuch a caſe, neceſſarily lead to the condemnation of the ſhip, yet when the firſt caſe is only a caſe of farther proof, falſe papers put on board by the common owners of both ſhip and cargo cannot but very materially affect their claim to that indulgence: What then have been the habits of this veſſel? As to her employment, it will not be contended that it has not been fraudulent throughout. In the firſt part of the hiſtory of this ſhip we find her ſailing from *St. Thomas* oſtenſibly to *Surinam*, but putting into *Cayenne* with Mr. *Beckmann* her principal owner on board, and, as it appears evidently, I think, from other circumſtances, by his concurrence and contrivance. From *Cayenne* ſhe ſails again, on a pretended deſtination to *Hamburg*, but puts into *Rochelle*, with

Mr.

The CALYPSO.

August 9th, 1799.

Mr. *Beckmann* ſtill on board, and the cargo is there diſpoſed of.

That Mr. *Beckmann* went to *Hamburg* or held any intercourſe with that place no where appears, except in the evidence of the maſter; that he went to *Paris* at this time is certain, and he appears to have entered into a charter-party, for this veſſel to go to *Cayenne* and back, making oath that ſhe was going to *St. Thomas:* By what ſalvos it is that perſons of any education, or of any credit make ſuch oaths, I am yet to learn; but the fact is that they ſwear the deſtination was to *St. Thomas*, at the ſame time that the veſſel is ſailing under a contract to go to *Cayenne* and back again to *France*. Inſtructions are put on board alſo, as artfully drawn, for the purpoſes of fraud, as it is poſſible for man to conceive; be a man's talent or genius for falſehood what it may, I defy him to fabricate a fraud more ingeniouſly than it is done in theſe inſtructions; that they were not without effect is evident, as the ſhip was ſtopped by an *Engliſh* frigate and releaſed. — So documented the ſhip goes again to *Cayenne*, under a pretended force from the *French* government; the fact being, that it was her true and original deſtination — the outward cargo is there ſold and a returned cargo taken in, documented in the bill of lading as the property of *Beckmann* and *Ecchardt*, though it appears from concealed papers that have been ſince produced, that the greateſt part belongs to a number of *French* merchants, and that only a ſmall part is in fact the property of theſe perſons; now it is ſaid that all the papers are to be taken together, and it is inſiſted on, as a reaſonable rule, that in caſes where ſome papers are

The CALYPSO. August 9th, 1799.

are produced at firſt, and others kept back, you are to ſuppoſe the papers not produced to ſtate the true and exact meaſure of intereſt. I allow that all the papers are to be taken together, but I cannot go ſo far as to admit that concealed papers are to be taken as neceſſarily containing the truth, becauſe if ſuch a rule was eſtabliſhed as a principle of this Court, it would let in an infinity of fraud, and make it the eaſieſt thing in the world to protect the chief bulk of property in any caſe by giving up ſome part upon the pretended diſcloſures contained in theſe concealed papers. The more reaſonable rule would be, that where there is one ſet of papers admitted to be falſe, and another ſet coming out of the ſame hands, that the whole is thrown into a ſtate of uncertainty and doubt. It is ſaid that *Beckmann* was a ſtranger to this part of the tranſaction, but I think that cannot be maintained; he knew the manner in which this voyage begun; he was the perſon ſending out the veſſel with fraudulent papers, and on a falſe oath, and that he ſhould not know how the returned cargo was to be conducted, is not very naturally to be conceived; it would require great charity to believe that *Eechardt* and Co. were not alſo privy to the whole deſign: I have already pointed out ſome papers which ſeem to me to connect them very cloſely with the fraud. But if it were not ſo, if they were entirely ignorant of the matter, I muſt adhere to the rule laid down, (without which the greateſt frauds would be eaſily practiſed on the Court;) that where perſons put their property into the hands of their agents and partner, as the agent is in this caſe, they muſt be bound by the conſequences of his acts, as to the property ſo

intruſted to him. If they put the veſſel into his hands and allow him to employ it as he pleaſes, whether they are immediately connuſant of his practices or not, they are affected with a legal privity, and that will be ſufficient to diſpoſe of their intereſt in her. Looking then to the whole of this tranſaction, I aſk, is this a caſe that, according to the principles on which this Court has proceeded, I can refer to farther proof? I am clearly of opinion that it is not. But I will go farther, and ſay, that I have no heſitation in delivering my opinion, that if it appeared in evidence to be neutral property in the cleareſt manner; ſtill, if it was proved that the ſhip was going from the mother country of the enemy to their colony under falſe papers and a falſe maſk, and coming back again to the mother country, that ſhe would be ſubject to confiſcation. On every principle of juſtice the employment of a veſſel in this manner, not only to carry, but to *cover* and protect enemy's colonial trade from the juſt rights of war, is ſuch a groſs departure from neutrality, that I ſhould have no heſitation to condemn expreſsly on this ground; but that is not neceſſary — the ground on which I condemn is, that groſs leaven of fraud which runs through every part of the tranſaction and contaminates the whole caſe; even on the neutrality of the property.

August 20th, 1799.

THE HOFFNUNG, BERENS Master.

Act 39 *G.* 3. *c.* 98. respecting liberation of ships bringing *Spanish* wool, does not supersede proceeding by captors before the Court of Admiralty on other grounds.

THIS was a case turning principally on the interpretation of an Act of Parliament, 39 *Geo. III.* cap. 98. respecting ships importing *Spanish* wool; Whether the power given to his Majesty's Council to release such ships superseded the jurisdiction of the Prize Court, on other grounds of enquiry that might be taken by captors?

The licence was dated on the 21st *March* 1799, being the date of the notification of the blockade of *Holland*; but as that was not noticed in the terms of the licence it was made a question on the part of the captors, Whether the licence to import *Spanish* wool from *Holland* was to be taken as exempting them from the blockade? and farther, as to the property, it was submitted, that as it was a ship asserted to have been purchased in *Holland*, but having no bill of sale on board, it was clearly on that ground, a case of farther proof.

On the other side *Laurence* contended on the part of the claimant of the ship, — That the power of the Court of Admiralty to proceed against this ship was precluded by what had already passed; that she came under the description of vessels whose release was provided for in a special manner by the stat. 39 *Geo. III.* cap. 98.; that this vessel had obtained her release in a summary manner, under that form, and was therefore not now liable to be proceeded against on a question of property, or blockade.

JUDGMENT.

JUDGMENT.

The HOFFNUNG.

August 20th, 1799.

Sir *Wm. Scott.* — The firſt thing that I ſhall do will be to lay out of the caſe all queſtion of blockade; on the ground that the licence is granted on the ſame day when the notification ſtated the blockade to commence; for I think I am bound to preſume that it was intended the parties ſhould have the full benefit of importing theſe articles, without moleſtation from a blockade, which could not be unknown to the great perſonage under whoſe authority, and in whoſe name this licence iſſues. I add farther, that I think this licence bears very materially on ſome other licences which had been previouſly granted; for when I ſee that the blockade was not conſidered as a ground for withholding theſe licences, I am led to ſuppoſe, that it was not intended to have the effect of ſuſpending the operation of ſuch as had already been granted.

The queſtion of blockade being diſpoſed of, Is there any thing elſe that puts the caſe in an unfavourable ſituation? It is ſaid, that the property of the cargo is not proved, — on this point it is indubitable that the King may, if he pleaſes, give an enemy liberty to import: He may, by his prerogative of peace and war, place the whole country of *Holland* in a ſtate of amity; or, *a fortiori* he may exempt any individual from the operation of a ſtate of war; but I apprehend, that unleſs there are very expreſs words to this effect to be found in the licence, I am to conſider its meaning, as not going to that extent, but as giving ſuch a liberty only to *ſubjects of this country*; it is a licence "to *Britiſh* ſubjects" to import, &c. and as I underſtand it, they are to import *on their own*

The HOFFNUNG. August 20th, 1799.

account (*a*); and if it appeared that the importation was on the account of other than *Britiſh* merchants, I ſhould hold, that under the terms of this licence, it could not be conſidered to be a legal importation. I muſt ſay, however, that there is nothing in this caſe, that ſhews the terms of the licence were not ſufficiently complied with, and therefore I reſtore the cargo.

The queſtion then remains as to the ſhip; and that queſtion might not be without its effect upon the cargo; for certainly a licence to import in a neutral veſſel, would be no licence for an importation in an enemy's veſſel; at the ſame time this Court could hold that it was ſufficient for the protection of the *Britiſh* importer of the cargo, if the ſhip was viſibly, and to all appearance, neutral. A merchant cannot look further: He cannot be ſuppoſed to look into the title deeds of the ſhip; and though this Court, by its power of enquiry, might be able to detect enemy's intereſts lurking therein, ſtill that would not be allowed to affect the cargo, unleſs the importer, or his agent, could be directly affected with the knowledge of that fraud.

With reſpect to the ſhip, one queſtion ariſes on an act of parliament, 39 *Geo. III.* cap. 98. It is a ſhip bringing commodities for the manufactures of this country; and certainly the Court would not, as it has been ſaid, be diſpoſed to preſs any thing more ſtrictly againſt a ſhip in ſuch a ſervice, than it is bound to do: At the ſame time, a ſhip coming into our port as a neutral veſſel, but being really not ſo,

(*a*) In the *Beurſe Von Koningſberg*, *February* 27, 1800, [introduced as the next caſe,] this queſtion came more immediately before the Court.

cannot

The HOFFNUNG. August 20th, 1799.

cannot be ſaid to come under the faith of a licence; ſhe can in no degree be compared with the caſes mentioned of ſhips coming under a flag of truce: They come in a known and avowed character; there is no concealment or abuſe. But if an enemy's ſhip comes under a licence granted only in terms to neutral veſſels, ſhe abuſes the licence, and muſt be conſidered not as coming on the faith of this Government, but as endeavouring fraudulently to take the benefit of a licence to which ſhe is not entitled.

Before the paſſing of the Act in queſtion it had been uſual to encourage the ſupply of this article of great neceſſity, by granting licences to "*A. B.* or his agent, or bearer of the bill of lading, to import *Spaniſh* wool in neutral bottoms:" But it is ſaid that this mode was attended with inconvenience; and therefore on application to the legiſlature, this act was paſſed.

On the firſt clauſe nothing particular ariſes; and I may perhaps be going out of my way to ſay any thing upon it. At the ſame time, it may be attended with convenience to merchants to know, that it appears to this Court to be expoſed to ſome degree of doubt and difficulty. There can be no diſpoſition in this Court (as there certainly ought not to be), to paſs light obſervations on Acts of Parliament: At the ſame time it is known that particular acts of parliament are not always modelled and drawn up by perſons ſufficiently acquainted with, or attentive to, the ſtate of the general law to which the new regulations are to apply. It rather appears to me, that the perſons procuring this act have not entirely ſecured themſelves from an inconvenience of this nature:— The words of the act are,

The HOFFNUNG. *August* 20th, 1799.

"Whereas by an act, paſſed in the thirty-third year of the reign of His preſent Majeſty, amongſt other things, to prevent traitorous correſpondence with His Majeſty's enemies; and by ſeveral ſubſequent acts, trade and intercourſe is prohibited between *Great Britain* and the Countries in hoſtility with His Majeſty, unleſs ſuch trade and intercourſe ſhall be ſpecially permitted by His Majeſty's licence and authority: And whereas, for the encouragement of the manufactures of this country it is expedient to permit the importation of *Spaniſh* wool from any place whatever, in ſhips or veſſels belonging to any kingdom or ſtate in amity with His Majeſty, Be it therefore enacted by the King's moſt Excellent Majeſty, by and with the advice and conſent of the Lords Spiritual and Temporal, and Commons, in this preſent Parliament aſſembled, and by the authority of the ſame, That it ſhall and may be lawful to and for any perſon or perſons to import into this kingdom *Spaniſh* wool from any port or place whatever in foreign parts, in any ſhip or veſſel belonging to any kingdom or ſtate in amity with His Majeſty; any thing in the ſaid act, paſſed in the thirty-third year of the reign of His preſent Majeſty, or any other act or acts of parliament to the contrary in any wiſe notwithſtanding."

Now by this, it appears as if the whole illegality of the trade, and the penalties belonging to it, aroſe out of thoſe ſpecial proviſions of the legiſlature; for the preamble points merely to thoſe acts of parliament, and the *non obſtante* in the concluſion points generally to Acts of Parliament. Yet it is perfectly well known, that independently of theſe, or any other Acts of Parliament, it is unlawful by the general maritime

The HOFFNUNG. August 20th, 1799.

maritime law of this realm, which prohibits such commerce; this clause exempts persons from the penalties of *those particular acts*, but if there are other penalties by the common maritime law, which considers that trade as illegal, and punishes it by confiscation of the goods, it will not be easy to point out how this clause takes off that illegality, and the penalties attached to it; or at least it must be admitted, that it leaves some question of interpretation, in a case where no such question, nor the danger of any such question ought to exist. The question more immediately before the Court arises on the second clause.

"II. And be it further enacted, That in case any ship or vessel having on board any *Spanish* wool, has been or may be detained, and it shall appear to the satisfaction of the Lords of His Majesty's Council that His Majesty's licence was granted for the importation of such *Spanish* wool before such detention, it shall and may be lawful for the said Lords of His Majesty's Council, and they are hereby authorised and required to order and direct the immediate restoration of every such ship or vessel, and all such *Spanish* wool, under the aforesaid circumstances, to the respective owner or owners, or proprietor or proprietors thereof."

Now that it should be the intention of the legislature to say this, that by putting on board any ship whatever a bale or two of *Spanish* goods, that ship should be protected to any extent, can hardly be maintained, unless there were very clear and express words to that effect; for by such an interpretation the whole navigation of the enemy might be protected. That the Court of Admiralty should be obliged to

The HOFFNUNG. August 20th, 1799.

ſhut its eyes to every circumſtance reſpecting a veſſel, except its having a bale of *Spaniſh* wool on board, ſeems not a very natural intention on the part of the legiſlature: more eſpecially when we look to the terms of the firſt clauſe, which deſcribes the indulgence to be meant only for the ſhips or perſons at amity; and the two clauſes muſt, I think, by fair conſtruction be taken together.

If there is a captor before the Court who takes upon himſelf to aver that a veſſel is not neutral property, I cannot think that I am not at liberty to examine that queſtion; and I am more ſtrengthened in this opinion, when I look back to the words of the Act, and conſtrue it by the Order of Council; the Order of Council declares the importation to be according to the licence — the licence is for "*importation in neutral ſhips*," and the Act directs "the immediate *reſtoration of every ſuch* ſhip *under the aforeſaid* circumſtances." If ſhips are *not neutral ſhips*, then they are not *under the aforeſaid circumſtances*. The order only declares the licence to have been granted, and directs the reſtitution, as far as the *Spaniſh* wool was concerned, leaving all other queſtions ſtill open, and the neutrality of the ſhip remains ſtill examinable by this Court, at the application of the captor. If the party is diſſatisfied with my interpretation, he will recollect that the Courts of Common Law are the moſt effectual expoſitors of Acts of Parliament.

Adverting then to the facts of the caſe, the maſter is ignorant of the built of the veſſel, but ſhe appears to have been purchaſed in *Amſterdam* by Mr. *Hillary Bauman*, a great purchaſer of ſhips, who handed it

over almoſt immediately to his ſon; ſhe continued under the former maſter, in the *Dutch* trade; I think it is not too much to ſay, that there is that reaſonable ſuſpicion of the continuance of *Dutch* intereſts in this veſſel, which calls for farther elucidation.

The HOFFNUNG. *Auguſt* 20th, 1799.

On 26th *June* 1800. On production of farther proof, the Court ſaid, The doubts are not abſolutely cleared away; but conſidering the ſmallneſs of the value, and the manner in which the ſhip firſt came into this port under a licence, I ſhall reſtore it.

THE BEURSE VAN KONINGSBERG, SHEMILLS Maſter.

February 27th, 1800.

THIS was a caſe on the claim of Mr. *Robarts*, a *Britiſh* merchant, for a quantity of *Spaniſh* wool imported under a licence from *Spain*.—An objection being taken by the *King's Advocate*,—That the claim did not expreſs the property of the claimant, nor negative enemy's intereſt.—It was ſaid for the claim, That it was in the ſame form as many other claims in which reſtitution had been obtained.

Terms of the licence reſpecting *Spaniſh* wool to *A. B. importer and holder* of his bills of lading, not meant to exempt a claimant under licence, from negativing enemy's intereſt in his claim.

Court.—Perhaps the claimant will not object to amend his claim.

This not being acceded to—The cauſe came to be argued.—For the captors, the *King's Advocate*.—In this caſe the articles in queſtion are claimed for Mr. *Robarts*, but the bills of lading expreſs accounts and

riſk

The Beurse Van Koningsberg.

February 27th, 1800.

risk of merchants in *Altona*. It is a claim (*a*) perfectly novel in its form; as it not only does *not* assert *British* property, but as it does not even assert neutral property, or negative the interest of an enemy: it is said, that Mr. *Robarts* claims under the terms of the licence "as *Importer* and *holder of the bills of lading*," and that he is entitled to restitution in that character. The whole question will depend then on the terms of the act, in conjunction with the licence, and if they have not been properly pursued, the goods imported under it, in trade with the enemy, will be subject to confiscation:—at any rate the captors will be entitled to their expences, as the licence

(*a*) The claim was in these words:—"The Claim *A. Rob. &c.* on behalf of himself, as *the importer and holder* of the bills of lading, for 140 bags, &c. laden on board the ship, being a neutral ship, under the authority of His Majesty's licence, and on behalf of himself and others, the owners and proprietors, at the time the said ship was seized by, &c.—and for the said 140 bags of *Spanish* wool, as being laden on board a neutral ship, for the purpose of being imported into this kingdom, by the authority of the aforesaid licence, and by an order of His Majesty's Most Honourable Privy-Council, bearing date 20th *December* now last past, directed to be liberated, it having been made to appear to their Lordship's satisfaction that His Majesty's licence was granted for the importation thereof previous to the detention of the said ship, and for all costs, &c.—The affidavit of Mr. *Robarts* annexed to the claim, stated the circumstance of the licence, the capture, and order of restitution from the Privy Council, and concludes"—and this deponent lastly saith, that he is duly authorised to make the claim hereunto annexed, for the said goods on behalf of the owners and proprietors thereof; and that the *same is a just and true claim*, and that he shall be able to make due proof and specification thereof, as he verily believes. For the usual form of claim, see the appendix.

was

was not on board, consequently as they were under the necessity of bringing the case to adjudication. The enacting words of the act allowing the importation of *Spanish* wool are, 'That it shall be lawful *for any per-* 'son or persons to import into these kingdoms *Spanish* 'wool from any port or place whatever in foreign 'parts, and the Lords of the Council are to direct 'restoration to the respective owners or proprietors.' —It must be contended, to support a claim in the present form, that it was the intention of this act to extend the importation to all persons *whatever*, friends or *enemies*—a position that will hardly be maintained. The form of the release * reciting the act and the licence, proves also that it was intended only to protect the importation of *Spanish* wool being *British* property.

* See Appendix.

It recites, the act requiring the importation to be by licence, and directing the restoration to be to the *proprietor* or *proprietors;* it then states Mr. *Robarts* to have caused to be put on board these articles, for the purpose of importing under the authority of the licence; and declares the release to be under the powers and authority vested in the Lords of His Majesty's Council by the said act, referring clearly to that clause which directs them to restore to the respective *owners and proprietors.*

It appears also by the subsequent order of Council †, which may be taken as explanatory of the act, that there was no intention of extending it to other than *British* subjects.—This is an order of the 19th *February* 1800, which recites the act of parliament, 39 *Geo.* III. *c.* 98. and states, "Whereas doubts have arisen whether according to the true construction of the said act, His *Majesty's subjects* are thereby authorised, &c." and

† See Appendix.

The Beurse Van Koningsberg.

February 27th, 1806.

and goes on to direct, "that it shall be lawful for any of *His Majesty's subjects* to purchase and import into this kingdom *Spanish* wool, notwithstanding the purchase and importation thereof may be deemed a trading with His Majesty's enemies; and notwithstanding the same might be liable to capture as the *property* of His Majesty's subjects trading with the enemy, in case the order had not been made." — Mr. *Robarts* claims as "*importer and holder* of the bill of lading;" If, it is meant, that he *is the proprietor*, there can be no objection to restore to him what he claims in that character; but it is submitted, that this form of words is not sufficient, the obvious meaning of them in the licence being only to extend the right of importing under it, from Mr. *Robarts* as the *original proprietor*, to any person to whom he might have indorsed the bills of lading, as a transfer of his original interest.

For the claim, *Arnold* and *Laurence*.—It is not necessary to go so far as it has been attempted to push our argument on the other side; or to maintain, that the words of this licence would extend to authorise an *enemy merchant* to come before the Court, and claim this property as duly imported under such licence. It is sufficient to shew that there is nothing in the form of words, particularly confining the property to Mr. *Robarts*, or requiring him to claim under any specific description of property. The terms of the licence direct the *British* cruizers to permit *A. B.* or the bearer of his bill of lading to import." It empowers him to make the importation by any means, either by himself or his agents. The words of the explanatory order are in like manner as broad as possible, "purchased or *caused* to be brought into this kingdom,"

kingdom," or "*cauſe* to be *imported*;" in conformity to theſe terms, it is ſubmitted, that Mr. *Robarts* ſtands before the Court in the character marked out by the licence, as the importer and holder of the bills of lading, and that as ſuch he is enabled to receive reſtitution, as it has been obtained before in other caſes, under a ſimilar form.

Court. — The only point on which I ſhall decide at preſent is, that the captor muſt be entitled to his expences. Whoever has heard this caſe diſcuſſed, muſt ſee that the captors were obliged to bring it to adjudication. I am ſorry that it ſhould be attended with additional expence to the merchants, but if they entitle themſelves to extraordinary privileges, they muſt know that they cannot enjoy the privileges of peace in time of war, without taking ſome diſadvantages along with them. The difficulty ariſes on the terms of the licence: It is a very important queſtion, and I ſhall not decide it without further deliberation.

On the 7th *March*, the *Court* ſaid — Since the argument in this caſe, on the reſult of which I entertained no doubt in my own mind, I thought it not an unreaſonable caution, on a matter ſo extenſively connected with the commerce of the country, to inform myſelf, whether it was at all within the intention of His Majeſty's Council in the grant of theſe licences, to permit the trade in the unlimited manner contended for by the claimants; and I find no ſuch indulgence was intended to be given, or was deemed poſſible to be given under this act of parliament. I am therefore under the neceſſity of aſſigning Mr. *Robarts* to amend his

The Beurse Van Koningsberg.

his claim, and certify that the goods are not the property of an enemy (*a*).

February 27th, 1800.

(*a*) The Editor has been informed, that upon an application afterwards made by the merchants, for a further extenſion of the trade with the enemy, and a full hearing thereon before the Council, it was deemed unadviſable to comply with the prayer of their petition.

Auguſt 30th, 1800.

THE HAABET, Vette Maſter.

Report of the Regiſtrar and merchants, diſallowing inſurance which had not actually been made, affirmed.

THIS was a caſe ariſing on an objection to a report of the regiſtrar and merchants reſpecting the allowance of inſurance, as part of the price of a cargo of wheat, going from *Altona* to *Cadiz*, but ſeized and brought into this country, and bought by Government. The demand of the claimant, Mr. *Peſchie* of *Copenhagen*, had been diſallowed in the report, on the ground that the inſurance had not actually been made.

For the petition, *Lawrence* and *Swabey*.—This is a caſe of a cargo of corn, purchaſed by Government, under a general agreement as to value, of allowing the invoice price, and ten *per cent.* profit: the inſurance has been charged to this account, but the regiſtrar and merchants have refuſed to admit it, becauſe the inſurance has not been actually made; that is, in effect, they are determined that owners are not at liberty to be their own inſurers, by taking the riſque on themſelves. It will appear that this is an opinion by no means confirmed by the general opinion of the moſt reſpectable mercantile perſons in this city: [a declaration of a contrary opinion was here offered to be introduced, ſigned by ſeveral merchants; and it was ſaid that this had been offered, agreeably to practice,

The HAABET.

August 30th, 1800.

tice, to allow perſons to ſtate their caſe in writing, before the regiſtrar and merchants at the time of forming their report. On objections to the admiſſion of ſuch evidence, it was rejected by the Court, with obſervations occurring the judgment.] *Counſel.*—If the opinion of theſe moſt reſpectable merchants is not to be received as evidence, it will not be unfair to object, on our part, againſt the competency of the merchants ſigning the report, to determine a queſtion of this ſort as judges. The authority which they may exerciſe in matters of freight and expences, in conjunction with the regiſtrar, can give them no authority to ſpeak as merchants on a point, in which it is ſubmitted the greateſt deference is due to the more general opinion of the mercantile world. It may be ſaid, perhaps, that there are ſome caſes of coſts and damages in which this charge has not been allowed, as between claimant and captor: but they will not be any authority for this caſe; this is a caſe between His Majeſty's government and neutral nations on the right of purchaſing goods *bordering* on the nature of contraband, and bound to ports of the enemy. It is a right in its nature, of much delicacy, and one that has not been ſanctioned by continued uſe; if it is a right which it is not thought adviſeable to give up on the part of this Government, it muſt be allowed on all ſides to be a right which is to be exerciſed with great fairneſs, and reſpecting which the terms of payment are to be interpreted with the moſt liberal conſtruction. The agreement is, that allowance ſhall be made for the original price, with a fair reaſonable profit. At the beginning of this war, when the agreement was made, the ſame terms were adopted that had been ſettled in the laſt war; and all that was required was, that the neutral merchants

The HAABET.

August 30th, 1800.

merchants ſhould prove that the premium charged was a fair one, in proportion to the ordinary ſea riſque, and that it had actually been charged in the invoice, previous to the capture, with a view to the general market price — it was not required that the policy of inſurance ſhould be produced. It was reaſonably conceived, therefore, to be immaterial, whether the merchant inſured with others, or whether, as large traders frequently do, he might chuſe to ſtand his own inſurer. This was the general underſtanding, and it is alſo warrantable to aſſert, that it was ſo underſtood on the authority of the Navy Board, (which was then empowered to ſettle theſe matters;) and that it was not uſual in the practice of the laſt war, to require the policy of inſurance to be produced. That being the caſe, on what principle can it be ſaid, that a merchant might not take the riſque on himſelf? and that although no formal contract had taken place, he might not charge on his cargo the uſual rate of inſurance. It would be to prevent perſons from conducting their own buſineſs in their own manner, and make a very good monopoly for public inſurers. A paper has been invoked from the *Fortuna*, a caſe ſimilar to the preſent, in which Mr. *Peſchin* was the claimant of the cargo, and in which a general average had been incurred before capture — this has been diſallowed alſo by the regiſtrar and merchants in their report on that ſhip, and therefore it is a loſs that he, ſtanding as his own inſurer, muſt bear himſelf. Suppoſing it to have happened in this very caſe, would it not be the moſt manifeſt hardſhip, to oblige him to ſtand to the loſs of one part, and at the ſame time to prohibit him from making the charge of the premium of inſurance? If the charge had not been made in the invoice,

Fortuna, Jeffon. Adm. 1ſt *Oct.* 1796.

invoice, there might have been ſome reaſon for reſiſting the payment, on the ground, that as every merchant muſt be ſuppoſed to take ſome means of indemnifying himſelf, he might be conceived to have included it generally under ſome other article. In this caſe, there was no invoice from the ſhipper, only a correct account. He could not know what the proprietor would do; but, on receiving his account, the proprietor ſent off before the capture, a full and complete invoice, containing all charges, and among them inſurance, and a fair intereſt for his money. It was ſaid before the Regiſtrar and merchants, that to allow inſurance would be to grant inſurance againſt *Engliſh* cruizers; but the rate of inſurance in this caſe may be ſhewn to be at the rate of the ſea riſque only, and therefore that objection does not apply. It is apprehended, that in many reſpects the charge of inſurance and freight ſtand on the ſame ground; as to freight, capture is conſidered as delivery, in ſuch a manner as to entitle the neutral veſſel to her freight. Suppoſe a cargo of this nature to belong to the owner of the ſhip, it could not be denied that he would be entitled to his freight; and not only on charges actually paid, for then it would be confined to the wages of ſeamen and other charges, but to the full extent of the fair profits of the voyage.—The demand of inſurance is ſtill ſtronger, for that is not a demand of profit, ſo much as of the price for riſque, which the merchant had fairly taken on himſelf. On theſe grounds, and recurring to the practice of the laſt war, in which the officers of Government who ſettled theſe things, allowed this practice, without calling for the policy of inſurance; and recollecting alſo that at the beginning

The HARBET. August 30th, 1799.

of this war, the ſame underſtanding prevailed, it is ſubmitted, that the Regiſtrar and the merchants had no right to alter this practice, and ſay, *we* conſider it otherwiſe; and, therefore, that their report ought not to be confirmed.

Againſt the demand the *King's Advocate*, and the *Advocate of the Admiralty*.—The queſtion is, Whether the claimant is to be allowed to reckon amongſt his charges and expences, a charge for inſurance which he has never made? The report which is now before the Court has refuſed this demand; and notwithſtanding the obſervations made on the report, it is apprehended that the *prima facie* preſumption will lie ſtrongly in favour of thoſe to whom the Court has referred the queſtion; it being a board of a mixed nature, conſiſting of the Regiſtrar, who is qualified to conſider the law and practice of the Court, and of merchants ſelected by the Court, to give information on matters of mercantile uſe and cuſtom. The opinion of ſuch a board will, therefore, ſtand in point of authority on very different grounds from the mere opinions of any private merchants, however reſpectable they may be. It is inſinuated, that there has been an agreement in this matter; if ſo, it would be deciſive; but that has not been ſhewn, and all that appears is, that the Navy Board, in ſettling ſuch accounts in the laſt war, did not demand the policy to be produced; ſo, in the beginning of this war alſo, before the Regiſtrar and merchants; but this might proceed only on a ſuppoſition that the inſurance had been paid; as when it is found charged in the invoice, the firſt impreſſion would naturally be, that it has been paid. But immediately that it was diſcovered, that the inſurance had not actually

The HAABET. August 30th, 1799.

actually been paid, it was disallowed. That this case is to be more favourably considered on behalf of the claimant, than cases of costs and damages, where a wrong is supposed to have been committed against him by the captor, cannot reasonably be contended, for there the captor being adjudged guilty of a tort, would be liable to make the fullest compensation. But this is a case arising out of a justifiable act, out of the right of pre-emption, which has always been asserted, and is allowed to be justly exercised by all belligerent nations. It has, accordingly, been reduced to a matter of agreement, what the compensation shall be—an allowance of all payments, and a reasonable profit—all that this country is bound to do as to the price, is to *reinstate* the claimant, to *repay* the party what he has disbursed. How can this take place for sums, which have never been expended? The Court will not look to the state of profits, nor to the risk that may be calculated, at the port of delivery, neither will it compare this demand of insurance, which is optional, and depending on various circumstances, with the allowance of freight, which is in its nature a thing always attending the cargo. The risque of loss in this case has never been incurred. The payment has never been made, and therefore there is nothing on which the demand of the claimant can be sustained.

JUDGMENT.

Sir *Wm. Scott.*—This is a question on a report of the Registrar and merchants respecting an allowance of insurance on a cargo of corn, seized and brought into this country: The cargo was decreed to be restored, and the Registrar and merchants were directed

The HAABET.

August 30th, 1799.

to make a report on the value due to the claimant; ſuch reports are in their nature partly legal and partly mercantile; it is a report proceeding from perſons qualified in both theſe reſpects, to form a ſound judgment on the ſubject before them; one of them being, from his connection with Courts of Juſtice, ſuppoſed capable of forming his own opinion, and of aſſiſting his aſſociates on all queſtions of law, in the firſt inſtance, ſubject to the inſpection and correction of the Court, whilſt the other part of this domeſtic forum, as I may call it, conſiſts of perſons acquainted with trade, and exerciſing their judgment on matters relative to commerce: It is from the report of a commiſſion ſo conſtituted, that the queſtion is now brought before the Court on a ſubject partly legal and partly mercantile. Another report has been brought before me to-day from other perſons, of whom it is impoſſible for me to ſpeak with too much reſpect, attending either to the extent of their information, or to their known probity and honour; but they have, I think, a little miſtaken their function in delivering their judgment upon the queſtion propoſed to them; they are perſons of great experience in mercantile affairs, and from whom the Court, upon ſubjects purely of that kind, would gladly receive any information which they could conveniently impart. If the Court had deſired to know, Whether it was the practice of merchants, in the ordinary courſe of commerce, uſually to charge and allow inſurance, though the inſurance has never actually been made? their anſwer to ſuch a queſtion would have ſatisfied its conſcience upon a matter of uſage beſt known to themſelves, and requiring nothing

on

The HAABET. *August* 30th, 1799.

on their part but a fair communication of their own experience and practice. But the question on which an opinion has here been obtained from them is this, "Whether if a neutral cargo is seized by a belligerent during war, the belligerent is in all cases bound in compensation for this cargo, (supposing it not liable to confiscation,) to pay such an insurance, no insurance having been paid by the shipper?" That is not a question merely of the law merchant, it is a question which may embrace other considerations, and those belonging to the general law of nations; in truth, it is the very question in the cause now submitted to my decision, and if I regard this opinion so given as an authority, there is an end of any duty which I have to perform, for here is an actual decision upon the whole law and fact of the present case. They will acquit me, I am sure, of any incivility, when I venture to say, that the labour of giving such a decision is not legally imposed upon *them*, and therefore that this private report so introduced, does not come with any just credentials of authority.

The question is, Whether there is any reasonable ground for me to pronounce that the Registrar and merchants have disallowed a just demand, in disallowing a charge of insurance which had not been made. It has been argued that this charge ought to have been allowed, because it is usually so allowed in the dealings of merchants with each other; I am not clear that this is a necessary consequence, for, it is surely no certain rule that in *all cases* where a cargo is taken *jure belli* but for the mere purpose of pre-emption, that it is to receive a price calculated exactly in the same manner, and amounting precisely to the

The MAABET. August 30th, 1799.

ſame value, as it would have done, if it had arrived at its port of deſtination in the ordinary courſe of trade.

The right of taking poſſeſſion of cargoes of this deſcription, *Commeatus or Proviſions*, going to the enemy's ports, is no peculiar claim of this country; it belongs generally to belligerent nations; the ancient practice of *Europe*, or at leaſt of ſeveral maritime ſtates of *Europe*, was to confiſcate them entirely; a century has not elapſed ſince this claim has been aſſerted by ſome of them. A more mitigated practice has prevailed in later times of holding ſuch cargoes ſubject only to a right of pre-emption, that is, to a right of purchaſe upon a reaſonable compenſation, to the individual whoſe property is thus diverted. I have never underſtood that, on the ſide of the belligerent, this claim goes beyond the caſe of cargoes avowedly bound to the enemy's ports, or ſuſpected, on juſt grounds, to have a concealed deſtination of that kind; or that on the ſide of the neutral, the ſame exact compenſation is to be expected, which he might have demanded from the enemy in his own port; the enemy may be diſtreſſed by famine, and may be driven by his neceſſities to pay a famine price for the commodity if it gets there; it does not follow that acting upon my rights of war in intercepting ſuch ſupplies, I am under the obligation of paying that price of diſtreſs. It is a mitigated exerciſe of war on which my purchaſe is made, and no rule has eſtabliſhed, that ſuch a purchaſe ſhall be regulated exactly upon the ſame terms of profit, which would have followed the adventure, if no ſuch exerciſe of war had intervened; it is a reaſonable indemnification

and

and a fair profit on the commodity that is due, reference being had to the original price actually paid by the exporter, and the expences which he has incurred. As to what is to be deemed a reasonable indemnification and profit, I hope and trust that this country will never be found backward in giving a liberal interpretation to these terms; but certainly the capturing nation does not always take these cargoes on the same terms on which an enemy would be content to purchase them; much less are cases of this kind to be considered as cases of costs and damages, in which all loss of possible profit is to be laid upon unjust captors; for these are not unjust captures, but authorised exercises of the rights of war.

Two or three considerations have been urged, which may, with all propriety, be dismissed; one is, that it was understood between the King's government and the parties that this charge should be allowed: Certainly if it were made out by any credible proof, that the faith of government had been in the slightest manner pledged to such an understanding, there is no principle which this Court would hold more sacred, than that the faith of government should be held inviolate in transactions of this kind; but no sort of proof is offered of this, and the fact has in no way come to my knowledge. It is said likewise, that in the cases of this kind which occurred last war, and which were then settled by the Navy Board, the charge of insurance was allowed, but the policy of insurance was never called for. How this practice came to prevail there, whether under a notion that the insurances had been really made whenever they were charged, whether under any order of government, or how otherwise, I am

The HAABET. August 30th, 1799.

not informed; the perſons who had to ſettle thoſe accounts were not mercantile men, and might be led by the charge to ſuppoſe, that it had actually been incurred: Under whatever circumſtances ſuch a practice grew up, if it did obtain, it is no binding rule upon the Regiſtrar and merchants here; it might be ſimple miſtake, and at beſt it is no deciding authority.

I have already ſaid, that the expected payment at the port of delivery, is not the neceſſary meaſure of compenſation at the port of the belligerent. It is not ſo with reference to any conſtituent of price; with reſpect to inſurance, conſidered as ſuch, it would be peculiarly improper; it is reaſonably to be charged at the port of delivery, although it has never been paid, becauſe the merchant has ſtood his own riſk, and has purchaſed the inſurance at the expence of his own danger. But is that the caſe where the voyage has been interrupted almoſt in its commencement, where the cargo has been carried into a neighbouring port? In the preſent caſe the voyage was from *Altona* to *Cadiz*, from the north to the ſouth of *Europe*, and the cargo is ſeized upon its entrance into the *Britiſh* Channel very ſoon after quitting its port. Moſt of the cargoes taken have a ſimilar deſtination, and are taken under ſimilar circumſtances; What pretence is there to ſay that all riſks of the voyage have been incurred? The utmoſt that could be claimed is an inſurance *pro rata itineris peracti*, amounting to a very ſmall proportion of the whole, hardly deſerving a particular conſideration. As to what is ſaid, that in the caſe of capture of ſhips, you allow the full freight of the whole

whole voyage; that allowance was made on another account; you take the ship in that case on account, not of itself, but of its cargo; you interrupt its occupation, which was legal and innocent, and it is therefore not unjust to allow it the benefit of its original contract, which you alone have prevented from being carried into execution. Very different is the consideration of risk, respecting a cargo, which has never been incurred, and of a payment which is due only, on the event of that risk having been actually incurred—no contract subsisting, and the cargo being, in its own nature, liable to this species of interception.

Upon the whole, I see no sufficient reason to pronounce that the Registrar and merchants have adopted a wrong measure of value in disallowing the charge of insurance: they have allowed what, upon their own experience, they pronounce to be a reasonable indemnification and profit; and I do not understand that the sufficiency of this indemnification and profit is impeached, on any other ground, than that an insurance would have been added in the ordinary course of a mercantile account, if the cargo had reached its intended destination. Being of opinion that the ordinary terms of a mercantile account, to be settled on the completion of the voyage, do not furnish, (all circumstances being duly weighed,) the necessary or just measure of value, to be applied in transactions of this kind, I do not find myself enabled to sustain the objection. If, as it has been repeatedly urged, an understanding to a different effect has subsisted between the King's government and the parties, there can be no doubt that on their resort to a superior tribunal, better acquainted with any

The HAABET. *August* 30th, 1799.

any communications that may have paſſed upon the ſubject, they will have the full benefit of any ſuch engagement. Report confirmed.

November 7th, 1799.

THE IMMANUEL, EYSENBERG Maſter.

Colonial trade. Principle of war 1756. Relaxations not to be extended by conſtruction. Voyage from a *French* port to *St. Domingo* illegal.

THIS was the caſe of an aſſerted *Hamburg* ſhip, taken 14th *Auguſt* 1799, on a voyage from *Hamburg* to *St. Domingo*, having in her voyage touched at *Bourdeaux*, where ſhe ſold part of the goods brought from *Hamburg*, and took a quantity of iron ſtores and other articles for *St. Domingo*. A queſtion was firſt raiſed as to the property of the ſhip and cargo; and 2dly, ſuppoſing it to be neutral property, Whether a trade from the mother country of *France* to *St. Domingo*, a *French* colony, was not an illegal trade, and ſuch as would render the property of neutrals engaged in it liable to be conſidered as the property of enemies, and ſubject to confiſcation? It was denied that *St. Domingo* was to be conſidered in its preſent ſtate as a *French* colony. After various obſervations on theſe points, farther proof was directed to be made of the property; and permiſſion was given, to both parties, to produce information as to the ſtate and condition of *St. Domingo* at that time.

On the 5th of *Auguſt* 1800 the cauſe was heard on farther proof.

For the captors, *King's Advocate* and *Laurence*.—The proofs of property that have been brought forward ſeem not to be expoſed to much objection; and therefore allowing it to be neutral property, the queſtion remains only as to the effect of the trade in which

The IMMANUEL. November 7th, 1799.

which it has been engaged.—Whether *St. Domingo* is not to be taken as a *French* colony?—And taking it ſo to be,—Whether property ſo engaged in trade, between the mother country and her colony, is not, under the eſtabliſhed principles of this country, ſubject to condemnation? That *St. Domingo* is to be conſidered as a *French* colony, ſufficiently appears from a variety of circumſtances, ſome of them ariſing in this very cauſe: Beſides the general profeſſions of *Toutiſſant*, and the continual communications that are paſſing between that colony and *France*; we find in this cauſe an exemption of duties, in reſpect to the importation of its produce into *France*, and a general underſtanding on the part of Mr. *Jenniſh*'s correſpondent at *Bourdeaux*, that the *French* laws were ſtill in force there. Conſidering beſides, that no proof which the Court can receive, has been produced on the other ſide, the fact may be aſſumed without farther argument, that *St. Domingo* was a *French* colony, and that ſufficient ground is laid, for the operation of the principle of law, which has always been applied to ſuch caſes. As to the general principle of law, it has ſo often been a *vexata queſtio* in this Court, that it will not be neceſſary to go at length into all the details of hiſtory and reaſoning by which it is ſupported. It will be ſufficient to advert to the principles of the war of 1756, when this matter was fully ſettled, on principles that have never yet been abandoned, notwithſtanding that they may have undergone temporary relaxations;—as in the laſt war, owing to the fallacious profeſſions of the *French* government, as to the changes of their colonial ſyſtem. It is notorious that theſe profeſſions proved untrue; the former

The IMMANUEL. November 7th, 1799.

former principle was re-eſtabliſhed, and has ever ſince been taken to be in full force, as far as it is not relaxed by the Orders of Council that have iſſued this war.

The firſt orders of 1793 contained no relaxation whatever. In *January* 1794 freſh inſtructions iſſued, directing the bringing in of *Weſt India* produce *coming to Europe*, being a relaxation as to the intercourſe of *America* with the *Weſt India* markets; a change thought reaſonable from the particular ſituation of that country, and the treaties that had been made with it; but not operating as any abandonment of the general principle, as it reſpected the colonial ſyſtem of *Europe*. Afterwards a farther relaxation took place, 25th *January* 1798, as to the allowance of bringing the produce of the *Weſt India* iſlands to *Europe*, but only to the ports of this country, or to ſome port of the country to which the neutral merchant belonged: This is the extent of the relaxations that have paſſed; they have not gone ſo far as to authoriſe a commerce between the colony and the mother country; and by parity of reaſoning there can be no pretence to ſay there has been any relaxation, as to the outward trade, from the mother country of the belligerent to the colony. In point of principle there can be no diſtinction made. There is the ſame ſupport and maintenance of their revenues by payment of duties, the ſame employment of the experience and induſtry of *French* merchants in aſſorting the cargo, and the ſame return of profits to them. On the contrary, the injury to the other belligerent is in ſome reſpects greater, as it furniſhes a ſupply of war ſtores, as appears by many of the articles of this cargo, hemp, flax, iron, bricks. It is, beſides, a general conſequence of theſe outward ſpeculations;

The IMMANUEL. November 7th, 1799.

ſpeculations; that they bring a return of importation of colonial produce into *France*; as it appears in this caſe that many neutral ſhips had gone from *Bourdeaux* to *St. Domingo*, which had found their way back to *Bourdeaux*, although the return of this particular veſſel is repreſented to have been deſtined for *Hamburg*.—On theſe grounds it is ſubmitted, that this is an illegal trade ſubjecting the property engaged in it to condemnation.

For the claimant, *Arnold* and *Sewell*.—The particulars of this caſe are, that it was a ſpeculation beginning at *Hamburg* to ſend certain goods to the market of *St. Domingo*, with a liberty of touching at *Bourdeaux*, where ſome of the goods were to be landed and others taken in for *St. Domingo*: In the original ſcheme of the voyage the bricks and iron pots were to have been carried on to *St. Domingo*; but it being found at *Bourdeaux*, that ſome difficulties were likely to ariſe at the Cuſtom-houſe, on clearing out ſuch articles, and as it was apprehended that ſimilar difficulties might ariſe at *St. Domingo*, they were landed at *Bourdeaux*, to be ſent back to *Hamburg*, and other articles of the ſame kind, but about which the ſame difficulties were not likely to ariſe, were put on board. The hemp, about which ſome argument was at firſt attempted to be raiſed, was not on board at the time of capture, and therefore it is conceived that may be laid out of the caſe. The principal queſtion ariſes on the legality of going on a voyage of this deſcription, from a port of *France* to a *French* colony: In reſpect to the ſtate of *St. Domingo*, it cannot be denied, that the repreſentations of the ſtate of the iſland were numerous and oppoſite, clearly ſhewing that

The IMMANUEL. November 7th, 1799.

that the iſland was at leaſt in a very unſettled ſtate, and affording a juſt cauſe of impreſſion on the mind of Mr. *Jenniſh*, to ſuppoſe it was no longer a *French* colony: there is at leaſt a fair ground for the inducement, under which Mr. *Jenniſh* ſtates himſelf to have acted, "in engaging in this trade, principally, owing to the unſettled ſtate of the iſland." It being ſhewn that there was ſufficient to juſtify this impreſſion on the part of Mr. *Jenniſh*, it may be better to addreſs the argument to the general queſtion, allowing, for argument's ſake, that *St. Domingo* was at this time a *French* colony.

It is true that the general colonial law of *Europe* has created monopoly, from which other countries are generally precluded; at the ſame time laws reſpecting colonies, and laws reſpecting trade in general, have always undergone ſome change and relaxation after the breaking out of hoſtilities; it is neceſſary that it ſhould be ſo, with regard to the rights of neutral nations; becauſe as war cannot be carried on between the principal powers of *Europe*, in ſuch a manner as to confine the effects of it to themſelves alone—it follows that there muſt be ſome changes and variation in the trade of *Europe;* and it cannot be ſaid that neutrals may not take the benefit of any advantages that may offer from theſe changes—becauſe, if ſo, it would lead to a total deſtruction of neutral trade; if they were to ſuffer the obſtructions in their old trade, which war always brings with it, and were not permitted to engage in new channels, it would amount to a total extinction of neutral commerce: Such a poſition, therefore, cannot be maintained, that they may not avail themſelves of what is beneficial in theſe changes, in lieu of what they muſt neceſſarily

neceſſarily ſuffer, in other parts of their trade, in time of war. It is not meant that they ſhould be entirely ſet at liberty from all the reſtrictions of peace,—that would be going too far: But that as there has been a regular courſe of relaxations, as well in our navigation laws, as in the colonial trade, in admitting importations and exportations not allowed in time of peace; it ſeems not to be too much to ſay, that if they have been regularly relaxed in former wars, neutral merchants may think themſelves at liberty to engage in it, in any enſuing war, with impunity;—and it does juſtify a preſumption, that, as a belligerent country allows a change in its own ſyſtem as neceſſary, and invites neutrals to trade in its colonies under relaxations, ſo it would allow them to trade in the ſame manner, with the colonies of the enemy. It may be ſaid that the ſtrict principle of war is, to do all poſſible miſchief to your enemy, and deſtroy his reſources and trade as much as you can—this may be true in theory, but it muſt be underſtood only as the ſtrict theoretic principle, which, in practice, is limited by other conſiderations, and by rights of other parties; the whole trade of the enemy cannot be deſtroyed without the greateſt injury to neutral nations, therefore this right againſt the enemy muſt be limited, in ſome degree, by the rights of neutral trade. If you can find indeed a trade wholly and excluſively confined to the enemy, that is the point on which it is lawful for you to ſtrike; that was the rule and the foundation of the principles ſet up in 1756; the ſtate of the colonies at that time juſtified it—the ſyſtem remained entire—and as long as the colonial trade remained an excluſive trade, that was the point on which it was lawful to ſtrike; but

The IMMANUEL. November 7th, 1799.

but since that time relaxations have been regularly admitted; at the commencement of the last war it was so allowed to be, and on that account the same principle was not enforced; the principle might not be abandoned, but the fact being, that the *French* had opened their ports, the principle was not applied: In the same manner the *French* have opened their ports in this war, and various relaxations have been admitted; it is now held to be an allowable trade from a neutral country to the colony of a belligerent. The war commenced with a general prohibition in the instructions of *November* 1793, and all vessels were directed to be taken that were carrying supplies to the colonies of the enemy, or bringing produce from them; but these were relaxed in *January* 1794, and other instructions issued of narrow extent. It was then directed to bring in those vessels that were carrying *West India* produce *from* the *West India* islands to *Europe*, and those that appeared to be going *to* such islands, in the *West Indies* as were under blockade. This seems to be the only restriction on trade *to* the *West India* islands, that it should not be going to islands under blockade; this order continued in force four years, till the restriction was still further taken off, by allowing neutral vessels to carry *West India* produce to *Europe*, either to our ports or to the ports of their own country. It is not asserted that the whole of the colonial trade is laid open by these relaxations, or that a neutral ship might go from a port of *France* to a colony and back again to *France*—making one whole and entire transaction; in that case the returns would be projected before the voyage began; and that, it must be allowed,

The IMMANUEL. November 7th, 1799.

would be only the trade of the enemy on increaſed freight. But as to ſeparate voyages the matter is very different — as well in regard, to the nature and effect of the trade itſelf, as to the terms of the inſtructions reſpecting it: — the legality of the trade homeward from the colony to *France*, is a queſtion at preſent ſuſpended before the Lords; and ſuch a trade might be conſtrued to fall within the ſcope of the King's inſtructions, although it is not ſo affirmatively expreſſed; but this trade outward to the colony cannot, by any implication, come within the terms of the inſtruction. It remains then, only to enquire, Whether there is any thing in the nature of it, that ſhould induce the Court to conſider it as illegal? It cannot be illegal on the ground that it is not legal for the neutral to go to the colony of the enemy, becauſe he is now allowed to go from his own port; therefore the ſame ſupplies may be afforded. It cannot be, that he aſſiſts the enemy by taking articles from the mother country; that he might do circuitouſly, by going to his own country firſt, with equal advantage to the mother country, in reſpect to its revenue ariſing from duties. On theſe grounds it cannot be illegal; neither is it made ſo by notification, or in the King's inſtructions to his cruizers. With reſpect to authorities, it cannot be expected that there ſhould be any. The queſtion has not ariſen in this war; or it would not be to be diſcuſſed ſo much at length in the preſent caſe. During the laſt war there could not ariſe any precedent, as there was then a general relaxation. But there is a caſe, of the *Vernagling* in 1786, where freight was given to a neutral ſhip going from *Marſeilles* to a *French* colony and back; from which it appears, that whilſt neutrals were admitted generally to partake in

Vid. vol. 4. p. 300.

The Immanuel. — November 7th, 1799.

the colonial trade, it was not thought to afford any ground of distinction that they were going from a *French* port.

August 15, 1800.

JUDGMENT.

Sir *Wm. Scott.* — This is the case of a ship taken on a voyage originally from *Hamburg*, first to *Bourdeaux*, where she discharged part of her cargo, and having taken on board other goods proceeded to the colony of *St. Domingo*, and was taken in this period of the voyage. The first point made on the part of the claimants is, that *St. Domingo* is not to be considered as a *French* colony, but as in a state of independence; and a second point made is, that even if it were considered as *French*, yet, as the *English* have themselves traded with that island, this must be deemed a permission to the subjects of neutral countries to do the like. In proof of the former allegation an attempt was made to introduce extracts from the common *English* newspapers, which the Court would not permit to be read; the *Gazette* is the only authority of this species admitted and respected by the Court for reasons too obvious to require a particular notice. From other more legitimate evidence, than any contained in unauthorised publications of that nature, I think it is legally to be held, that *St. Domingo* continues a *French* colony. It appears that a direct commercial correspondence, and communication, is carried on between *France* and that island, which could hardly be if it was deemed to be in a state of revolt and disruption from the mother country; the *French* Custom-house ordinances and regulations appear all to be in full force there; ships go certificated and bonded as upon the former system; and if there are parts

The IMMANUEL. November 7th, 1799.

parts of the iſland not under *French* dominion, it does not at all appear that it was in the view of the preſent parties to trade with thoſe parts excluſively.

Upon the ſecond preliminary point, *viz.* That an *Engliſh* trading with this *French* colony, muſt, at all events, be deemed an authoriſation of the ſame trade to the ſubjects of other countries, I have only to obſerve, that it might be admitted to have that effect, if the fact were true in the degree neceſſary to ſupport the concluſion. The matter of illegality imputed to the preſent claimants is a direct trading between the mother country of the enemy and his colony, a lending of themſelves to the purpoſe of a direct communication between the two. To ſhew that *Engliſhmen* have traded to *St. Domingo*, and under the authority of their government, is not ſhewing enough, unleſs it is likewiſe ſhewn, that they had, under that authority, lent themſelves to be the inſtruments of a direct commercial correſpondence between *France* and its colony; a trading between the dominions of *Great Britain* and *St. Domingo*, could authoriſe no more than a trading between the neutral country itſelf and that colony.

On the other hand it has been preſſed againſt the claimants, that ſome part of the cargo which came from *Hamburg* and was diſcharged at *Bourdeaux* was contraband, and being the property of the ſame perſons would affect the goods, which travelled with them from *Hamburg*, and were proceeding onwards to their ultimate deſtination of *St. Domingo*. The goods which are charged to be of the nature of contraband, are hemp, or ſome ſimilar ſubſtance, under another name fit for the manufacture of ropes. As

The IMMANUEL. November 7th, 1799.

theſe commodities are not now remaining on board the ſhip, they cannot become the ſubjects of any inſpection, which the Court could order for the purpoſe of aſcertaining their real nature and probable uſe. It is argued indeed, that the claimants' agents at *Bourdeaux* ſpeak, in a letter, of their expectation that the rope-makers employed by the government at that place would purchaſe them. But it does not appear that theſe perſons had themſelves ſeen the articles, or that they had any thing more than a general hope that the goods might find a vent of that kind. On the other hand it appears that theſe goods had been inſpected by a *Britiſh* man of war at *Dover*, when the ſhip put in there in the courſe of her voyage to *Bourdeaux*; there is reaſon to preſume that the ſearch was not made in a perfunctory manner; it was made in a harbour where a ſearch could be conveniently made, and by perſons generally ſincere enough in their deſire to make ſuch ſearches effectual. The inference is, that they were not of a contraband nature; at beſt it is left ambiguous, and without any particular means remaining of affording a certainty upon the matter. If ſo, it is uſeleſs to enquire what the effect of contraband in ſuch circumſtances would have been. I ſhall ſay no more, than that I incline to think that the diſcharge of the goods at *Bourdeaux* would have extinguiſhed their powers of infection. It would be an extenſion of this rule of infection not juſtified by any former application of it to ſay, that after the contraband was actually withdrawn, a mortal taint ſtuck to the goods with which it had once travelled, and rendered them liable to confiſcation even after the contraband itſelf was out of its reach.

Another

The IMMANUEL. November 7th, 1799.

Another conſideration was likewiſe preſſed againſt theſe goods; that having been entered at *Bourdeaux*, and exported from thence, it muſt be deemed an actual exportation from that port, and conſequently that they are liable to be treated legally in the ſame manner (whatever that manner may be) as the goods firſt put on board at *Bourdeaux*. I incline to think that this would be much too rigorous an application of principles rather belonging to the revenue law of this kingdom, a ſyſtem of law having little in common with the general prize law of nations; and that theſe goods are entitled to be conſidered as coming from *Hamburg*, the original place of their ſhipment; and former deciſions having fully eſtabliſhed that a direct commerce from a neutral country to a *French* ſettlement was open, I decree reſtitution of theſe goods, which all appear to be neutral property.

Upon the mere queſtion of property, as it reſpects all the goods as well as the ſhip, I ſee no reaſon to entertain a legal doubt. Conſidering them as neutral property, I ſhall proceed to the principal queſtion in the caſe, *viz.* Whether neutral property engaged in a direct traffic between the enemy and his colonies, is to be conſidered by this Court as liable to confiſcation? And firſt with reſpect to the goods.

Upon the breaking out of a war, it is the right of neutrals to carry on their *accuſtomed trade*, with an exception of the particular caſes of a trade to blockaded places, or in contraband articles (in both which caſes their property is liable to be condemned), and of their ſhips being liable to viſitation and ſearch; in which caſe however they are entitled to freight and expences.

The IMMANUEL. November 7th, 1799.

I do not mean to ſay that in the accidents of a war the property of neutrals may not be variouſly entangled and endangered; in the nature of human connections it is hardly poſſible that inconveniences of this kind ſhould be altogether avoided. Some neutrals will be unjuſtly engaged in covering the goods of the enemy, and others will be unjuſtly ſuſpected of doing it; theſe inconveniences are more than fully balanced by the enlargement of their commerce; the trade of the belligerents is uſually interrupted in a great degree, and falls in the ſame degree into the lap of neutrals. But without reference to accidents of the one kind or other, the general rule is, that the neutral has a right to carry on, in time of war, his accuſtomed trade to the utmoſt extent of which that accuſtomed trade is capable. Very different is the caſe of a trade which the neutral has never poſſeſſed, which he holds by no title of uſe and habit in times of peace, and which, in fact, can obtain in war by no other title, than by the ſucceſs of the one belligerent againſt the other, and at the expence of that very belligerent under whoſe ſucceſs he ſets up his title; and ſuch I take to be the colonial trade, generally ſpeaking.

What is the colonial trade *generally ſpeaking?* It is a trade generally ſhut up to the excluſive uſe of the mother country, to which the colony belongs, and this to a double uſe; — that of ſupplying a market for the conſumption of native commodities, and the other of furniſhing to the mother country the peculiar commodities of the colonial regions; to theſe two purpoſes of the mother country, the general policy reſpecting colonies belonging to the ſtates of *Europe*, has

The IMMANUEL. November 7th, 1799.

has reſtricted them. With reſpect to other countries, generally ſpeaking, the colony has no exiſtence; it is poſſible that indirectly and remotely ſuch colonies may affect the commerce of other countries. The manufactures of *Germany* may find their way into *Jamaica* or *Guadaloupe*, and the ſugar of *Jamaica* or *Guadaloupe* into the interior parts of *Germany*, but as to any direct communication or advantage reſulting therefrom, *Guadaloupe* and *Jamaica* are no more to *Germany* than if they were ſettlements in the mountains of the moon; to commercial purpoſes they are not in the ſame planet. If they were annihilated it would make no chaſm in the commercial map of *Hamburg*. If *Guadaloupe* could be ſunk in the ſea by the effect of hoſtility at the beginning of a war, it would be a mighty loſs to *France*, as *Jamaica* would be to *England*, if it could be made the ſubject of a ſimilar act of violence. But ſuch events would find their way into the chronicles of other countries, as events of diſintereſted curioſity, and nothing more.

Upon the interruption of a war, What are the rights of belligerents and neutrals reſpectively regarding ſuch places? It is an indubitable right of the belligerent to poſſeſs himſelf of ſuch places, as of any other poſſeſſion of his enemy. This is his common right, but he has the certain means of carrying ſuch a right into effect, if he has a decided ſuperiority at ſea: Such colonies are dependent for their exiſtence, as colonies, on foreign ſupplies; if they cannot be ſupplied and defended they muſt fall to the belligerent of courſe — and if the belligerent chooſes to apply his means to ſuch an object, what right has a third party, perfectly neutral, to ſtep in and prevent the execu-

The IMMANUEL.

November 7th, 1799.

tion? No existing interest of his is affected by it; he can have no right to apply to his own use the beneficial consequences of the mere act of the belligerent; and to say, "True it is, you have, by force of arms, forced such places out of the exclusive possession of the enemy, but I will share the benefit of the conquest, and by sharing its benefits prevent its progress. You have in effect, and by lawful means, turned the enemy out of the possession which he had exclusively maintained against the whole world, and with whom we had never presumed to interfere; but we will interpose to prevent his absolute surrender, by the means of that very opening, which the prevalence of your arms alone has affected; supplies shall be sent and their products shall be exported; you have lawfully destroyed his monopoly, but you shall not be permitted to possess it yourself; we insist to share the fruits of your victories, and your blood and treasure have been expended, not for your own interest, but for the common benefit of others."

Upon these grounds, it cannot be contended to be a *right* of neutrals, to intrude into a commerce which had been uniformly shut against them, and which is now forced open merely by the pressure of war; for when the enemy, under an entire inability to supply his colonies and to export their products, affects to open them to neutrals, it is not his will but his necessity that changes his system; that change is the direct and unavoidable consequence of the compulsion of war, it is a measure not of *French* councils, but of *British* force.

Upon these and other grounds, which I shall not at present enumerate, an instruction issued at an early period

period for the purpoſe of preventing the communication of neutrals with the colonies of the enemy, intended, I preſume, to be carried into effect on the ſame footing, on which the prohibition had been legally enforced in the war of 1756; a period when Mr. Juſtice *Blackſtone* obſerves, the deciſions on the law of nations proceeding from the Court of Appeals, were known and revered by every ſtate in *Europe*.

Upon further inquiry it turned out that one favoured nation, the *Americans*, had in times of peace been permitted, by ſpecial convention, to exerciſe a certain very limited commerce with thoſe colonies of the *French*, and it conſiſted with juſtice that that caſe ſhould be ſpecially provided for; but no juſtice required that the proviſion ſhould extend beyond the neceſſities of that caſe; whatever goes beyond, is not given to the demands of ſtrict juſtice, but is matter of relaxation and conceſſion.

Different degrees of relaxation have been expreſſed in different inſtructions iſſued at various times during the exiſtence of the war. It is admitted that no ſuch relaxation has gone the length of authoriſing a direct commerce of neutrals, between the mother country of the enemy and its colonies; becauſe ſuch a commerce could not be admitted without a total ſurrender of the principal; for allow ſuch a commerce to neutrals, and the mother country of the enemy recovers, with ſome increaſe of expence, the direct market of the colonies, and the direct influx of their productions; it enjoys as before, the duties of import and export, the ſame facilities of ſale and ſupply, and the maſs of public inconvenience is very ſlightly diminiſhed. Even ſuppoſing that this trade is carried on

The IMMANUEL. November 7th, 1799.

on with integrity (which it is difficult to hope under all the temptations and opportunities of fraud which a direct intercourse will supply), there is every reason to believe that the ancient monopoly will, in effect, revive itself without the aid of exclusive prohibitions. The force of long established connection, and of ancient habits of trade, would in a great measure preserve for a time to the mother country, its ancient exclusive commerce with colonies, although the communication might be legally open to the merchants of other countries.

Much argument has been employed on grounds of commercial analogy—*this trade* is allowed—*that trade* is not more injurious—*Why not that* to be considered *as equally permitted?* The obvious answer is that the true rule to this Court is, the text of the instructions; what is not found therein permitted, is understood to be prohibited, upon this plain principle, that the colony trade is generally prohibited, and that whatever is not specially relaxed continues in a state of interdiction. The utmost that could be contended would be, that a commerce exactly *ejusdem generis & gradus* would be entitled to the favour of the permission; but the relaxation is not to be extended by construction, particularly where authority has been gradual in its relaxation;—where it has distinguished, and stopped short in several stages, individuals have no right to go further, upon a private speculation of their own, that authority might as well have gone further. It is argued that the neutral can import the manufactures of *France* to his own country and from thence directly to the *French* colony; Why not *immediately* from *France*, since the same purpose is

The IMMANUEL. November 5th, 1799.

is effected? It is to be anſwered, that it is effected in a manner more conſiſtent with the general rights of neutrals, and leſs ſubſervient to the ſpecial convenience of the enemy. If a *Hamburg* merchant imports the manufacture of *France* into his own country, (which he will rarely do if he has like manufactures of his own, but which in all caſes he has an uncontroulable right to do,) and exports them afterwards to the *French* colony, which he does not in their original *French* character, but as goods which, by importation, had become a part of the national ſtock of his own neutral country, they come to that colony with all the inconvenience of aggravated delay and expence; ſo if he imports from the colony to *Hamburg*, and afterwards to *France*, the commodities of the colony, they come to the mother country under a proportionable diſadvantage; in ſhort the rule preſſes upon the ſupply at both extremities, and therefore if any conſiderations of advantage may influence the judgment of a belligerent country in the enforcement of the right, which upon principle it poſſeſſes, to interfere with its enemy's colonial trade, it is in that ſhape of this trade, that conſiderations of this nature have their chief and moſt effective operation.

It is an argument rather of a more legal nature than any derived from theſe general topics of commercial policy, that variations are made in the commercial ſyſtems of every country *in wars and on account of wars*, by means of which neutrals are admitted and invited into different kinds of trade, for which they ſtand uſually excluded, and if ſo, no one belligerent country has a right to interfere with neutrals for acting under variations of a like kind made

The IMMANUEL. November 7th, 1799.

made for ſimilar reaſons in the commercial policy of its enemy. And certainly if this propoſition could be maintained without any limitation, that wherever any variation whatever is made during a war and on account of the ſtate of war, the party who makes it binds himſelf in all the variations to which the neceſſities of the enemy can compel him, the whole colony trade of the enemy is legaliſed; and the inſtructions which are directed againſt any part are equally unjuſt and impertinent; for it is not denied that ſome ſuch variations may be found in the commercial policy of this country itſelf; although ſome that have been cited are not exactly of that nature. The opening of free ports is not neceſſarily a meaſure ariſing from the demands of war, it is frequently a peace meaſure in the colonial ſyſtem of every country; there are others which more directly ariſe out of the neceſſities of war;—the admiſſion of foreigners into the merchant ſervice as well as into the military ſervice of this country;—the permiſſion given to veſſels to import commodities not the growth, produce, and manufacture of the country to which they belong, and other relaxations of the act of navigation and other regulations, founded thereon: Theſe it is true take place in war, and ariſe out of a ſtate of war, but then they do not ariſe out of the predominance of the enemy's force, or out of any neceſſity reſulting therefrom, and that I take to be the true foundation of the principle. It is not every convenience or even every neceſſity ariſing out of a ſtate of war, but that neceſſity which ariſes out of the impoſſibility of otherwiſe providing againſt the urgency of diſtreſs inflicted by the hand of a ſuperior enemy, that can be admitted to produce ſuch an effect. Thus in time of war

every country admits foreigners into its general ſervice—every country obtains, by the means of neutral veſſels, thoſe products of the enemy's country which it cannot poſſibly receive, either by means of *his* navigation or its own. Theſe are ordinary meaſures to which every country has reſort in every war, whether proſperous or adverſe: they ariſe, it is true, out of a ſtate of war, but are totally independent of its events, and have therefore no common origin with theſe compelled relaxations of the colonial monopoly; theſe are acts of diſtreſs, ſignals of defeat and depreſſion, they are no better than partial ſurrenders to the force of the enemy, for the mere purpoſe of preventing a total diſpoſſeſſion. I omit other obſervations which have been urged and have their force, it is ſufficient that the variations alluded to, ſtand upon grounds of a moſt diſtinguiſhable nature.

Upon the whole view of the caſe as it concerns the goods ſhipped at *Bourdeaux*, I am of opinion that they are liable to confiſcation. I do not know that any deciſion has yet been pronounced upon this ſubject; but till I am better inſtructed by the judgment of a ſuperior tribunal, I ſhall continue to hold that I am not authoriſed, either by general legal principles applying to this commerce, or by the letter of the King's inſtructions, to reſtore goods, although neutral property, paſſing in direct voyages between the mother country of the enemy and its colonies. I ſee no favourable diſtinction between an outward voyage and a return voyage.—I conſider the intent of the inſtruction to apply equally to both communications, though the return voyage is the only one ſpecially mentioned.

The only remaining queſtion reſpects the ſhip; it belongs to the ſame proprietors, and if the goods could

The IMMANUEL. November 7th, 1799.

could be conſidered as properly contraband, would on that account be liable to confiſcation, for in the caſe of clear contraband this is the clear rule: I incline to apply a more favourable one in the preſent caſe. It is a caſe in which a neutral might more eaſily miſapprehend the extent of his own rights, it is a caſe of leſs ſimplicity, and in which he acted without the notice of former deciſions upon the ſubject. The ſhip came from *Hamburg* in the commencement of the voyage, ſhe was not picked up for this particular occaſion, but was intended to be employed in her owner's general commerce. Attending to theſe conſiderations, I ſhall go no further than to pronounce for a forfeiture of freight and expences, with a reſtitution of the veſſel.

Cargo, taken in at *Bourdeaux*, condemned; ſhip reſtored, without freight.

On the ſame day, in the caſe of the Roſe, Young maſter,

Which was a caſe of an *American* ſhip going from *Amſterdam* to *Guadaloupe*, with an aſſorted cargo—claimed on behalf of *American* merchants:

The Court.—With reſpect to this caſe it differs only from the laſt, in this circumſtance, that it is the caſe of a voyage from one enemy to the colony of another enemy allied in the war.—I am of opinion, that this does not form a ſolid diſtinction: On the principles which I have laid down, I think it would be impoſſible to maintain the rule of law without applying it alſo in this extent.

Sentence the ſame.

THE END OF THE FIRST PART.

REPORTS
OF
CASES
DETERMINED IN THE
HIGH COURT OF ADMIRALTY,
&c. &c. &c.

THE CHRISTOPHER, SLYBOOM Maſter.

Nov. 18th, 1799.

Condemnation *in France* of a *Britiſh* ſhip, taken by a *French* privateer into a *Spaniſh* port, and lying there at the time of condemnation, held valid.

THIS was a caſe of a *Britiſh* prize-ſhip taken by the *French*, and carried into the *Spaniſh* port of *St. Sebaſtian;* from whence the ſhip's papers were tranſmitted to *France*, and a ſentence of condemnation paſſed at *Bayonne*, *May* 9th, the ſhip ſtill lying in the *Spaniſh* port. The ſhip was then ſold to the preſent claimant, a merchant of *Altona;* and was ſailing at the time of capture, *July* 1799, in ballaſt from *St. Sebaſtian* to *Altona*.

On the part of the Captors—It was contended under the authority of the *Fladoyen*, that this was a purchaſe reſting on an illegal ſentence of condemnation; and therefore that it could not avail, to transfer any right or juſt title to the neutral claimant. Vol. I. p. 135.

JUDGMENT.

Sir *W. Scott.*—This is a caſe materially differing from thoſe in which condemnation has paſſed on ſhips carried into a neutral country; thoſe proceedings have been held illegal, principally, becauſe it was not to

The CHRISTOPHER. *Nov.* 18th, 1799.

be presumed that a neutral government would so far depart from the duties of neutrality as to permit the exercise of that last, and crowning act of hostility, if I may so express myself, the condemnation of the property of one belligerent to the other; thereby confirming and securing him in the acquisition of his enemy's property by hostile means. — But this will not hold good with respect to condemnations passed on ships brought into the ports of an ally in the war. In such cases there is nothing to prevent the government from proceeding to that last act of hostility; there is a common interest between them on the subject; and both governments may be presumed to authorize any measures conducing to give effect to their arms; and to consider each other's ports as mutually subservient. I am, therefore, inclined to hold such a condemnation sufficient, in regard to property taken in the course of the operations of a common war.

As the facts of purchase appear to be sufficiently proved on the farther proof that has been exhibited, I shall decree restitution of this ship for the claimants.

Ship restored.

In the *Harmony*, *Elbrecht*, *Nov.* 18th, 1799, which was a case of a *British* prize ship taken by a *French* privateer, and carried to *Helvetsluys*, and condemned by *the French Commissary of Marine, at Rotterdam*, 6 *Prair. an* 6, 25 *May* 1798; and in the case of the *Adelaide*, *Pietrom*, under circumstances *exactly similar*; further proof being required to be given of the property, and of the *bonâ fide* transfer to the neutral claimant, the question of law respecting the legality of such condemnations was expressly reserved.

In the *Betsy*, *Kruger*, 12 *August* 1800, which was a case under *circumstances exactly similar*, the question of law *was waived*; and the legality of the condemnation being admitted by the Court, further proof was directed to be made of the fact of transfer.

THE GERTRUYDA, De Vries Maſter.

Nov. 19th, 1799.

Dutch ſhips detained in port, at the *Cape of Good Hope*, before declaration of hoſtilities againſt *Holland*, claimed as *droits* of Admiralty; condemned to the Crown, *jure coronæ*.

THIS was a caſe on the admiſſion of an allegation on the part of the Admiralty, claiming to have the *Dutch* ſhips taken by Lord *Keith* at the *Cape of Good Hope*, condemned as *droits* of Admiralty; *as being taken in port* ſubſequent to the declaration of hoſtilities againſt *Holland*.

Againſt the admiſſion of the allegation, the King's Advocate and Arnold. —The queſtion before the Court ariſes on a capture made in the year 1795, and it is undoubtedly to be lamented on all ſides, that diſtribution ſhould have been long prevented by any conflicting claims, as to the manner in which it ſhall be condemned: It now comes forward on an oppoſition to the allegation; that, if the Court ſhould think there is no ground to ſuſtain the demand ſet up on the part of the Admiralty, all farther delay may be removed. The queſtion is, Whether certain ſhips taken by Ld. *Keith*, at the *Cape of Good Hope*, and detained by him there previous to the act of capture, ſhall be condemned, to the King *jure coronæ*, or as *droits* of Admiralty. The diſtinction of law on this point, it is apprehended, has been long clearly eſtabliſhed, "that all veſſels detained in port, and found there "at the breaking out of hoſtilities, are condemned "*jure coronæ* to the King; and that all coming in "after hoſtilities, not voluntarily by revolt, but "ignorant of the fact, are to be condemned as *droits* "of Admiralty."—The only doubt that can be made

The GERTRUYDA.

Nov 19th, 1799.

in the preſent queſtion, is to determine, under which of theſe deſcriptions theſe ſhips are, under all the circumſtances preceding and attending the capture, to be conſidered: the circumſtances are briefly theſe: on the 11th of *June* 1795, Lord *Keith* ſailed into *Symond's Bay*, and found ſeveral *Dutch* ſhips lying there: a *Dutch* packet was allowed to ſail, and alſo a *Dutch* frigate, the *Midenbleck*, on the 21ſt *June*, but the ſhips in queſtion, and ſeveral other merchant ſhips lying there, were not permitted to depart.

Lord *Keith* wrote to the commanders of the *Dutch* ſhips on the 28th *June*, ſtating, "that from ſome "unfriendly appearances in the Governor and Coun- "cil at the *Cape*, he was apprehenſive of a deſign to "deliver the colony at the *Cape* to the *French* fac- "tion, that had over-run the mother country; and "that he was commiſſioned by the King of *Great* "*Britain*, in conjunction with the Stadtholder, to "prevent ſuch a meaſure, and accordingly laid his "commands on them not to move from that "place."

It is impoſſible to contend, therefore, that there was not a detention and embargo and reſtraint of princes, in this caſe; or that the property ſubſequently taken as prize, in conſequence of ſuch detention, is to be diſtinguiſhed in any way from property taken under ſimilar circumſtances in *Europe*: on the 9th of *July* a farther communication was made by Lord *Keith*, "that it would be neceſſary for him to put ſome of his men on board to prevent any waſte or damage of the cargo of the ſhips, or any miſchievous intention that might be formed of ſetting fire to them; but that the veſſels were not to be

be conſidered as ſeiſed."—It is on this expreſſion, perhaps, that the claim of the Admiralty is now ſet up; but whatever might be the terms of the intercourſe, it is impoſſible to ſay, theſe ſhips were not preciſely under the very ſame circumſtances, in point of fact, as all other *Dutch* property detained in the ports of this kingdom.

All this paſſed previous to the declaration of hoſtilities againſt *Holland*, which did not iſſue till the 15th of *September* 1795; on the 18th Captain *Hardy* took poſſeſſion of one of the *Dutch* ſhips, the *Williamſtadt en Boetſlaar*, for His Majeſty's ſervice, under a commiſſion granted to him on the 12th of that month by Lord *Keith*: this was all that happened previous to the knowledge of the declaration of hoſtilities againſt *Holland*; theſe ſhips remained in the ſame ſtate till the month of *May* 1796, when the intelligence of hoſtilities was received at the *Cape*, and immediately the *Dutch* flags were ſtruck, and the ſhips taken poſſeſſion of as prize. A ſimilar queſtion has already been determined in the caſe of the *Overyſſel*, which was a *Dutch* ſhip of war, detained in an *Iriſh* port in the month of *March* 1795, and carried into the *Cove of Cork* for ſecurity: till, after the declaration of hoſtilities, the colours were ſtruck *October* 1795, and the ſhip has ſince been condemned as prize to the Crown. The detention which has happened, as well in that caſe as in the preſent, is all that can in any caſe take place; it is not neceſſary, that an actual ſeiſure ſhall be made, in the form of prize; becauſe before the proclamation iſſues, that cannot be; an embargo, or the forcible detaining of ſuch veſſels,

The GERTRUYDA. Nov. 19th, 1799.

is all that can in the firſt inſtance be put in force. It has taken place in this inſtance; and it is ſubmitted that theſe ſhips ſtand in the ſame ſituation and muſt follow the ſame courſe, as all the other *Dutch* property, detained in the ports of this kingdom, before the actual declaration of hoſtilities, and ſince condemned *jure coronæ*, to the King.

For the allegation, the Advocate of the Admiralty and Laurence. — If in the ports of this kingdom, an order of Council puts a general embargo on the ſhips of any foreign ſtate, and repriſals afterwards take place, it is not contended that ſuch veſſels would not be condemnable as prize to the King *jure coronæ:* the *Overyſſel* was a caſe of that deſcription; and no queſtion was raiſed about it; it paſſed, in a manner *ſub ſilentio*, as a matter of common condemnation, and no obſervation was made upon it, but many material diſtinctions ſeem to render that caſe no authority of the preſent queſtion. That ſhip was detained, on an embargo laid on the ports of this kingdom, and operating therefore with juſt force and authority to produce its effect: but no embargo iſſuing in this country can operate with any effect, beyond the limits of His Majeſty's realms; it is a mere nullity as to other countries; and no inſtance can be produced of an attempt to lay an embargo on the ports of a foreign power. The detention, therefore, which is aſſerted to have taken place, in this caſe, could not, if it were proved, operate as an ordinary embargo, which puts the object into the legal poſſeſſion of the Crown, and therefore affords a commencement to the right of prize, if hoſtilities afterwards enſue, on the part of the Crown. It could

could not in law have operated to this effect, had it been the intention of the parties to have done ſo. But the very terms of the letters that paſſed, are ſufficient to convince the Court that during the whole of this previous tranſaction, nothing of an hoſtile nature ever entered into the contemplation of the parties. The firſt letter (*a*) ſtates, that as the appearance on the part of the colony make it doubtful whether there may not be an intention to deliver up the colony to the *French*, and as my inſtructions particularly direct me to prevent ſuch a meaſure, and ſecure the property of the *Eaſt India* Company, and

(*a*) Letter, No. 1.

" Whereas from the preſent unfriendly appearances on the part " of the governor and council of the *Cape*, towards the ancient " friends and allies of *Holland*, it is doubtful whether there " may not be an intention of delivering the colony to the *French* " faction, which have overrun the mother country; and being di- " rected by the King my ſovereign, in conjunction with the Prince " Stadtholder, to reſiſt the ſame, and to ſecure all ſhips and public " property belonging to the *Dutch Eaſt India* Company, and to " keep and protect the ſame from embezzlement, and to pre- " vent its falling into the hands of the enemy, and alſo to pre- " vent all ſhips of the ſaid country from ſailing, unleſs under the " protection of a States ſhip or *Britiſh* ſhip of war; I do there- " fore, in conſequence of thoſe inſtructions, command you not to " move from this place, but to remain here and keep a ſtrict and " careful watch over the ſhip and cargo intruſted to your charge, " until the ſame can be reſtored to the lawful owner; and ſhould " you refuſe to obey the Stadtholder's orders ſignified through " me, you are at liberty to depart with all your private effects and " property, and all ſuch who chooſe to remain and abide at their " duty ſhall be protected in the due exerciſe of the ſame."

" 28th *June* 1795."

" To the captains and commanders " of the *Dutch* ſhips now in *Sy-* " *monds Bay*."

The GERTRUYDA. Nov. 19th, 1799.

protect it from embezzlement, I am to inform you that no veſſel will be permitted to ſail but under a ſhip belonging to the States, or a *Britiſh* ſhip. From this it is evident that it was no plan, even of abſolute detention, on the part of this nation; but a mere act of caution, to prevent theſe ſhips from falling into the hands of the *French*. Another paſſage in the ſame letter is ſtill ſtronger, "you are to remain and "keep a ſtrict watch over the ſhip and cargo, until "the ſame can be reſtored to the lawful owner;" ſhewing that there was no deſign of diveſting the *Dutch* owner of his intereſt.

The ſecond letter (*a*) ſtates an apprehenſion of embezzlement and a deſign of ſetting fire to their ſhips, which might endanger the *Engliſh* fleet, and made it neceſſary

(*a*) Letter, No. 2.

"Whereas I underſtand that great waſte and damage is done "to the property of the *Dutch Eaſt India* company, every night, "by order of the Governor; and have reaſon to believe he hath "ſent or intends to ſend orders of a ſimilar nature to the ſhips in "this Bay, and to ſet fire to them, which will endanger thoſe of "His Majeſty under my command; therefore to prevent any ſuch "miſchievous intentions from being put into execution, I find "myſelf obliged to ſend officers and men to watch, and make "known any irregularity that may take place.

"9th *July* 1795. "G. K. ELPHINSTONE."

No. 3. "*Monarch*, 9th *July* 1795.

Orders to the captains of *Britiſh* ſhips.

"You are to ſend an officer a midſhipman, and ſix men to one "of the *Dutch* ſhips, to be relieved every day, to keep a ſtrict "watch that the ſhips are not plundered or fired, to endanger the "fleet.

"They

The GERTRUYDA.

Nov. 19th, 1799.

neceſſary to ſend officers and men to prevent any irregularity of that kind. From theſe letters it appears that the meaſures purſued were merely of a proviſional nature, and were in no degree connected with any hoſtile purpoſe on the part of the Engliſh ſquadron; and it is not at this day competent to any perſon to attempt to fix on them a meaning different from the obvious intention of the parties at that time. The intention is ſtill more ſtrongly evinced by the fact of letting a ſhip of war depart. Had any notion of hoſtility prevailed, this ſhip of war would have been the firſt object to be detained; it was ſo in *Europe* with the *Overyſſel;* that ſhip was immediately detained, and it cannot fail to preſs itſelf on the mind of the Court, that theſe different modes of acting ſhew more clearly than words can ſpeak, that a different principle of action governed the proceedings. In *England*, the embargo following the general nature of embargoes, was connected with a latent purpoſe of confiſcating the property as prize, if repriſals ſhould enſue. At the *Cape* no ſuch purpoſe prevailed, it was a ſtate of ſimple caution only, to prevent the property from falling into the hands of the *French;* and in that ſtate things continued, till after the ſurrender of the *Cape;* from the mo-

---

" They are to be circumſpect in their conduct, and to uſe " nothing belonging to the ſhips, which are not to be conſidered " as ſeized.

" But you are to uſe every means to protect and aſſiſt the com- " manders in protecting the ſhip's cargoes, and the men's private " property."

ment

The GERTRUYDA. *Nov.* 19th, 1799.

ment of ſurrender, the port became a *Britiſh* port, under the protection of the Lord High Admiral; and therefore any ſeiſure made in it of enemy's property, after that time, is to be conſidered as made in his name; no ſeiſure was made of the ſhips in queſtion, as prize, till *May* 1796, and therefore it is ſubmitted they are to be conſidered as *droits* and perquiſites of Admiralty.

JUDGMENT.

Sir *William Scott.* — This queſtion ariſes on certain *Dutch* ſhips, which were found at the *Cape of Good Hope*, by the ſquadron under the command of Lord *Keith;* and which have been proceeded againſt as prize, on the part of His Majeſty, *jure coronæ.* An intervention has been now given, on the part of the Admiralty, claiming them as *droits* and perquiſites of Admiralty; and there can be no doubt that ſuch an intervention may be rightly given; becauſe as long as *the office of* Lord High Admiral, though now reſiding in the perſon of His Majeſty, continues in this kingdom to have a legal exiſtence, it is extremely proper that the *droits* and perquiſites of the office ſhould continue as anciently diſtinguiſhed; and although the difference may not be very important as to any immediate conſequence under the preſent application of them, (which is directed by the Treaſury, and not by the Admiralty), it is ſtill fit that they ſhould be ſtrictly determined, and with as much exact obſervance of the ancient rules, as if the proceeds were carried in the ancient and diſtinct courſe. Amongſt theſe rules, I take it to be an eſtabliſhed maxim, that the rights of the Lord High Admiral

are to be conſidered as rights *ſtricti juris*, as rights originally granted, in derogation of thoſe higher rights of the crown, which are veſted in the crown for general utility: ſuch grants are to be conſtrued ſtrictly on the known preſumption, that the crown has not parted with any right which the public wiſdom has conferred upon it, farther than the expreſs words of the grant import.

The grant alluded to is to be found recognized in the order of council of *Charles* II. That order, among other things, directs, "That all ſhips and "goods belonging to enemies *coming* into any port, "creek, or road of this His Majeſty's kingdom of *Eng-* "*land*, or of *Ireland*, by ſtreſs of weather or other "accident, or miſtake of port, or by ignorance, not "knowing of the war, do belong to the Lord High "Admiral;" but certainly not in foreign ports: It is the firſt time that I ever heard the idea ſtarted, that it was to extend beyond the dominions of the crown, to ports belonging to foreign powers. Beſides, it has always been underſtood that ſuch a coming in muſt be during the ſubſiſting war. — The very terms uſed, "by miſtake of port, or ignorance, *not knowing of the war*," neceſſarily imply that; and all other ſeizures made any where elſe, or under any other circumſtances, before a war, do belong to His Majeſty.

This being the caſe, let us ſee how the terms of this order apply to the circumſtances of the preſent caſe. On the breaking out, I cannot ſay of war, but of that ambiguous ſituation into which the irregular conduct of *France* had put different countries, by diſ-

ſolving

The GERTRUYDA.

Nov. 19th, 1799.

ſolving the connection between the governors and the governed, it was found neceſſary, when *Holland* became expoſed to the invaſion of the *French* arms, to detain, by the ſtrong hand of power, a number of *Dutch* ſhips in the ports of this kingdom. At the ſame time, conciliating language was uſed to the proprietors, and promiſes were held out to all ſuch as ſhould voluntarily come in, that their property ſhould be reſtored to them. It is notorious alſo, that on the declaration of hoſtilities that enſued, theſe ſeizures were enforced, with a retroſpective operation, on all who had not complied with the terms; and were not conſidered as mere civil embargoes, but as acts of forcible poſſeſſion, on which the property ſo ſeized was finally condemned as prize to the crown. Now, unleſs very ſtrong and ſold diſtinctions can be pointed out between this caſe and thoſe which have purſued this courſe, I ſee no reaſon why this ſhould not journey in the ſame track. Two or three diſtinctions have been taken: In the firſt place, it is ſaid, that the detention in the ports of *England* was a mere civil embargo; and that an embargo of that nature could not extend to foreign ports, where the crown of *England* has no juriſdiction. In the firſt place, it is not neceſſary that the embargo ſhould be exactly of the ſame nature, in order to veſt the rights of the crown; for any mode of forcible occupancy or detainer prior to hoſtilities is ſufficient for the purpoſe; and ſecondly, the nature of the embargo in the ports of this kingdom is not very accurately deſcribed, when it is termed a mere civil embargo; for it was a detention by actual force applied to them.—The

ſhips

ſhips were generally taken poſſeſſion of by an armed Power; it was not the mere hand of the Cuſtom-houſe that was laid upon them, in the civil mode of forbidding an egreſs; but it was a reſtraint and compulſion, acting by the terror and uſe of force. The embargo at the *Cape* was likewiſe an embargo of force; and the very argument that it could not be a civil embargo, becauſe this government had no right to lay on a civil embargo in a foreign port, proves that it was an embargo of force; though, if it was at all neceſſary that it ſhould partake of any thing like a civil authority, it muſt be remembered that the Stadtholder's name and authority, is likewiſe employed; but it is notorious, that ſome ſhips of war that attempted forcibly to eſcape, were forcibly detained: that is enough to ſhew its nature, if it were at all neceſſary.

Another diſtinction is, that in this caſe a ſhip of war was allowed to go away, whilſt in *England* a ſhip of war, the *Overyſſel*, was detained. I think it does not appear under what particular motive the permiſſion to depart was given: it might be under an underſtanding that the ſhip was going to ſome other port, where diſpoſitions favourable to the Stadtholder might be expected. I think the terms of the letter lead us to conjecture that there muſt have been ſome ſuch motive as I have ſtated; becauſe it could not be ſuppoſed that ſhe was allowed to depart, as going to the mother country, when the ſame letter expreſsly ſtates that country to be in the hands of the *French*, as in fact it now remains. That permiſſion to the ſhip of war muſt at any rate be taken as a peculiar permiſſion,

The GERTRUYDA.

Nov. 19th, 1799.

miſſion, influenced by ſome particular inducement, and therefore affording no ground by which we can be juſtified in diſtinguiſhing that embargo from what took place here, much in the ſame ſtyle.

The queſtion is, indeed, not ſo much how the matter was conducted, but whether they were in truth detained or not; *that* I muſt underſtand, from the very terms of theſe letters, which it is impoſſible to underſtand in any other way; becauſe, when it is ſaid they would not be allowed to depart but under a ſhip of the State, I muſt underſtand it to mean, a ſhip in the ſervice of the Stadtholder. Looking at this, I muſt ſuppoſe, that it was conducted only with that moderate and ſoothing language which was uſed alſo in this country; but that the ſhips were in no degree leſs under the gripe of power than thoſe under detention here. They were not allowed to depart, unleſs under a *Britiſh* ſhip, or a ſhip that had declared its attachment and obedience to the Ally of this country. I muſt therefore conſider it as being as effectual a detention as that uſed here, and *eodem intuitu.* Indeed it is impoſſible to ſuppoſe, that any real diſtinction was intended to be made between property detained here, and property detained there: it was all intended to be ſubject to the ſame final application, whatever that might be; and, though local circumſtances might call for ſome difference in the apparent mode of treatment for the preſent, yet the real intention, and the ultimate deſtination, was the ſame in both. It was not, as was aſſerted, for the mere purpoſe of caution, to prevent their falling into the hands of the *French*, but for the further purpoſe of ſecuring them for *Britiſh*

Britiſh uſe, in caſe ſubſequent events ſhould diſqualify the *Dutch* proprietors for reſtitution.

As for the expreſſion, "that they were not to be conſidered as ſeized," I look upon that to be nothing more than the ſame ſort of ſofter language, of preſent policy, that was uſed here, in a ſituation of affairs that required ſome management and addreſs; and when one obſerves the actual and effectual detention for nine months, during which time theſe ſhips would have moved off, if they had not been forcibly reſtrained, it is impoſſible to ſuffer the mere expreſſion and ſtyle of the letter to alter the real conſequences, or diſtinguiſh them from thoſe which took place here under ſimilar circumſtances.

The *Cape* in the end ſurrendered, and certainly as a hoſtile colony: the very next day it is ſtated, that Captain *Hardy* was commiſſioned to take the command of one of theſe veſſels; this was before the declaration of hoſtilities againſt *Holland* was known at the *Cape*, and it affords, I think, a pretty authentic expoſition of the intention under which the firſt poſſeſſion was taken. The colours were not formally taken down till a ſubſequent day, after the declaration of hoſtility had arrived, but the ſhips had not been leſs really under the power of the *Engliſh* ſquadron. Generally ſpeaking, the taking down of the colours is the formal act of ſurrender; but in the preſent caſe it is evident that it was an unſubſtantial form, and that no ſurrender was required.

Under theſe circumſtances, I cannot think that the diſtinctions taken in this caſe do materially vary it from

The GERTRUYDA.

Nov. 19th, 1799.

from the cafes of ſeizure of all other *Dutch* property at the ſame time; and, therefore, I reject the allegation.

Allegation on the part of the Admiralty rejected.

Nov. 22nd, 1799.

THE SALLY, Joy Maſter.

(Inſtance Court.)

Appeal from Vice Admiralty Courts in the *Weſt Indies*, in a revenue caſe. Time of appeal proteſt of reſpondent as to *one of the ſentences*, as it was repreſented, over-ruled.—The whole conſidered as one ſentence.

THIS was a motion made for an inhibition on the Vice Admiralty Court of *New Brunſwic*, in a revenue cauſe, in which that Court had pronounced, *March* 26, 1798, that there was no cauſe of ſeizure; and in *Auguſt* 1799, had farther proceeded to decree coſts againſt the ſeizor.

It was now ſubmitted by the King's Advocate, that the cauſe was not to be conſidered as finally determined, till after the decree for coſts; that it was from the date of that definitive ſentence that the time for appeal was to be reckoned; and that the ſeizor was at liberty, within the accuſtomed time from that period, to appeal, as well from the ſentence of reſtitution, as from the decree of coſts.

No oppoſition being given, the Court ſaid, I ſhall ſuffer the inhibition to iſſue; it will be for the parties to take their exception.

Jan. 27th, 1801.

The caſe came on again, on act and petition of the party, appearing *under proteſt* to the inhibition, and praying that it might be relaxed.

In

The SALLY.

Nov. 22d, 1799.

In ſupport of the proteſt, Swabey and Sewell. — The proceedings out of which this application ariſes have been theſe: On the 19th of *October* 1795, this veſſel with a cargo of proviſions, being the property of *N. Godard* and other merchants of *America*, was ſeiſed in the port of *St. John* in *New Brunſwick*, and proceeded againſt on the part of the collector of the cuſtoms, for importing ſuch proviſions contrary to ſtatute: On the 9th of *March* 1798, the Judge of the Vice Admiralty Court of *New Brunſwick* pronounced "that there was no probable ground of "ſeizure;" and on the 1ſt of *Auguſt* 1799 he proceeded farther to pronounce "the coſts of the ſuit to be paid by the ſeizor." The ſuſpenſion of the proceedings during this interval was occaſioned by an appeal, which the ſeizor entered *apud acta*, againſt the firſt ſentence, accompanied by an apprehenſion on the part of the Judge, that he was ſtopped from proceeding farther in the cauſe; during this time the Judge waited, but at length finding that no inhibition had iſſued againſt him, he finally proceeded, on the 1ſt of *Auguſt* 1799, to make a farther decree on the queſtion of coſts.

To the appeal, proſecuted from this decree of coſts on the part of the ſeizor, the reſpondents are ready to appear abſolutely, and ſubmit the merits of the queſtion of coſts to the Court. But as to the former ſentence, it is ſubmitted on their part, that the time of appeal is elapſed, and therefore that the ſeizor muſt be pronounced to have deſerted his appeal on that ſentence. The time for appeal is known to be twelve months; originally it was expected that the whole cauſe would be finally determined within that term; and ſo late as the middle of the laſt century, it was the practice to make a ſpecial application to the Court to be admitted to a ſecond year. This practice has

The SALLY.

Nov. 22d, 1799.

fallen into diſuſe, as to the termination of the ſuit; but as to the term within which the appeal ſhould be proſecuted, it ſtill remains according to the practice of the civil law, which is recognized in a late ſtat. 38 *G.* 3. ch. 38. ſect. 2. for regulating the time of appeal on ſeizures of another nature (*a*), as the law of nations, and as the law proper to be adhered to in Courts of Admiralty.

That the ſeizor was underſtood on all ſides to have appealed from the firſt ſentence, is evident from his words, and the conduct of the Court below. The Judge *deferred* to his appeal; had it been a mere proteſtation of appeal; and not *an actual* appeal, the Judge might have aſſigned the party a term within which to proſecute it; but being an actual appeal, and immediately allowed by the Judge, the Court by that act, *in law*, concluded itſelf; and did *in fact* accordingly abſtain from proceeding farther in the cauſe; and at laſt, when he went on to entertain the queſtion of coſts, the appellant himſelf alledges, not generally, that he appeals, but "*that he farther appeals.*"

The term, therefore, for the appeal on the firſt point, is to be reckoned from the actual appeal interpoſed on the former ſentence; from which time it was near a year and a half before the appellant took any ſtep to proſecute his appeal, and therefore he is to be pronounced to have deſerted it; and the reſpondents are entitled to have the inhibition relaxed, as far as it applies to the firſt decree.

On the other ſide, the King's Advocate and Croke. — It is not very eaſy to underſtand what is meant by repreſenting the proceedings of the Court below, as two decrees and two ſentences. According to

(*a*) In prize cauſes.

the

The SALLY.

Nov. 22d, 1799.

the practice of the Court of Admiralty, a party can only appeal from a definitive ſentence, or a decree having the force and effect of a definitive ſentence; and therefore the power is reſerved to him of appealing at the ſame time from all grievances that have been done previouſly, or inflicted by the Judge from whom the appeal is brought. In the Eccleſiaſtical Courts, following the different practice of the canon law, it is otherwiſe; and if a party proceeds to take any ſtep, after the grievance complained of, he is held to have *perempted* his appeal. This is a diſtinction ariſing from the different proceſſes of the civil and the canon law: but in the Admiralty Courts, which are regulated by the former, the party has an undoubted right to appeal at the final ſentence; which, in this caſe, muſt be taken to be the decree on the queſtion of coſts; and whatever may have been done irregularly, or ſaid in informal language, before this time, cannot deprive him of this right. It is from this time therefore, (1ſt *Auguſt* 1799), that the term of appeal is to be reckoned; and in reſpect to that, there is no attempt to ſay, that his time had elapſed before the commencement of the proceedings here; as to the underſtanding of the party, it is not material whether he was under a miſtake or not, but by his conduct he appears to have waited for the final decree; notwithſtanding the proteſtation of appeal, in the firſt inſtance, no bail was given or required for proſecuting the appeal, till after the decree of 1ſt *Auguſt* 1799, and then bail was given to proſecute the appeal on both points.

Swabey. — In theſe cauſes it is not neceſſary to give bail, as in prize cauſes, therefore no inference ariſes from that.

The SALLY.

Nov. 22d, 1799.

JUDGMENT.

Sir *W. Scott.* — This is an application under proteſt, as I underſtand it, againſt the form in which the inhibition is now drawn, *as upon two ſentences;* becauſe it is not contended that it is not good againſt one, that is, againſt the laſt ſentence, or that the party is not bound to appear to it, or that the Court is not bound to determine on the ſecond queſtion.

I ſhould have been obliged to the gentlemen who have argued for the appeal on the laſt ſentence excluſively, if they had put me in poſſeſſion of any manner of determining the ſecond queſtion without conſidering the other at the ſame time. The former ſentence, as it is called, pronounced that there was no probable cauſe of ſeizure; which, in effect, by neceſſary implication, did determine that coſts were due; therefore it would be impoſſible for me to adminiſter ſubſtantial juſtice on this queſtion of coſts, whilſt there ſtands ſuch a judicial declaration, which I am not at all at liberty to conſider, whether it is well founded or not. The Court muſt conſider both ſentences, or it muſt diſmiſs the appeal altogether, or it muſt follow up with a blind and mechanical obedience, that declaration of the inferior Court, by giving coſts as a neceſſary conſequence; on the propriety of which it has no power to deliberate or enquire.

I need not obſerve, that it has never been the practice of this Court, on appeals from Vice Admiralty Courts in the *Weſt Indies*, to tie them down to nice rules of practice, which we know are not much attended to in thoſe Courts; the practitioners there having not much of that ſort of buſineſs which familiariſes the minds of men to great exactneſs in theſe matters. There are however great intereſts con-

The SALLY.

Nov. 22d, 1799.

fided to thoſe Courts, particularly with reſpect to the enforcement of the revenue laws; and it might be the means, as well of oppreſſing individuals, as of defrauding government, if, on appeals, this Court was to judge by thoſe correcter rules of practice, which would be obſerved here in ſimilar caſes, (if this Court exerciſed any original juriſdiction upon them), but which are not familiar to the practitioners there, and appear not to be attended to in the original proceedings.

This Court therefore, looks to find out the real merits of the queſtion, without attending much to the irregularity of proceeding, in which they are frequently involved and buried. It takes no advantage of ſuch irregularities againſt the one party or the other. It takes the queſtion, and conſiders and treats it, as it conceives it ought to have been conſidered and treated in the Court below, and purſues the real meaning of the parties, as it ſuppoſes that meaning would have been led and directed by practicers, capable of conducting it with preciſion and regularity.

With reſpect to time, it particularly has never been the practice of this Court to conſtrue the limitation of time for appeals, with the ſame ſtrictneſs as would be applied to appeals from Courts of this country. It has been held that the ſtatute of *H.* 8, does not apply to caſes in the plantations, but that it is left to the diſcretion of the Court to entertain an appeal. The circumſtances of the preſent caſe ſhew the reaſonableneſs of this exception; for although the only fact to be examined was, (as far as I can infer from what is at preſent before me,) whether an *American* ſhip came into the port of *St. John in breach* of the navigation act, in *October* 1795;

The SALLY.

Nov. 22d, 1799.

it is not till two years and a half after, although the proceedings were immediately commenced, and almoſt in the very ſpot where the tranſaction happened, that the Judge proceeds to ſentence; in a matter, on which one would ſuppoſe, that even a cautious and deliberate juſtice might have been diſpenſed within ſix weeks; and the court is then delivered of only a half ſentence,—an imperfect thing, which requires the labour of a year and a half more in order to perfect and bring it into regular ſhape and ſubſtance. When ſuch indulgence as this, in point of time, is allowed in theſe Courts, this Court will not be too preciſe in holding the parties ſtrictly to their time of appeal; nor will it look with ſcrupulous accuracy to the phraſeology and ſtyle of their minutes, nor to the common errors, in which both the parties and the practitioners appear to have been involved.

In the preſent caſe the Judge pronounces, "that "there is no probable cauſe of ſeizure, and that the "ſhip and cargo ought to be reſtored." The ſeizor immediately appeals (as he ſays); and the Judge upon that abſtains from proceeding any farther, makes no order as to coſts, but leaves the ſentence in this ſuſpenſive ſtate, implying that coſts ought to be given, but not giving any coſts expreſsly; certainly the appeal or proteſtation, or whatever it is to be called, of the ſeizor, needed not to have prevented the Judge from unfolding his ſentence, and expreſſing in terms what it is evidently intended to imply. It could hardly have been deemed a new act, if he had gone on to infer his concluſion that coſts ought to be given againſt the ſeizor; however he does not do this, and the matter remains in this ſuſpended ſtate for another year and a half; all parties appearing to ſtand agaſt and motionleſs, the party that had appealed

The SALLY.

Nov. 22d, 1799.

appealed not profecuting his appeal; the party appellate not urging the profecution of that appeal, nor the Court directing any effectual ſteps to be taken for the purpoſe. Finally, the party which had obtained this half ſentence comes before the Court, and prays a determination upon the matter of coſts and damages; then the Court makes the direct judicial declaration, that coſts and damages are due. The appeal from this ſentence, and likewiſe from the other, is regularly purſued. Security is required, and is given for the effectual proſecution of it; and it ſeems to have been the common underſtanding of all parties, that the whole merits of the caſe were devolved to the judgment of the ſuperior Court.

Indeed the abſolute impoſſibility of conſidering and determining with any degree of juſtice, the matter of the laſt ſentence taken ſeparately from the other, proves in the moſt deciſive manner the indiſſoluble connexion that ſubſiſts between them, and the abſolute neceſſity of conſidering them in conjunction.

In my view of the latter ſentence, it is nothing elſe than a mere diſtinct verbal explication of what is implied in the firſt; unleſs the firſt is examined, it is impoſſible to examine, to any effect of juſtice, the ſecond; and the parties having admitted that they are forced to appear to the appeal upon the ſecond, which decrees coſts, I think that they are *ex neceſſitate rei* bound to appear likewiſe to the appeal upon the firſt, which decides that there is no juſt or probable cauſe of ſeizure. Proteſt over-ruled.

An important queſtion having lately occurred in the caſe of the *Fabius*, reſpecting the extent of the Vice Admiralty juriſdiction in revenue matters, it will be brought forward in this number, without regard to the regular order of dates.

(Inſtance Court.)

Nov. 22d, 1799.

THE FAVOURITE, NICHOLAS DE JERSEY, late Maſter.

Mate becoming maſter, by capture of former maſter, allowed to *ſue for wages as mate* through the whole time.

THIS was a caſe on petition for wages, and ſundry other charges, on the part of *Joſeph Grout*, formerly *mate*, and late *maſter of the veſſel*, againſt *the proceeds* of the ſhip *Favourite*, an *American* ſhip, which had been proceeded againſt by a *primum decretum* on the part of —— *Carver* of *Goſport*, and *Torlades* and Company of *Liſbon*, holders of bottomree bonds, and ſold by a decree of this Court, bearing date 17th day of *June* 1799.

The hiſtory of the veſſel as it was detailed in the ſeveral proceedings before the Court was:—That in the month of *April* 1797, the above veſſel belonging to *S. Lewis* of *Boſton*, and commanded by *Nicholas de Jerſey* maſter, ſailed with a cargo of flour from *Havre* to *Breſt;* and being taken as prize by a *Britiſh* cruizer, and brought to *Portſmouth*, was reſtored by a ſentence of the Court of Admiralty; that ſhe was then repaired, refitted, and revictualled, on money taken on bottomree, *September* 28th, 1797, of —— *Carver* of *Portſmouth*, to the amount of 1283*l.* 17*s.* 8*d.* and ſailed to *London* in ballaſt, where it was determined to proceed with the ſhip to *St. Ube*'s, there to load a cargo of ſalt for *Charleſtown;* that ſhe went to *St. Ube*'s, and having ſailed laden with a cargo of ſalt, was forced into *Liſbon*, in diſtreſs, where a farther ſum of 100*l.* was taken up on bottomree, from the houſe of

of *Torlades* and Company; that the veſſel then proceeded to *Charleſtown*, but that the maſter and ſupercargo, *Taylorſon*, being unable to diſcharge the aforeſaid bottomree bonds, *renewed the ſame by a farther bond of hypothecation*, bearing date 14th of *April* 1798, and covenanted to pay the aforeſaid ſums with intereſt, within a reaſonable time after the arrival of the ſhip at *Goſport*, whither ſhe was then bound; that on that voyage ſhe was captured by a *French* privateer, 24th *April* 1798, and the aforeſaid maſter *Nicholas de Jerſey* was taken on board the privateer, and had never ſince rejoined the ſhip; that on her capture, the ſaid veſſel was taken to *St. Domingo*, and releaſed, and ſailed again for *Charleſtown*, 2d *Sept.* 1798, under the command of *Grout* the mate (now become maſter from the abſence of *Nicholas de Jerſey*); that the veſſel being again laden for *London*, the aforeſaid mate *Grout* was under the particular circumſtances of the caſe, by the appointment of *Taylorſon* the ſupercargo, and with the permiſſion of the Collector of the Cuſtoms, permitted to clear out *as maſter;* that on her arrival at *London*, the aforeſaid bonds being preſented and not paid, the ſhip was arreſted, and proceeded againſt, and finally ſold by a decree, bearing date 17th *June* 1799, on the petition of *Runqueſt* and *Cowie*, agents of the houſe of *Torlades* and Company, and holders of the bottomree bond, executed to —— *Carver* of *Goſport*.

The ſummary petition of *Joſeph Grout* ſet forth that he was hired by *Nicholas de Jerſey*, at *Goſport*, *April* 1797, as mate, to ſerve on board the ſaid ſhip, at 35 dollars *per* month; that he continued on board the ſaid ſhip in the ſaid capacity till her arrival at *Charleſtown*,

The FAVOURITE.

Nov. 22d, 1799.

Charleſtown, 4th *February* 1798, and not being then paid or diſcharged, did, at the particular requeſt of the maſter *Nicholas de Jerſey*, agree to continue on board, and in the ſervice of the ſhip, on the further voyage; that in the proſecution of that voyage, he became maſter in the abſence and detention of *Nicholas de Jerſey*, as before recited.

The ſchedule of accounts annexed to the petition contained charges for wages at 35 dollars *per* month, as mate, from 16th *April* 1797 to 20th *May* 1798	103	7	9
From the 20th *May* 1798, the time when the ſaid mate began to act as maſter, to the 19th *June* 1799, at 60 dollars *per* month, the ſame as would have been paid to *Nicholas de Jerſey* - -	175	11	0
For balance, due on account of ſaid ſhip, as *per items*, &c. above caſh received - - - - - - -	84	16	10
	£.363	15	7

Againſt the petition, on the part of the bottomree bond-holders, Arnold.—This is a petition, which is liable to ſo many objections in different parts of it, that the Court will find only one article that can be ſuſtained: it ſets out by a demand of wages, for ſervices performed as maſter; but it has already been decided in the common law courts, in the time of Lord *Holt*, 12 *Mod.* 405. that a ſuit cannot be maintained in the Admiralty Court for the wages of a maſter; and on theſe grounds, that although mariners are ſup-

poſed

The FAVOURITE. Nov. 22d, 1799.

poſed to contract on the credit of the ſhip, the maſter's contract is altogether of a perſonal nature, on the credit of his owner. It will be ſaid that theſe caſes do not exactly apply to the circumſtances of this caſe, for that this man went out *as mate*, and therefore that his original contract was not on the credit of the owner, but of the ſhip, and that he ſucceeded to the office of maſter, only by devolution, on the capture and detention of the former maſter: the ſhip has, however, ſince that ſucceſſion, been into an *American* port, the country of the owner, and therefore ſince that time he ſtands in the condition of a maſter, originally appointed, and on the credit of the owner. There are however other authorities which reach this diſtinction, 2 *Strange*, 937. *Read* v. *Chapman*, "A man went out as mate, and on the death of the maſter ſucceeded to the command and brought home the ſhip, and ſued in the Admiralty Court for his wages *as mate*, and for a further allowance after he became maſter; a prohibition was granted, *quoad* the time he was maſter, and refuſed *quoad* the time he was mate;" this will be ſufficient to diſpoſe of that article: another article contains a demand for expences uſually incurred by maſters for the payment of mariners wages. But there have been caſes on this point alſo, *Carthew*, 518. *Molloy*, 357. *Forteſ. Rep.* 230. where a maſter having ſued in the Court of Admiralty for ſeamen's wages paid by him, a prohibition was granted. There is alſo a further charge for a cable purchaſed at *Deal*, which is evidently a debt for which a remedy muſt be ſought elſewhere; there are alſo other diſburſements which fall

The FAVOURITE.

Nov. 22d, 1799.

fall under the former objection, and muſt diſpoſe of his whole demand in character of maſter.

In ſupport of the petition, Swabey.—It was ſaid, in *Clay* v. *Sudgrove*, *Salk.* 33. "that it was not reaſon-"able that the maſter ſhould ſue for wages, where "he commences the voyage as maſter." In this caſe it is a ſucceſſion in a foreign port, *de jure*, for the neceſſary ſervice of the ſhip. In the caſe cited in *Strange*, it was a ſuit againſt the ſhip, in that reſpect materially differing from the preſent, as the ſhip has been already ſold, on the proceedings of other parties; and our act is only *againſt the proceeds*. It has been frequently ſaid in this Court, that a diſtinction might be made, and that maſters and (*a*) *material men* alſo, by the indulgence of the Court, may be allowed to be paid *out of proceeds* in the hands of the Court, although they would not be allowed to proceed originally againſt the ſhip.

Court.—I could wiſh the caſes to be looked into, reſpecting perſons allowed to take money *out of proceeds*, who are not allowed to ſue originally: I think what is ſaid by Dr. *Swabey* is true, that it has been allowed to *material men*, but the caſes to which I refer were caſes in which there might be no per-

(*a*) By material men, in the ſtyle of the Court of Admiralty, are meant the perſons who furniſh and conſtruct the different materials of ſhips: ſhipbuilders, ropemakers, &c. &c. See a learned argument of Sir *L. Jenkins*, before the Houſe of Lords, on the competency of ſuch perſons to ſue originally in the Admiralty. *Life of Sir L. Jenkins, vol.* 1. *p.* 76.

ſon

ſon objecting, or where there remained an undiſputed ſurplus, after payment of the debt which was the original cauſe of the ſuit.

Arnold. — In this caſe the objection is taken on the part of the bottomree bond-holder, who is not yet paid his debts.

JUDGMENT.

Sir *W. Scott.* — It has been repeatedly decided that a maſter cannot ſue in the Court of Admiralty for his wages; becauſe he is ſuppoſed to ſtand on the ſecurity of his perſonal contract with his owner, not relating to the bottom of the ſhip, and therefore he has been prevented from ſuing here. A caſe has alſo been cited, in which a mate, who had become maſter during the voyage by the death of the former maſter, was alſo prohibited from ſuing in the latter character, his contract having been made only in the capacity of mate: if that caſe had not ſtood in the way, I might have been diſpoſed to entertain this ſuit; becauſe, having contracted originally as mate, and becoming maſter in conſequence of ſubſequent events, it is ſtill ſuch a demand as might be taken to ariſe out of his original contract. His original contract being not only, that he ſhall perform the duties of mate, but alſo, by neceſſary implication of law, that he ſhall in caſe of neceſſity take upon himſelf alſo the duties of maſter; for, by the maritime law, the mate is *hæres neceſſarius* to the employment of maſter in caſe of neceſſity; it might therefore have been underſtood as a thing mutually underſtood in the original contract, and foreſeen and provided for at the time, and in the act of

The FAVOURITE. Nov. 22d, 1799.

of forming it: the Court might have been induced to ſuſtain ſuch a ſuit, not under the view of a contract entered into by this man as maſter, but as a conſequence ariſing originally out of the primary contract as mate, over which contract this Court has an undoubted juriſdiction. But ſince it appears by the caſes cited, that the courts of common law have determined otherwiſe, and have granted a prohibition on this point, the petition muſt be reformed according to thoſe determinations; but, excluding the *quantum meruit* due to him as maſter, he is ſtill, I hold, entitled to proceed for his wages as mate; he muſt apply elſewhere for his *quantum meruit*, for thoſe additional duties performed by him as maſter.

Arnold aſked — Whether it was not the intention of the Court that the demand of the petitioner, as mate, muſt end with the day of his appointment to the office of maſter?

Court.—My opinion is, that he is ſtill entitled to his wages as mate, and that he muſt go elſewhere for the reward of the additional ſervices performed as maſter. I conſider his new character of maſter as ſuperinduced to that original one of mate: he contracted to ſerve as mate, and it is a part of that contract legally implied in it, that he ſhall likewiſe act as maſter in caſe of the death or removal of the actual maſter; but I do not think that the character of mate is neceſſarily merged in that of maſter, or that his title to a mate's wages is totally extinguiſhed, by his acquired title to a *quantum meruit* for his additional ſervice as maſter; unleſs it can be ſhewn, that the office of mate was regularly devolved upon ſomebody

body elſe, and the duties of it were entirely performed by that other perſon: it is the inclination of the Court to aid the preſent ſuitor as far as it can conſiſtently with law, as it clearly appears that he has no chance of recovering elſewhere from an inſolvent party.

THE FAVOURITE. Nov. 22d, 1799.

In reſpect to the diſtinction taken between an original ſuit, and a permiſſion to be paid out of the proceeds, upon enquiry no inſtance has been found, in which a maſter has been permitted to ſue againſt proceeds in the Regiſtry, except in caſes of mere remnants and ſurplus; and not even then, if there have been any adverſe intereſts opppoſing it.

THE PERSEVERANCE, PITTOR Maſter.

Nov. 22d, 1799.

Amelioration of prize ſhip, purchaſed by a neutral, *under illegal* condemnation in *Norway*:—allowance made, on reſtitution, to original owner.

THIS was a caſe of a ſhip that had been a *Britiſh* prize, ſold under a ſentence of condemnation in *Norway*, to a *Swediſh* merchant, and was ſeized on coming to the Iſle of *Guernſey*, on the part of the former owner: an appearance being given for the neutral purchaſer, it was ſubmitted, on his part, that, if the veſſel was to be reſtored to the former owner under the authority of the *Fladoyen*, it was ſtill but reaſonable, that ſome compenſation ſhould be made for conſiderable repairs which the ſhip had undergone, in the poſſeſſion of the *Swediſh* purchaſer, to the amount of 205*l.*

Vol. I. p. 135.

JUDGMENT.

Sir *W. Scott.*—It is a general ruſe, undoubtedly, that whoever purchaſes under an illegal title, does it at

The PERSEVERANCE.

Nov. 22d, 1799.

at his own peril; and muſt take the conſequence (both in his purchaſe and in his own ſubſequent expenditure upon it) of his inattention to his own ſecurity; but I think this was not a title ſo notoriouſly bad, at the time when this purchaſe was made, as to bring it fairly under the application of the general rule to its utmoſt extent.

The Court has had occaſion to enquire into the validity of ſuch purchaſes, and has, upon a regular diſcuſſion, pronounced them invalid; and if henceforth neutrals ſhall continue to purchaſe under ſuch flimſy titles, they muſt take the conſequences of their own imprudence. But it may be too much to apply this maxim without any alleviation, to a perſon who has heretofore bought under a practice, which, though illegal, was too prevalent in ſome ports of the North of *Europe:* it appears that a ſum of money has been expended on the repairs of this veſſel, by which the claimant will be benefited, though not to the amount of the ſum laid out; ſomething muſt be allowed for wear and tear; and beſides, the party who has expended this ſum, has had the uſe of the veſſel in the mean time: I ſhall therefore not allow the whole ſum, but I ſhall take a moiety, and I ſhall allow that, in conſideration of the benefit which the original owners are likely to receive from the amelioration.

Sum aſked 205*l.*
Given 102*l.*

Ship reſtored to the former owner on ſalvage.

(Inſtance Court.)

THE ISABELLA, BRAND Maſter.

Nov. 22d, 1799.

Mariners' wages, ſhip's articles, to be ſigned before clearing officer, &c. to be concluſive:—A& 2 *G.* 2. *c.* 36., 2 *G.* 3. *c.* 31., 39 *G.* 3. *c.* 80. *ſ.* 27.— Demand of additional *privilege* under cuſtom of the trade, not allowed.

THIS was a caſe of a ſummary petition (*a*) on behalf of the widow and repreſentative of *G. Carlſon*, late chief mate of the ſaid ſhip, to recover a ſum of money due for wages, on a voyage from the port of *London* to the coaſt of *Africa*, &c. and from thence to the *Weſt Indies*. The demand was for 26*l.*, at the rate of 4*l. per* month under agreement; and beyond that, for 70*l.*, as the value of a privilege of one ſlave, ſaid to be a part of the agreement, and a privilege due under the ordinary practice of that trade, according to average price at the port of delivery.

Againſt the petition, Swabey. — This mariner died before the ſlaves were delivered, on the paſſage to the *Weſt Indies*; and therefore, it is not clear that he would be entitled by the cuſtom, if it was proved to exiſt: but with reſpect to that part of the demand

---

(*a*) The firſt article of the petition pleading the hiring, ſtated, "that the maſter, &c. did hire the ſaid *G. Carlſon* to ſerve as chief "mate on board the ſaid ſhip, at and after the rate or wages of "four pounds the month, with the *benefit of a ſlave*, when the "cargo was taken completely on board, in *Africa*," without any mention of the cuſtom of trade:—and the ſchedule annexed to the petition was, wages for ſix months and ſixteen days, - - - - £. 26 5 6
To a ſlave *as per agreement*, the value of which is 70*l.* or thereabouts, - - - 70 0 0:

The ISABELLA.

Nov. 22d, 1799.

for privilege, the parties are precluded by their own ſhewing, on other grounds: for it is ſtated to be under agreement, and yet it makes no part of the contract, as it ought to have done, under regulations of the old act 2 *G.* 2. *c.* 36., made perpetual, 2 *G.* 3. *c.* 31. which have been again inſerted in a late act, 39 *G.* 3. *c.* 80. *ſ.* 27. reſpecting this particular trade; by which it is required, "that articles of agreement "ſhall be ſigned by the maſter, officers, and ſeamen "before the ſhip leaves port, which ſhall be conclu-"ſive, and no other form uſed."

If there was in this caſe any ſuch privilege allowed, it ought to have made part of the articles; that not having been done, it is a competent objection to take on the part of the eſtate of the defendant, who has ſince become a bankrupt, that the petitioner is precluded from this part of his demand, on his own ſhewing.

For the petition, Sewell ſaid, — That it did not appear that the regulations of the act were meant to apply to thoſe things which are due under the ordinary cuſtom of the trade, under which this privilege had been always enjoyed.

Swabey. — If it is a cuſtom, it ought to have been diſtinctly pleaded.

Court. — Inſtead of being pleaded as a cuſtom, it is pleaded under the agreement; although I do not find in the articles of agreement, one word of the general cuſtom, nor the leaſt mention of the privilege of a ſlave as matter of ſpecial agreement. The general act

act for the regulation and government of ſeamen in the merchant ſervice, 2 *G.* 2. *c.* 36. made perpetual, 2 *G.* 3. *c.* 31., directs, "that if any ſeaman "or mariner enter or ſhip himſelf on board any "merchant ſhip or veſſel, on any intended voyage "for parts beyond the ſeas, he and they ſo entering "themſelves as aforeſaid ſhall, and they are hereby "obliged to ſign ſuch agreement or contract within "three days after he or they ſhall have ſo entered "themſelves on board any ſhip or veſſel, in order to "proceed on any voyage as aforeſaid; which agree-"ment or agreements, or contracts, after the ſigning "thereof, ſhall be concluſive and binding to all par-"ties, any cuſtom or uſage to the contrary notwith-"ſtanding." I take it to have been the intention of the general act, as well as of the act lately paſſed, 39 *G.* 3. *c.* 80. *ſ.* 27., for the regulation of this peculiar trade to *Africa*, to render the agreement as diſtinct and definitive as poſſible, to prevent any part of it from reſting in parol, or vague converſation, which is at all times ſo difficult to be aſcertained in a court of juſtice; and in no caſes more ſo than in ſuch as relate to the tranſactions of this claſs of perſons. If there had been no ſuch act, or if it had been leſs imperative, ſtill the rule is no more than what the diſcretion of the Court would have wiſhed to apply to ſuch a ſubject. The late act ſtates; "and for the better regulation, en-"couragement, and preſervation of the health of the "officers and ſeamen employed in ſhips or veſſels "trading to the coaſt of *Africa* for ſlaves, and from "thence to the *Weſt Indies* and *America*, be it fur-"ther enacted, that from and after the firſt day of

The ISABELL. Nov. 22d, 1799.

" *Auguſt* next after the paſſing of this act, before any " ſhip or veſſel ſhall proceed to ſea, the maſter, offi- " cers and mariners ſhall ſign and execute articles " of agreement, and a muſter roll, in the preſence " of, and witneſſed by the clearing officer, and one " of the tideſmen of the port from whence the ſhip " departs; and a duplicate of the articles of agree- " ment and muſter roll, duly ſigned and executed, " ſhall be delivered to the aforeſaid clearing officer " in order to its being lodged with the proper officer " in the cuſtom-houſe, according to the forms here- " unto annexed; which agreement ſhall be conclu- " ſive to all parties for the time contracted for, and " no other form whatſoever of articles of agree- " ment or muſter roll, ſhall be uſed, under the pe- " nalty of fifty pounds; one half to be paid to the " uſe of *Greenwich* hoſpital, and the other half to " the informer or other perſon who ſhall ſue for the " ſame in any of His Majeſty's courts of record." That being the ſtatutable rule, it is impoſſible to ſet up a demand of this collateral nature, which exceeds twice the amount of the principal agreement, and to ſupport it on the plea of a cuſtomary right; eſpecially for a cuſtomary right which was ſo unknown, that the party himſelf was not ſufficiently apprized of it, but pleads it as matter of ſpecial agreement. It is ſaid, that the exiſtence of ſuch a privilege is proved by the terms of the wages; the maſter and mate having leſs, by their agreement, than the ordinary mariners; but it is impoſſible for me to ſay, that becauſe their wages are ſo ſmall, that therefore this particular privilege of a ſlave exiſts. I may have my ſurmiſes, that they might enjoy ſome other additional advantages;

advantages; but it is impoſſible that I can come to a concluſion, that therefore this particular privilege of a ſlave exiſts, which ſo much exceeds the amount of the contract. If any ſuch underſtanding prevails, care ought to be taken to inſert it in the articles. I muſt reject that part of the petition.

The Isabella. Nov. 22d, 1799.

Petition directed to be reformed.

(Inſtance Court.)

THE FABIUS, Cowper Maſter.

Nov. 27th, 1800.

THIS was a caſe in which a material queſtion aroſe reſpecting the extent of the juriſdiction of the Vice Admiralty Courts in revenue matters.

The Vice Admiralty Courts in the *Weſt Indies* have no juriſdiction over offences committed againſt revenue laws, out of their reſpective Iſlands.

It was the caſe of an *American* ſhip and cargo, taken as prize, 18th *February* 1798, by the *Lark* privateer, and carried to *New Providence*, where ſhe was reſtored by conſent, *February* 25th. On the ſame day, ſhe was again ſeized by Capt. *Church*, of His Majeſty's ſhip of war the *Topaz*, lying in the harbour of *Naſſau*, in *New Providence*; on ſuggeſtion that ſhe had exported from *Savannah la Mer*, in *Jamaica*, her laſt clearing port, logwood, &c. in violation of the plantation laws of this kingdom. On this ground a libel of information was filed; and proceedings were regularly purſued in the Vice Admiralty Court of *New Providence*, and the Court pronounced a ſentence of confiſcation of the ſhip, tackle, and cargo, &c.

The cauſe was now brought before the High Court of Admiralty, on appeal from this ſentence, on the part of the maſter, claimant of ſhip and cargo.

The FABIUS.

Nov. 27th, 1800.

In support of the appeal, Lawrence and Swabey — argued on the merits, that the ſhip had gone into *Jamaica*, with proviſions, &c. in conſequence of a proclamation from the Governor of *Jamaica*; and that the logwood had been weighed by the cuſtom-houſe officer, and ſhipped with his privity and knowledge. They were proceeding farther to diſpute the competency of a Vice Admiralty Court to take cognizance of a breach of the revenue laws, committed without the limits of its local juriſdiction, and in another iſland, — when the Court ſtopped the argument.

Court. — I have a ſtrong perſuaſion that there has been a determination on this point; and that it has been decided, that Vice Admiralty Courts have no authority to take cognizance of offences committed not within the limits of their local juriſdiction. I ſhall defer this cauſe, that an inquiry may be made into the precedents on this point.

On the 11th *December* 1800 the cauſe came on again, when Dr. *Swabey* produced the caſe of the *Vrouw Dorothea*, *Block* maſter, determined before His Majeſty's High Court of Delegates, at *Serjeant's Inn*, *June* 17, 1754. — Preſent,

Sir *Michael Foſter.*
Sir *Sydney Stafford Smyth.*
Mr. Juſtice *Gundry.*
Dr. *Walker.*
Dr. *Betteſworth.*
Sir *Ed. Simpſon.*
Dr. *Collier.*
Dr. *Ducarel.*

Vrouw Dorothea, Block, an. 1754.

[The facts of that caſe were, that the *Dorothea*, a *Dutch* ſhip, from *Amſterdam* to *Curacoa*, was taken by the *Wager* man of war, 26th *Auguſt* 1746, and carried to *Jamaica*,

The FABIUS. Nov. 27th, 1809.

Jamaica, where ſhe was proceeded againſt as prize, and reſtored; after which the maſter petitioned the governor for leave to ſell ſome part of his cargo, and having ſold part under his permiſſion, and the inſpection of the naval officer of *Jamaica*, ſailed from that port, but was driven back in diſtreſs, when he obtained permiſſion to unload and careen, and ſell a farther part of his cargo to defray his expences; ſhe again ſailed, and on the 7th *Auguſt* 1747 was again taken as prize by the *Trelawney* privateer, and carried to *Charleſtown*, where ſhe was proceeded againſt as prize, and reſtored with coſts; but on the 7th *December* 1747, as ſhe lay off *Charleſtown*, ſhe was ſeized by *W. Hopton*, deputy naval officer, and proceeded againſt as forfeited, for having imported into, and exported out of *Jamaica*, goods contrary to law. After the uſual proceedings the ſhip was condemned, *July* 4th 1748, and the maſter, *Block*, appealed to the High Court of Admiralty of *England*.

Vrouw Dorothea, an. 1754.

The libel of appeal was not in common form, but ſpecial, in objecting againſt the juriſdiction of the Judge appealed from. "That a certain cauſe, civil and "maritime, was unjuſtly brought before the Honour-"able *J. Green* in *Carolina*, for a pretended breach "not within the juriſdiction of the Court." This objection was ſupported on the part of *Block*, the maſter, by an allegation, in which the character of the ſhip, and the previous circumſtances of the voyage, were ſet forth, and in which it was pleaded, "that in fact no ſuch goods were imported, or ex-"ported, and that if they had been imported or ex-"ported, no ſuit could be commenced on that act "before the Judge of the Vice Admiralty Court of "*South Carolina*, for a breach of the plantation laws

The FABIUS.

Nov. 27th, 1800.

"committed at *Jamaica*; and that the Judge of "*Carolina* had no juriſdiction to condemn or acquit "for any act done at *Jamaica*." The allegation was admitted, and exhibits produced, by which the facts were proved, but no witneſſes were examined; and on the 12th *July* 1751, the High Court of Admiralty pronounced, "that the Vice Admiralty Judge of "*Carolina* had no juriſdiction." From this ſentence *Hopton* appealed to the High Court of Delegates, where the cauſe was elaborately argued, by the King's Advocate, Mr. *Murray*, Attorney General, Dr. *Pinfold*, Dr. *Hay*, and Mr. *Pratt*, for the appellant *Hopton*; and by Mr. *Hume Campbell*, Dr. *Jenner*, and Dr. *Smalbroke*, for the reſpondent *Block*.

Vrouw Dorothea, an 1754.

By a note of the caſe (with which I have been favoured by my learned friend, Dr. *Swabey*), an objection appears to have been ſtrongly preſſed before the Court of Delegates, reſpecting the juriſdiction of the High Court of Admiralty to receive appeals from the Vice Admiralty Courts on revenue cauſes; on the ground that they were not in their nature cauſes civil and maritime, and under the ordinary juriſdiction of the Court of Admiralty, but that it was a juriſdiction ſpecially given to the Vice Admiralty Courts by ſtat. 7 & 8 *W.* 3. *ch.* 22. *ſ.* 6. which did not take any notice of the appellate juriſdiction of the High Court of Admiralty in ſuch cauſes. This point was fully argued and determined (*a*), and on the 17th *June* 1754, "the Judges pro-"nounced

(*a*) The ſame point has ſince, I am informed, received the unanimous concurrence of all the Judges, on a reference from the Privy Council. It was contended, that the appeal more properly lay to the

The PABIUS.

Nov. 27th, 1800.

" nounced for the appeal, and complaint made and in-
" terpoſed on the part and behalf of *Block*, the maſter,
" to the High Court of Admiralty of *England*, from
" the Judge of the Vice Admiralty Court of *South*
" *Carolina*; and that the ſaid appeal and complaint
" were made and interpoſed for cauſes true, juſt,
" and lawful. Wherefore the Judges revoked the
" ſentence of the Vice Admiralty Court of *South Ca-*
" *rolina*, and decreed reſtitution of the ſaid ſhip,
" tackle, &c. and did farther condemn the appellant
" *Hopton* in the damages ſuſtained and incurred by
" the owners of the ſaid ſhip and her cargo, by the
" ſeizure and detention thereof at *South Carolina*;
" and did farther condemn the appellant in coſts
" of ſuit, as well in the firſt and ſecond, as in this
" inſtance of the cauſe (*a*)."]

(*a*) From the regiſter of the High Court of Delegates.

On the production of this precedent, the King's Advocate took an exception, that no fact of exportation appeared to have been ſtated in that caſe; and that there was a material diſtinction between the offences of importation and exportation, and the neceſſary modes of proceeding againſt them; that the former might be juſtly amenable only to the local juriſdiction of the iſland where it was committed, becauſe it was fully within the reach of the Court; but that the offence of exporting, contrary to the ſtatutes, could not be conſidered as complete, till the ſhip had actually got out of the port and out of the diſtrict of the local juriſdiction. That the authority of the caſe

the Privy Council, the general court of appeal in all plantation cauſes, and the Privy Council had entertained ſome few revenue cauſes from the Plantations. The opinion of the Judges was, that it lay to the High Court of Admiralty.

ſtated

The FABIUS.

Nov. 27th, 1800.

ſtated ought not to be carried farther than the facts of the caſe; which did not appear to amount to a caſe of exportation; that it had fallen within his obſervation to ſee other caſes, in which the Vice Admiralty Courts did proceed to take cognizance of frauds committed in other iſlands.

JUDGMENT.

Sir *W. Scott*.—I have had occaſion to obſerve that too; and I am aware of ſome inconveniencies that may poſſibly ariſe on either ſide. But if this point has been decided by the Court of Delegates, a court very ably compoſed, I ſhall not hold myſelf at liberty to look into the queſtion of convenience. If inconveniencies ariſe, they muſt be guarded againſt by proviſions framed under an authority of a ſtill higher nature. But it is very evident to me that the inconveniencies would be ten times more intolerable, if the cruiſers could carry ſhips charged with offences againſt the revenue laws to any remote juriſdiction they might think fit: The injuſtice to which it might lead, would be horribly oppreſſive to the individual. With reſpect to the diſtinction which has been taken between importation and exportation, I need ſay no more than that the ſentence of the High Court of Admiralty, which was affirmed by the Delegates, is, "That the "Judge having heard Advocates, as to the juriſdiction "of the Judge appealed from, declared that the Judge "appealed from had no juriſdiction, to enquire as to "the *importation* or *exportation* of goods at *Jamaica*, "contrary to the act of parliament."

Laurence prayed intereſt.

Court,

The FABIUS.

Nov. 27th, 1800.

Court. — I obſerve that the Court of Delegates did condemn in coſts and damages: After that deciſion, I am to conſider it as clear and ſettled law that the Vice Admiralty Court of *New Providence* had no juriſdiction whatever, and that the whole of the proceedings there were vexatious and null; and I think I am bound to decree coſts and damages, as the other Court did when the matter was *res integra*, and might be thought a very fit caſe for judicial determination. I ſhall conſider myſelf bound by the authority of that deciſion, ſettled by ſuch a Court, after a very deliberate argument; and I ſhall follow the direction of that ſentence, in annulling the decree of the Vice Admiralty Court of *New Providence* in this caſe, with coſts and damages.

THE SUSA, BARZILLAI HUSSEY Maſter.

Dec. 3d, 1799.

French whale fiſhery: Aſſerted *American* veſſel: Effect of ſuppreſſion of enemy's part intereſts: Condemnation.

THIS was a caſe of an aſſerted *American* ſhip, taken on a voyage from *Dunkirk* to *St. Ubes*, in ballaſt, with an intention of proceeding with a cargo of ſalt, as it was contended on the part of the captors, to the *French* South whale fiſhery; but as it was repreſented on the part of the claimant, on an ulterior voyage only from *St. Ubes* to *New York*.

For the Captors, King's Adv. and Advocate of the Admiralty.—This veſſel was taken going under *American* colours from *Dunkirk* to *St. Ubes*, with an intention of proceeding afterwards, as it is aſſerted, to *New York*, and it is claimed for Mr. *Mark Coffin* of *Nantucket*. There is the original meaſuring bill on board, bearing date, *New Bedford*, *July* 4, 1795, in which *B. Huſſey* is deſcribed

The Susa.

Dec. 3d, 1799.

described as master; but there are two subsequent indorsements, one at *New Bedford*, 23d *July* 1796, by the collector, — "*Isaiah Hussey* having taken the oath required by law, is at present master of the within vessel, "in lieu of *B. Hussey*, late master;" and another at *Dunkirk*, 31st *January* 1797, by the *American* consul — "*B. Hussey* having taken the oath required by "law, is at present master of the within vessel in lieu of "*Isaiah Hussey* late master; signed *C. F. Coffyn*, consul "for the United States of *America*." It is clear, therefore, that both the *Husseys* have been concerned in this vessel in her previous occupation, whatever that may turn out to have been. She appears to have been a *French*-built vessel, engaged in the South whale fishery, and on those voyages returning to *Dunkirk*.

The account which the master gives of her former occupation is, "that the ship, since the deponent has belonged to her, sailed from *New Bedford*, on the whale fishery, and then returned to *New Bedford*, and afterwards sailed with the same cargo to *Dunkirk*, and there delivered it to Messieurs Brothers *Dubeaque*, merchants there, and then sailed from *Dunkirk* on the whale fishery, and returned with the produce to *Dunkirk*, and there delivered it to the said Brothers *Dubeaque*, in or about the month of *May* 1798; and continued there till the 18th day of *July*, when she sailed on the present voyage," proceeding, as we submit, on a similar ulterior destination to the whale fishery. On these grounds it is submitted that a domiciled *French* character is stamped upon this vessel by her employment, be the property in whom it may; but many circumstances that appear

in

The Susa.

Dec. 3d, 1799.

in these documents, and in the management of the vessel, shew not only strong marks of a voyage back to *Dunkirk*, in the same course as before, but also afford great reason to suppose that the actual property of this vessel belongs to persons resident at *Dunkirk*. She is professedly going to *America*, under the command of *B. Huffey*, appointed by these persons, as it is expressed, "for and in the name of the owners." The terms are, "that he was to receive from *the owners* "*or their agents* 30 *Spanish* doubloons *per* month, "and five *per cent.* for all freight she should make, "whether laden on owners or transient account, and "an allowance of 2s. 6d. *per* day, all the time the "ship is in port, *Dunkirk* excepted." The former part of these terms are not like the terms for a voyage homeward to the port of her owners; and the latter exception clearly shews, that every other port was a foreign port, in which an extra allowance was to be made, and that *Dunkirk* was in truth the home port, in which this allowance was to cease. The last article of this agreement is, "that these articles are "to stand for the ship *Susa*'s present voyage from "*Dunkirk* round to *New York*, and back to a port "in *Europe*, when they shall either be continued or "altered as the owner or captain may judge conve-"nient. Signed for and in behalf of owners, *J. Du-*"*baeque*, *B. Huffey*." These passages strongly prove that the real interest resides at *Dunkirk*. From papers in a former cause, the *America*, in which the name of *Coffin* appeared as the claimant, it appeared also that he and *Huffey* were persons living at *Dunkirk*, and engaged in the South whale fishery. On all these grounds it is submitted that this vessel would be sub-

ject

The Susa. Dec. 3d, 1799.

ject to condemnation, even as an *American* ship, from her adopted character; but that in reality she has even more than an adopted *French* character belonging to her, and is, on all these grounds, subject to condemnation.

For the Claimant, Arnold and Croke contended—That it was not necessary to advert to the former voyages of this vessel, or to say what would have been the legal effect, if she had been taken in one of them, as it is clear that the former occupation had ceased; that there had been a cessation of above a year, and that there was no reason to suppose she had again resumed that trade; that the terms of the ship's articles were different from those on whaling voyages, which generally included some proportion of the success of the adventure, and that no fishing tackle was found on board; neither was there any intimation that she was to touch any where to take in any such articles. It was submitted, that the suspicion drawn from the attempt the ship was making to touch at *Calais*, was fully answered by the necessity she was under of landing the *Dunkirk* pilot, which she had before been prevented from doing by adverse winds. In respect to the papers, invoked from the *America*, it was said that the facts and persons in that case were wholly different; that the claim was given, not for *Mark Coffin*, but for *Sh. Coffin*, although the name of *Mark Coffin* was introduced by some mistake into the cause; that that vessel was taken on her return to *Dunkirk*, and the witnesses swore she belonged to persons at *Dunkirk*.

The Court asking, Whether there was any paper to connect the property of the vessel with *Coffin*, since

1795,

The Susa.

Dec. 3d, 1799.

1795, a letter was produced from *Mark Coffin* to *J. Huſſey*.

" Reſpected brother, *Iſarat Huſſey*, I have lately heard of thy misfortune of being taken and retaken, and carried to *Liverpool*, and further, that thou intended to ſell thy ſhip, and proceed to *Hamburgh* to purſue the firſt capture for damages. If thou ſhouldſt go to *Dunkirk*, aſſiſt to get the ſhip *Suſa* to *America*; ſhe has been lying there nine months, and cannot ſail on account of the ſtrictneſs of the *French* laws reſpecting the muſter roll. Send her in ballaſt, or with a loading of ſalt; but do not take goods of the manufacture of *France*, as the laws of *America* do not admit them to an entry. Perhaps thou may wiſh a paſſage home in her; if that ſhould be the caſe, I ſhould be very glad thou wouldſt take thy paſſage in her, and give her ſome freight if thou can; but as I mentioned above, our laws ſtill continue as to *French* goods. *Mark Coffin*,

Nantucket, March 2d, 1799."

JUDGMENT.

Sir *W. Scott*. — This is the caſe of a ſhip which was taken under *American* colors, on the 19th *July* 1799, on a voyage from *Dunkirk* to *St. Ubes*, in ballaſt; the ſhip is claimed for Mr. *Mark Coffin*, of *New Bedford*, whoſe name has, by ſome means or other, appeared in the Court of Appeal, in a tranſaction very much reſembling the preſent, at leaſt in exterior form and ſhape. In that caſe the name of *Mark Coffin* was uſed by perſons carrying on the whale fiſhery of *France*, without having any footing in *America*, or any viſible thread of connexion with it; but

The Susa.

Dec 3d, 1799.

carrying back the produce to *France*, and ſupplying the manufactures and induſtry of *France*, without any communication or intercourſe whatever with *America*. It did appear to the ſuperior Court, as it always appeared to this Court, that perſons carrying on ſuch a trade, were juſt as much to be conſidered as incorporated in the commerce of *France*, as if they were native merchants of *France*, and that their property ſo employed would be juſtly ſubject to confiſcation, be their perſonal reſidence where it might. The other actors of that drama were exactly the ſame as thoſe that appear in this caſe; there were the ſame names of *Coffin*, the *Huſſeys*, and *Dubeaque*, the proprietor. Such a coincidence could hardly happen, unleſs the ſame names, in both caſes, do in reality belong to the ſame perſons, engaged in ſimilar tranſactions; at any rate, it is an awakening circumſtance, which calls upon the vigilance of the Court, to examine minutely into the facts of the caſe, and into the proofs of property that are brought forward.

In the firſt place, the ſhip is *French* built, firſt ſeen at *Dunkirk*, and employed in the South whale fiſhery; the maſter repreſents the former trade "to "have begun from *New Bedford*;" — the Counſel have put it on better grounds; yet the utmoſt to which they can bring the caſe is, that it had generally been to *France*, but that that courſe of trade was now abandoned, though for the firſt time.

If that were the caſe, and I was ſatisfied by the evidence in the cauſe that the ſhip was the property of *Mark Coffin, and of him only*, I ſhould hold myſelf bound to reſtore; but if on the other hand, it ſhould appear that there are other owners, with a joint intereſt,

tereſt, and thoſe perſons originally domiciled in *France*, or returning from thence, after having lived ſo long there, as to lie under a ſuſpicion of being liable from that reſidence, to be treated as *French* perſons; I ſhould hold ſuch a claim fraudulent, inaſmuch as the ſuppreſſion of ſuch names would be a fraudulent ſuppreſſion, and being ſo, would juſtly ſubject the property in queſtion to condemnation. I allude to the Mr. *Huſſeys*, whoſe reſidence in *France* is at leaſt queſtionable, and very ſufficient to provoke the queſtion, whether they are to be pronounced to have left that country, and to be pure *American* characters, without any ſtrong intermixture of *French* intereſt adhering to them. If I am ſatisfied that the claim is incorrect, in leaving out other *French* perſons, or theſe Mr. *Huſſeys*, (on whom at any rate a ſtrong taint and ſuſpicion of *French* character attaches); with an intent of diſguiſing their intereſt from the Court, I ſhall conſider it to be my duty to reject ſuch a claim altogether, as not erroneouſly but fraudulently incorrect. Amongſt the papers there is clearance on the affirmation made by *Mark Coffin*, in which he is repreſented as the owner; but other papers ſpeak of a plurality of owners. The agreement between *Dubaeque* and the maſter ſpeaks of "the owners and "their agents," and when I am given to underſtand that this maſter is the brother-in-law of *Mark Coffin*, it appears to be a ſingular miſtake for a perſon ſo intimately connected with him, to fall into, and amounts as nearly to a contradiction as any poſitions can do, that are not ſtanding in direct verbal oppoſition to each other. The maſter ſays, "that "*Mark Coffin* is the ſole owner;" but here again the

The Susa.

Dec. 3d, 1795.

depoſitions are more at variance than the papers; for I find the mate, ſpeaking on the authority of the maſter, ſays, "that there are other owners beſides *Mark* "*Coffin*; that he has heard and believes that the ſaid "maſter, together with two of his brothers which "were on board the ſaid ſhip, one as a mariner, the "other as a paſſenger, or ſome one of them, were "owners of the ſaid ſhip at the time ſhe was ſeized;" and to the 30th interrogatory, "that the maſter at "the time when this deponent was ſhipped, declared "to this deponent that he the ſaid maſter, and his "ſaid brothers, were the real, true, and only owners "of the ſaid ſhip." Theſe are ſtrong and emphatical words, and taking it to be as held out, that *Coffin* has an intereſt in her, ſtill they would go a great way to ſhew, that there are other owners. If I credit this man, and his right apprehenſion of the matter, I muſt hold theſe perſons to be the true owners; and it is to be obſerved, that the mate has no temptation to miſrepreſent; he is in a ſituation of ſome confidence, and appears totally diſintereſted, and gives a teſtimony, as far as I can judge, free from all imputation; whilſt the depoſition of the maſter bears ſtrong marks of what is called miſtake, but what other perſons muſt term a very diſingenuous manner of delivering a teſtimony. There is beſides an obſervation ariſing on the affirmation of theſe *Huſſeys*, that though they come from perſons deſcribed as *Quakers*, and as ſuch, allowed to have their affirmations received in this, and other Chriſtian countries, where that perſuaſion of men is admitted, yet the ſame perſons are certified by the conſul at *Dunkirk*, and by another perſon, the collector of the cuſtoms in *America*, as having

ing on other occaſions taken an oath. It is impoſſible for me to preſume ſuch an inaccuracy in public inſtruments; and therefore with all the reſpect that is due to religious tenderneſs of mind, this variance cannot but raiſe inferences to their diſadvantage. It muſt be allowed at leaſt, that there is ſomething in this diſagreement that calls loudly for explanation; and when I look at the diſingenuous account which the maſter has given of his former voyage, ſtating it to have commenced from *New Bedford*, though I am ſatisfied it began from *Dunkirk* and no where elſe; when I ſee the ſame inſincere account of the deſtination of the preſent voyage, not only in the clearance, but in the depoſition of the witneſſes, ſtating it to be "direct for *New York*," as if there was no real deſign of viſiting *St. Ube*'s, it is impoſſible for me, ſo left to pick the truth out, from people who will not tell it themſelves, to do otherwiſe than draw inferences ſtrongly to their diſadvantage.

The Susa. Dec. 3d, 1799.

If the Court was to attend merely to the balance of credit, it would be bound to give credit to the mate, when he ſays, that the maſter told him, "he and his brothers were the ſole owners;" it is impoſſible for me to find a ſolution for it in mere miſapprehenſion; it could not but be underſtood in the terms in which it was delivered. There is, beſides, ſomething in the agreement that points ſtrongly to an intereſt in theſe *Frenchmen*: If the *Huſſeys*, who are the brothers of *Coffin*, had the direction of the veſſel, and ſhe was actually quitting *Dunkirk*, how comes it, that Mr. *Dubaeque* is entering into an agreement with the maſter "for the owners and their agents." It has been made to appear by a let-

The Susa.

Dec. 3d, 1799.

ter that has been produced late in the cauſe, that *J. Huſſey* had the care of the ſhip committed to him by Mr. *Coffin*; but how does this agree with the appointment from the hands of theſe *French* merchants? How happened it, that *they* ſhould regulate the whole tranſaction after that; and that *they* ſhould aſſume the power of ſettling every thing reſpecting the concerns of the ſhip, — and moſt manifeſtly, providing for her return to *Europe?* All interference on the part of *Mark Coffin* is entirely excluded, and the whole matter is to be ſettled between the maſter and theſe *French* merchants in *Europe.*

Upon the whole, I cannot help ſaying that theſe are great difficulties; and although it is ſaid, that Mr. *Mark Coffin* does not appear to have been implicated in this part of the tranſaction; and though it is poſſible that they may have been thrown on the caſe, by the manner in which the party's agents in *Europe* have conducted themſelves, and that they might have admitted of explanations, if the whole truth had been ingenuouſly ſet forth; ſtill as the matter is now repreſented, it is loaded with difficulties. The ſhip is claimed for Mr. *Mark Coffin*, as the ſole proprietor, although the evidence of the caſe ſtrongly ſhews, that there are *French* intereſts behind, which are not ſufficiently diſcloſed; I have already ſaid what the conſequence of that would be: if the parties are diſſatisfied with my judgment, they muſt take the opinion of a ſuperior Court, if they think they can make out a more conſiſtent hiſtory: but, on the evidence by which I am to determine this caſe, I think myſelf warranted to condemn this ſhip.

(Inſtance Court.)

ROBINETT againſt THE SHIP EXETER.

Dec. 10th, 1799.

Suit of mate for wages: Defence, that he had been diſcharged for miſconduct: Sufficiency of defence not allowed, on proof of facts: Wages decreed, &c.

THIS was a caſe of a ſuit for wages, &c. againſt the ſhip *Exeter*, on behalf of *Robert Robinett*, who had been hired as mate in the ſervice of the ſhip in *Bombay* by the captain, and was afterwards, in proſecution of the voyage to *Europe*, forcibly diſcharged by him, from the ſervice of the ſaid ſhip at the iſland of *Columbo;* on a charge of incapacity, drunkenneſs, neglect, and diſobedience of orders. The demand was for 127*l.* as the balance of wages and expences incurred in returning to *Europe*.

JUDGMENT.

Sir *W. Scott.* — This is a ſuit brought by an officer of a ſhip, in the *Eaſt India* ſervice, for his wages; and it has been obſerved in the defence, that in this reſpect, officers do not come before the Court with ſo ſtrong a title to the indulgence and favourable attention of the Court, as common mariners; who are, from their ignorance and helpleſs ſtate, placed in a peculiar manner under the tender protection of the Court. But there are other grounds, on which officers are juſtly objects of equal attention, inaſmuch as an injury done to their character is of wider extent, and is attended with conſequences of a more

The EXETER. Dec. 10th, 1799.

ferious nature; mariners, if diſtreſſed in one ſervice, may eaſily obtain another, and a ſailor may remain a ſailor to the end of his days, as it is not uſual to be minute in the enquiry made into their characters. But if an officer is diſcharged for inſufficiency, it may not be eaſy for him to procure another ſituation; and he is in danger of loſing, not only his preſent footing, but more particularly thoſe proſpects of promotion, which depend in a great meaſure on the character, that has travelled along with him during his former employs, and has been the moſt valuable fruit of a life of ſervice. Theſe conſiderations are ſufficient to place officers alſo under the particular protection of the Court; at the ſame time this muſt not be ſo underſtood in either caſe, as if the Court would ſhew ſuch a blind indulgence, as ſhould over-rule the real juſtice of the caſe; it is only ſuch an indulgence as the equitable conſiderations of public utility require, which can ſeldom in ſuch caſes, any more than in others, be ſeparated from particular juſtice.

In this caſe the officer was hired in *Bombay*, to proceed in the ſervice of the ſhip to *London*; there is no difference about the agreement or terms of ſervice: but it is alledged in the defence againſt this demand, that the ſervice was not performed; on the other ſide it is ſaid, that he was at all times ready to diſcharge his ſervices till he was forcibly removed, which is to be conſidered in law as equivalent to the diſcharge; and on the part of the maſter, this act of removal is juſtified.

The queſtion before the Court will be then, to decide whether the charges are of a ſufficient nature to ſupport this refuſal, and whether they are ſupported by

The EXETER. Dec. 10th, 1799.

by ſufficient evidence. In the firſt place, I obſerve there is no general incapacity ſet up; ſuch a charge is introduced into the depoſition of Captain *Whitford*, indeed, but it makes no part of the plea. If a general incapacity had been ſpecially pleaded, and properly ſupported by the depoſitions of the maſter; this Court would find a difficulty in oppoſing the preſumption, ariſing from the opinion of a ſuperior officer. If that had been pleaded in the allegation, it muſt have been ſtrong evidence, that would have induced the Court to determine againſt ſuch a teſtimony. But if that had been pleaded, Mr. *Robinett* would have had an opportunity of defending himſelf; and he might have called forward the judgment of the former maſter with whom he ſailed, and by whom he was recommended to Captain *Whitford*, as well as that of others who were acquainted with his talents; as that has not been done; as this charge of general incapacity has not been put in iſſue in any manner, and conſequently Mr. *Robinett* has had no notice to defend himſelf againſt it, I muſt leave it entirely out of conſideration, and confine myſelf to the ſpecific articles, charging him with drunkenneſs, neglect of duty, and diſobedience. Theſe are certainly offences of a high nature, fully ſufficient to juſtify the diſcharge, if proved. In reſpect to the negligence, it would not be neceſſary to prove, that it was wilful negligence; it would be ſufficient if it appeared to amount to that habitual inattention to the ordinary duties of his ſtation that might expoſe the ſhip to danger; for the perſon in *Robinett's* ſtation ſtipulates againſt ſuch negligence.

The EXETER.

Dec. 10th, 1799.

Upon the matter of drunkenneſs, the Court will be no apologiſt for that; it is an offence peculiarly noxious on board a ſhip, where the ſober and vigilant attention of every man, and particularly of officers, is required. At the ſame time the Court cannot entirely forget, that in a mode of life peculiarly expoſed to ſevere peril and exertion, and therefore admitting in ſeaſons of repoſe ſomething of indulgence and refreſhment; that indulgence and refreſhment is naturally enough ſought by ſuch perſons in groſſer pleaſures of that kind; and therefore that the proof of a ſingle act of intemperance, committed in port, is no concluſive proof of diſability for general maritime employment. Another rule would, I fear, diſable many very uſeful men for the maritime ſervice of their country.

As to diſobedience to lawful command, it is an offence of the groſſeſt kind; the Court would be particularly attentive to preſerve that ſubordination and diſcipline on board of ſhip which is ſo indiſpenſably neceſſary for the preſervation of the whole ſervice, and of every perſon concerned in it. It would not, therefore, be a peremptory or harſh tone, or an overcharged manner in the exerciſe of authority, that will be ever held by this Court to juſtify reſiſtance. It will not be ſufficient that there has been a want of that perſonal attention and civility which uſually takes place, on other occaſions, and might be wiſhed, generally, to attend the exerciſe of authority. The nature of the ſervice requires, that thoſe perſons who engage in it ſhould accommodate themſelves to the circumſtances attending it; and thoſe circumſtances are, not unfrequently, urgent, and create ſtrong ſenſations, which naturally find their way, in ſtrong expreſ-

ſions

ſions and violent demeanor. The perſons ſubject to this ſpecies of authority are not to be captious, or to take exception to a neglect of formal and ceremonious obſervances of behaviour; and on theſe grounds the Court would hold, that the charges of this defence are *of a nature* ſufficient to juſtify diſmiſſal, if they are properly ſubſtantiated in evidence; although it might at the ſame time be proved that leſs perſonal civility had been uſed, than would excuſe ſomething of an heſitation of obedience, in other modes of life.

The next queſtion will be, what is the evidence; and on this point, it is unfortunate that Mr. *Whitford* is the only witneſs examined on the part of the defence. At the utmoſt Mr. *Whitford* can only have become competent to give evidence in this caſe, by having become a bankrupt; and he may have expoſed the property of his owners to danger, by not having taken the precaution to do, what ought always to be done, in a matter ſo tender as the diſcharge of an officer, — to call the attention of the paſſengers and crew to the circumſtances attending it, that the propriety of the act may be properly warranted, and vouched by as much evidence as poſſible. This not having been done, Captain *Whitford* is the only witneſs on that ſide; at any rate it muſt appear, that he would have an intereſt to defend the propriety of his own conduct; if unoppoſed, the Court would be inclined to preſume in favour of authority, ſuch being its proper and legal inclination; but oppoſed as he is, in this caſe, by two witneſſes, who are not affected by any intereſt, or otherwiſe liable to objection, it would be difficult to take his ſingle evidence in oppoſition to their united teſtimony. But the

The EXETER.

Dec. 10th, 1799.

the matter does not reſt on the credibility of theſe witneſſes; an objection has been taken to the competency of Captain *Whitford*; and although I permitted his evidence to be read, *de bene eſſe*, reſerving the objection, it was not from any doubt entertained, but becauſe I wiſhed to give it farther conſideration. The objection taken, is to the concluſion drawn from the 13th and 14th articles of the allegation on the part of the defence which plead—

" 13th, That the ſaid ſhip *Exeter*, together with " her tackle, apparel, and furniture, hath, ſince her " arrival in the port of *London*, from her aforeſaid " voyage, been ſold by the decree of this Court to " diſcharge the claim of the officers and mariners " belonging to her for their ſervice on board the " ſaid ſhip during the aforeſaid voyage; that after " payment of the juſt and legal claims of the ſaid " officers and mariners, there will remain about the " ſum of 4,000*l.* as the balance of the proceeds. " That there were juſt and legal claims of bottomree " and other bond holders on the ſaid proceeds to " the amount of 6,000*l.* and upwards, and on whoſe " behalf ſuch proceeds have been arreſted. That " two of the ſaid bonds, amounting reſpectively to " the ſum of 1,250*l.* and upwards, including intereſt, " were given by the ſaid Captain *Whitford* upon the " bottom of the ſaid ſhip, as a ſecurity for money " advanced at the *Cape of Good Hope*, in the proſe- " cution of her aforeſaid voyage, and are entitled to " a priority of payment to the other of the ſaid " bonds, which were given as a ſecurity for money " previouſly advanced at *Bombay*, and have been ſo " paid accordingly. That by payment thereof the " balance of the ſaid proceeds hath been reduced to " about

" about the ſum of 1,500*l.* being all that will re-
" main for the diſcharge of the ſaid laſt mentioned
" bonds, which amount together including intereſt
" to the ſum of 3,500*l.* or thereabouts.

" 14th, That the ſaid *Richard Whitford*, late
" commander and two-thirds owner of the ſaid ſhip
" *Exeter*, hath, ſince the arrival of the ſaid ſhip in
" the port of *London*, been declared under the great
" ſeal of *Great Britain* a bankrupt; and having con-
" formed himſelf in all reſpects to the ſeveral acts of
" parliament relating to bankrupts, on or about
" the 20th day of *October* laſt paſt, duly obtained
" his certificate, under the aforeſaid ſeal, and was
" and is hereby exonerated from all claims and de-
" mands whatever, which aroſe prior to the date of
" the ſaid certificate. That by reaſon of the premiſes,
" *he* the ſaid *Richard Whitford*, was and is a legal
" and competent witneſs to be produced, ſworn, and
" examined in this cauſe."

Perſonally exonerated he certainly is, but not exonerated as to the eſtate, about which he is ſtill liable to be examined. He has an intereſt ſtill remaining as to the ſurplus of the eſtate, and alſo as to the allowance which will depend on the payment that is made: till he has done more, therefore, than he has yet done, till he has releaſed all intereſt under the eſtate, and alſo the allowance; I have no doubt, upon the conſideration which I have been able to give the matter, and alſo on converſation with eminent perſons at the common law, that he is not a competent witneſs. Unleſs the defence, therefore, can be ſuſtained on Mr. *Robinett*'s own witneſſes, there is an end of this ſuit.—How do they depoſe?

As

The EXETER.

Dec. 10th, 1799.

As to his general conduct, Mr. *Urquhart*, who was one of the officers of the ship, says, "That during all "the time the said *Robert Robinett* continued on board "the ship, saving the time he was confined in his "cabin, as herein-before set forth, he did well and "truly perform his duty as second mate, and was "obedient to all the lawful commands of the said "*Richard Whitford* the master, and other his superior "officers on board;" and the second witness speaks in the same terms, and adds, "that he appeared al-"ways ready and willing to perform his duty." As to the charge of drunkenness, the first witness says, "he never saw any thing of the kind;" and the second witness, "that he never saw him in liquor but "on one occasion on *Christmas-day*, whilst the ship "was lying at *Bombay*:" this single instance is not, I think, sufficient to support the charge. I must observe too, that this witness *Eshington*, was the steward of the ship, and that it was part of the interrogatory addressed to him, "whether *Robinett* was not importunate *to* "*him* for liquor; and whether he did not complain "to Captain *Whitford*, that the said *Robinett* was "always applying to him for an extraordinary quan-"tity of wine and spirituous liquors;" to all which he answers in the direct negative, and says, "that "he never did apply to him for more wine and other "liquors than other officers were usually supplied "with; and that he the respondent never did make "any complaint to Captain *Whitford* on that score;" then, how is it possible to support this charge?

Next, as to negligence, it is not immaterial to observe, that in the note of dismissal from Captain *Whitford*, the only act of negligence specified, is the omitting

The EXETER.

Dec. 10th, 1799.

ting to take in the yawl, and by that means ſuffering ſome *Laſcar* ſailors to deſert; this was all that was ſpecified, and it does rather induce a belief that this was all that was taken notice of at the time, and that the reſt has been called in aid, as ſubſidiary matter, to make out the charge: Then what are the acts of negligence? The firſt inſtance of neglect is charged in theſe words, "That whilſt the ſaid ſhip *Exeter* "was off the gulph of *Manora*, in the proſecution "of her voyage from *Bombay* to *Colombo*, the ſaid "*Robert Robinett*, who was the officer upon watch, "notwithſtanding it was obvious a ſquall was ariſing, "neglected to take in her ſails, as was his duty to "have done, but ſuffered her to proceed in full ſail; "that upon Capt. *Whitford* coming on deck, he ex- "preſſed great diſpleaſure towards the ſaid *Robert* "*Robinett*, for ſuch his negligence, and ſaid to him, "if he were ignorant of his duty himſelf, he might "have ſeen was was neceſſary for him to do by the "ſhip *Nottingham*, which was ſailing in company "with the ſaid ſhip, and had then taken in all her "ſails; that notwithſtanding every exertion was "then uſed by the order of the ſaid Capt. *Whitford* "to take in the ſaid ſails, the topſails had been "(owing to ſuch the negligence of the ſaid *Robert* "*Robinett*) nearly carried away by the ſquall coming "on before they could be lowered." On this article Mr. *Eſhington* ſays that he cannot ſpeak, not being a judge of nautical matters, and having been, beſides, below during the time enquired of; and Mr. *Urquhart*, though he confirms the fact, except as to the danger of the topſails being carried away, ſays, "That

The EXETER.

Dec. 10th, 1799.

"That he did not consider Mr. *Robinett* to have "been guilty of any acts of negligence in the course "of the voyage, or to have betrayed any want of "nautical skill." This is all that is said; and I need not add that it is impossible for me to pronounce that the charge of neglect in this article is sustained on such evidence. The next charge is of losing the boat, and suffering five *Lascar* sailors to desert. It is charged in the allegation, "That the said *Robert* "*Robinett*, whilst he was in charge of the said ship "*Exeter*, as the superior officer on board, when she "lay at *Colombo*, on or about the 13th day of *Feb-* "*ruary* 1797, left her long boat at the buoy of an "anchor parted with some days before, together "with five *Lascars* belonging to the said ship, in her; "that at day-light the next morning it was disco- "vered that the said five *Lascars* had deserted with "the said long boat, a hawser, and three large "tackles; that it was five or six days before the said "long-boat was again found, when she was found at "*Point de Galle*, much damaged, and the hawser "and tackles had been taken out of her, and were "totally lost; that the said *Lascars* were never after- "wards discovered, nor did they, or either of them, "ever return to their duty on board the said ship." On this article the witness *Urquhart* says, "That "although Capt. *Whitford* did blame the producent "for leaving the long-boat in charge of the *Lascars*, "that he never heard any other officer on board im- "pute blame to the producent *Robinett* on that ac- "count, neither did he consider him to be blame- "able;" and the second witness says, "That the "said

" ſaid *Robinett* was not conſidered as groſsly neg- " ligent in loſing the long boat by the deponent, it " not being his duty to be on board at that time." I cannot ſay that the fact of imprudent conduct, or of negligent conduct, is in any way faſtened down on him in this inſtance.

The next charge is that, " whilſt the ſaid *Robinett* " was in charge of the ſhip, as ſuperior officer on " board, in *Colombo Bay*, he one night neglected to " have the yawl hoiſted in, as it was his duty to have " done, by which means ſeven other *Laſcar* ſailors " went on ſhore and deſerted. To this the wit- neſſes ſay, " that although it might have been proper " to hoiſt in the yawl at night, as it is uſually done, " that it is not an invariable rule."

The next inſtance of neglect is, " That the ſaid " *Robert Robinett*, whilſt he was in charge of the " ſaid ſhip *Exeter*, as the ſuperior officer on board, " as ſhe lay at *Colombo*, on or about the 14th day of " the ſaid month of *February* 1797, let go a ſecond " anchor; that Capt. *Whitford* the commander, " when he came on board the ſaid ſhip on that day, " obſerved that the ſame croſſed the cable, by which " the ſaid ſhip was originally riding, and ordered the " ſaid anchor to be immediately weighed; that the " ſaid cable upon its coming in, was found ſo much " chafed from want of proper ſervice on it, as to " render it abſolutely neceſſary to cut it off, about " ten fathom from the clinch; that it was the duty " of the ſaid *Robert Robinett*, as the officer in charge, " to have ſeen that proper ſervice had been put on " the ſaid cable, and that he was guilty of a groſs " act

The EXETER.

Dec. 10th, 1799.

" act of negligence on ſuch occaſion, and thereby " greatly endangered the ſafety of the ſaid ſhip, and " the property of the owners; that if the ſaid ſhip " had ſuſtained any damage by the breaking of the " ſaid cable, ariſing from its being chafed as afore- " ſaid, the underwriters would have been exonerated " from payment thereof under the policy of in- " ſurance." The only witneſs that ſpeaks to this article is *Urquhart*, and the account which he gives is very material. He ſays, " That it was the duty " of *Robinett*, as the officer in charge, to ſee that " proper ſervice was put on the cable which he " believes was done at firſt; but as the producent " *Robinett* was then the only officer on board except " the chief mate who was confined by the captain, " and this reſpondent who was ill, it was impoſſible " for him to pay conſtant attention to the cable, " and the accident of the chafing was owning to the " inattention of the black gunner who was in charge " thereof, whilſt the producent went to ſleep." Adverting, as I muſt always do, to the circumſtance of Mr. *Robinett* being the only officer on board, and to the ſurplus duty that he had to perform in conſequence of being ſo; and finding that the black gunner was on that account appointed to aſſiſt him, and that the chief imputation thrown on him was, that he did not ſee that the black gunner did his duty whilſt he went to reſt, it is impoſſible to ſay that this perſon is affected with the charge of negligence on this account.

I come next to the charge of diſobedience, which I have ſaid is of a very malignant nature in the eye of

The EXETER. Nov. 28th, 1799.

of the Court, and which the Court would upon every conſideration be diſpoſed to diſcountenance. But the only command upon him that I ſee, which was diſobeyed, was an order to leave the ſhip: and although I do not ſay, that a maſter has not a right to give a diſcharge, and if the perſon ſo diſcharged refuſes to quit the ſhip, that he might not turn him out, being reſponſible for his conduct in ſo doing; yet this muſt always be underſtood to be ſubject to reſponſibility on the queſtion of the propriety of the diſcharge; becauſe it could never be maintained in the *Engliſh* maritime ſervice, that if a maſter choſe to turn a mariner on ſhore, without cauſe, in a foreign country, the mere refuſal to go would of itſelf juſtify an improper diſcharge. The propriety of the refuſal in ſuch a caſe muſt depend entirely on the propriety of the order, and that muſt depend almoſt entirely upon its neceſſity, for little leſs than abſolute neceſſity is required to bear out ſuch an order. That a perſon ſhould be a little averſe to be turned aſhore on this remote iſland, which though in *Engliſh* poſſeſſion is in truth a *Dutch* ſettlement, cannot be matter of ſurprize: it is eaſy to ſay, that it was his duty to obey, and fight his way home, and ſeek redreſs from a court of juſtice here; but that the perſon ſhould feel a little unwilling to be turned adrift, in this remote and foreign ſettlement, is not to be wondered at; and I cannot think his expreſſing a diſinclination can be conſidered to conſtitute an offence of mutiny or poſitive diſobedience.

On the whole, I am of opinion, that the evidence of Captain *Whitford* is not admiſſible, and that on the evidence of the other witneſſes I am in no degree

The EXETER.

Nov. 28th, 1799.

warranted to say that the charges set up as the defence to this suit are made out. I must, therefore, pronounce for the demand of wages, and the expences which have been incurred in the course of this suit to recover them.

Dec. 10th, 1799.

THE CAPE OF GOOD HOPE and its Dependencies.

Claim of joint capture, by *East India* ships carrying troops to the *Cape of Good Hope*, and asserting to have contributed to the capture, by intimidation occasioned by their appearance, not allowed: Nature of the *association* by which transports can entitle themselves, as joint captors.

THIS was a case of an allegation given on the part of the Admiralty, claiming an interest in the capture of the *Cape of Good Hope*, in virtue of several non-commissioned *East India* ships, asserted to have assisted in that enterprize.

In support of the allegation, the Advocate of the Admiralty and Laurence. — It is scarcely necessary to call the attention of the Court on this question to any other evidence than the letter (*a*) of Lord *Keith*, written *in recenti facto*, which acknowledges in the

---

(*a*) "To the officers and seamen of the honourable company's ships in *Symons Bay*.

"However unnecessary it may appear to true *Britons* to thank them for services rendered to their country, yet the particular situation of the Admiral must excuse his doing so, because he feels himself personally obliged by the ready attention of the officers and seamen of the *India* ships, in assisting their brethren *so essentially, as greatly* to contribute towards the fortunate event of the reduction of this valuable colony.

"*Monarch, Symons Bay*, 16th *Sept.* 1795."

fullest

fulleſt terms the ſervices of theſe ſhips, and the great aſſiſtance they afforded towards the reduction of the colony. The terms of this letter are ſo ſtrong, and go ſo directly to ſupport the ſubſtance of the demand, reſulting from the actual aſſiſtance afforded by theſe ſhips, that it is hardly neceſſary to detail more at large the nature of the ſervices, and the particular advantages that were derived from them. The immediate effect of their aſſiſtance will be found, however, ſtated more particularly in the letter written from General *Craig*, in theſe terms: "On the one hand as the enemy appears numerous, and diſpoſed to an obſtinate defence, for which they had ample time to make the beſt preparations, I could not but be ſenſible that the force under my command was, in point of numbers, inadequate to the attempt of reducing them." And again, "In a conference with Sir *G. Elphinſtone*, on the 2d of *Sept.* it was agreed to wait ſix days longer for the poſſibility of the arrival of General *Clarke*, and that if he did not appear by that time, I ſhould then advance under every diſadvantage of numbers and ſituation, try the fortune of an attack, which however hazardous, we deemed it our duty to make, before the total failure of our proviſions put us under the neceſſity of ſeeking a ſupply elſewhere. On the morning of the third, however, the enemy encouraged by the little ſucceſs which had attended our attempt on the firſt, meditated a general attack on our camp, which, in all probability, would have been deciſive of the fate of the colony. They advanced in the night with all the ſtrength they could muſter, and with a train of not leſs than eighteen field pieces; ſome movements which had been obſerved

The Cape of Good Hope.

Dec. 10th, 1799.

The Cape of Good Hope.

Dec. 10th, 1799.

ſerved the preceding evening had given me a ſuſpicion of their intention, and we were perfectly prepared to receive them. They were on their march, and conſiderable bodies began to make their appearance within our view, when at that critical moment the ſignal for a fleet firſt diſconcerted them, and the appearance of fourteen ſail of large veſſels, which came in ſight immediately after, induced them to relinquiſh their enterprize, and retire to their former poſts." It is ſtill farther material to obſerve that the effect of this arrival was not matter of accident merely; the ſhips ſailed from *St. Salvador*, on this particular enterprize, in conſequence of the immediate application of General *Craig*, ſent from the *Cape* to *St. Salvador*, on the coaſt of *Brazil*, for the expreſs purpoſe of haſtening the arrival, as he did not think it prudent to begin the attack, on the ſettlement of the *Cape*, till he was reinforced. Theſe facts being eſtabliſhed beyond contradiction by the acts of the commanding officer, do, it is ſubmitted, amount to that proof, which in ordinary caſes of claims on the part of non-commiſſioned ſhips, is required of them to make out their caſe. The *onus probandi* being taken off from them, and the facts being ſupplied by the *captors*, it becomes a caſe not merely of conſtructive ſervice, but of *actual aſſiſtance*, and the only queſtion is, how far it will *in law* entitle them to ſhare. By analogy to former caſes, it comes within a recognized principle; for this Court has gone ſo far as to allow non-commiſſioned ſhips to ſhare in caſes of *actual* aſſiſtance. In the caſe of the *Twee Geſuſters*, *Cooman*, in the laſt war, the act of joint chaſing was allowed to amount to this aſſiſtance, although the non-commiſſioned ſhip did not come up till after the capture

Vid. infra, p. 284.

capture had been effected. In the case of the *Le Franc** also, the non-commissioned ship was allowed to share; and therefore the principle of law being admitted, that associated actual services are of a competent nature without a personal interposition in the act of capture; it can hardly be denied that the acts of assistance rendered in this case are sufficient to entitle the parties to the application of it. It is admitted that one of the ships, the *Bombay Castle*, is entitled to share, as having been detached on a particular service, to make a diversion on the side of *Table Bay*. But it will be difficult to make this admission, without allowing the whole claim, because it was only by means of a draft from each of the other ships, of twenty men, by order of Lord *Keith*, that this ship was enabled to act; and the manner of making this draft goes strongly to shew the character in which these ships were received; for it was made not in the manner of volunteering merely, but under an order from Lord *Keith*, directed to Capt. *Rees*, the commanding officer of the *East India* company's ships, to supply the necessary men. It had been before intimated from Lord *Keith*, that all orders to the crews of the *East India* company's ships should be directed to him: he was admitted to the Council. The ships were particularly directed to wear pennants, which is in itself, according to the opinion of a distinguished naval Officer, an acknowledged mark of an adoption into the military character; and the whole mode of intercourse at the time, shews, that they were considered in the nature of a combined force.

*Dec. 10th, 1799.

*Vid. infra, p. 285.

Vid. infra, p. 288.

That non-commissioned ships are capable of being considered in the light of an associated force, is clear

The Cape of Good Hope.

Dec. 10th, 1799.

from the precedents that have been cited; all the intimidation that can in any case be derived from an associated force, was produced in this instance; it was the cause that induced the enemy to relinquish their hopes of defence; it was materially instrumental to the surrender that took place; and therefore the Admiralty is, by virtue of the services of these ships, entitled to share in this prize.

Against the allegation, the King's Advocate, and Arnold.—The capture is admitted to have been made by a conjoint force, under the special instructions of His Majesty; therefore, if a claim was set up to partake in this capture, on the part of private ships of war, *actually commissioned against the Dutch*, it would be incumbent on them, to make out a case of active *co-operation* and *assistance:* This, it is apprehended, was fully settled, in a case much agitated in another place, the case of the capture of *Negapatam* by Sir *Edward Hughes;* in which a similar question was discussed, whether the ships claiming to share, were, under the circumstances of that case, to be considered in a military character, or as transports? It was then fully established, that ships in the character of transports *cannot* share. But it is said that this case stands on different grounds, on an associated military character, and intimidation produced on the enemy: the association is by no means proved; it rests upon the claimants to make that clear; and as to intimidation, it was only in the character of transports, that the ships in question could possibly produce any intimidation—as ships of war, they were useless. There were, at that time, six or seven men of war, as many as could be used,

Lords, 22d March, 1792.

The Cape of Good Hope.

Dec. 10th, 1799.

lying in *Symons Bay*, under the command of Lord *Keith*. In what way could they then produce intimidation, as ships armed and appointed as ships of war? The *Dutch* were lying at some distance, between *Symons Bay* and *Cape Town*. General *Craig*'s letter to Lord *Keith* states, "that he was in a critical situation, and disposed to wait six or seven days longer;"—not for ships, because Lord *Keith* was there in force, with a sufficient number of ships of war, but for troops in ships acting as transports. The intimidation, therefore, is out of the question, as to their military character. But it is said they were treated in that character, from the moment of their arrival; that having hauled down their pennants, they were desired to hoist them again. As far as respect and honourable treatment is concerned, that might be a distinction; but as a mark of character, that circumstance is wholly immaterial, and equivocal; and, to all legal effects, they remain transports still. It is said that they received all orders through their commodore, Captain *Rees*; but even in this respect, the orders are not issued in the same form as to ships of war; for it is stated by Captain *Rees*, "that exclusive of a number of men sent with the *Bombay Castle*, he did, in pursuance of an address received from Lord *Keith*, which he desired to be circulated through the fleet, for *the purpose of procuring volunteers*, procure twenty men from each ship, amounting to 240 men, &c." This is not like the order issued to men of war:—But much reliance is placed on Lord *Keith*'s letter; and it is said, that the thanks are addressed, not only to the volunteers, but to all the fleet generally. If this letter stood alone, unexplained, and receiving no construction from the facts

The Cape of Good Hope.

Dec. 10th, 1799.

before the Court; it might lead to an inference, that all the ships were equally entitled; but this is only a general expression of thanks in the hour of triumph, and cannot controul the particular evidence in the cafe, on the points pleaded in the allegation. Lord *Keith* had no power to give an intereft, beyond what the facts pleaded can fuftain. In cafes of non-commiffioned veffels, no claim of mere conftructive affiftance can be admitted; no active co-operation, in any degree, bearing upon the capture in queftion, can refult from the facts pleaded in this allegation; and therefore it is hoped the Court will reject this claim at once, by not admitting the allegation to go to proof.

JUDGMENT.

Sir *W. Scott.*—This queftion arifes on the claim of certain *Eaft India* fhips, or rather of the Admiralty on their behalf, to fhare in the capture made at the *Cape of Good Hope*. It appears by reference to the gazettes, and in the allegation, and in all the evidence, as far as it is neceffary for me to ftate it, that thefe fhips were employed to carry a number of troops to the *Cape of Good Hope*. The greateft part of the naval operations, neceffary for the reduction of that colony, had been performed, before the arrival of thefe fhips; and there appears to have been only one particular piece of military fervice performed on the part of the navy after their arrival, and on which only one of thefe fhips was employed; that veffel will undoubtedly be allowed to fhare; as to the reft, although it muft be admitted, on all fides, that the *Eaft India* Company have performed fervices, in refpect to this expedition, which may entitle them

to

The Cape of Good Hope.

Dec. 10th, 1799.

to the thanks of their country; yet the queſtion of legal merit, whether they will be entitled to ſhare in the proceeds of this prize, will depend on very different conſiderations.

It is not ſtated in what way the agreement was made with theſe ſhips, whether it was to act in a military capacity or not; if it was to act in a military character, that might nearly decide the queſtion. But nothing is ſaid on this ſubject in the plea, and therefore I muſt infer, that no ſuch ground of pretenſion could be ſuſtained. All that is ſaid is "that they carried out General *Clarke* and his troops." It is perfectly clear, that at the time of leaving the coaſts of *Braſil*, it was perfectly unknown to theſe ſhips for what attack theſe troops were conveying: —Whether, by virtue of their contract, they were to ſtay at any place, or come away after the troops were landed at ſuch place, is wrapped in complete ſilence; and therefore, for want of any more particular deſcription, I can look only to their general character; which is that of merchant veſſels, commiſſioned againſt the *French*, but having no commiſſion againſt that enemy who was the particular object of this expedition; whatever their force may have been, I do not ſee that they can be conſidered in their original character, as more than tranſport veſſels, liable to be called upon occaſionally to act, with alacrity and vigor; (for *Britiſh* veſſels, of any character, are liable to be ſo called upon on extraordinary occaſions of public neceſſity;) but not deriving from that circumſtance, as far as this expedition was concerned, any title to inveſt them with a military character; for the mere conveyance of troops would have no ſuch effect. At the ſame time, it is true, that a military character

The Cape of Good Hope. Dec. 10th, 1799.

character might be afterwards impreſſed upon them, by the nature and courſe of their ſubſequent employment. If they have been aſſociated to act, in conjunction with the King's fleet, and did ſo act, they may acquire an intereſt, which, on proper application, will be ſure to meet with due attention. The queſtion, for me to conſider, then will be, whether they have acquired that military character or not? Their pretenſions have been put on ſeveral grounds; it is firſt ſaid, that they were aſſociated with the fleet; mere aſſociation will not do, the plea muſt go farther, and ſhew in what capacity they were aſſociated, and that capacity muſt be directly military. Tranſports are aſſociated with fleets and armies for various purpoſes, connected with, or ſubſervient to the military uſes of thoſe fleets and armies. But if they are tranſports merely, and as ſuch are employed ſimply in the tranſportation of ſtores or men, they do not riſe above their proper mercantile character in conſequence of ſuch an employment; the employment muſt be that of an immediate application to the purpoſes of direct military operations, in which they are to take a part.

It is next placed, on the ground of intimidation; and it is ſaid, that when the enemy is *proved* to have been intimidated, where it is not matter of inference, but of *actual proof*; the aſſiſtance ariſing from intimidation is not to be conſidered as conſtructive merely, but an actual and effective co-operation. But I take that not to be quite correct; for an hundred inſtances might be mentioned in which actual intimidation might be produced, without any co-operation having been given. Suppoſe the caſe of a ſmall frigate, going to attack an enemy's

The CAPE OF GOOD HOPE.

Dec. 10th, 1799.

enemy's veſſel, and four or five large merchant ſhips, unconſcious of the tranſaction, ſhould appear in ſight; they might be objects of terror to the enemy, but no one would ſay, that ſuch a terror would entitle them to ſhare; though the fact of terror was ever ſo ſtrongly proved, there would not be that co-operation, nor that active aſſiſtance which the law requires, to entitle non-commiſſioned veſſels to be conſidered as joint captors. What is the intimidation alleged?—"That "the *Dutch* forces were about to make an attack on "the *Britiſh* army, but on the appearance of theſe "fourteen ſhips, deſiſted." This was an intimidation, of which the ſhips were totally unconſcious; and which would have been juſt as effectually produced by a fleet of mere tranſports; and I ſee no principle on which I could pronounce theſe ſhips entitled, on which I ſhould not be alſo obliged to pronounce any fleet of merchantmen entitled in a ſimilar ſituation; for any number of large ſhips, known to be *Britiſh*, and not known to be merchantmen, would have produced the ſame effect. The intimidation was entirely paſſive, there was no *animus* nor deſign on their part, nor even knowledge of the fact; for it was not till the next day, when their commodore returned from Lord *Keith*, that they knew any thing of the matter, or ever thought of the terror that they had aſſiſted in exciting. I take it to be uncontrovertibly true, that no caſe can be alleged in which a terror ſo excited, has been held to enure to the benefit of a non-commiſſioned veſſel. Another ground on which it is put, and which it may be proper for me to advert to, is the ground of analogy. That it is a caſe of aſſiſtance, analogous to that of joint chaſing, on which it is ſaid to be ſufficient, if the non-commiſſioned

The Cape of Good Hope.

Dec. 10th, 1799.

miſſioned ſhip puts itſelf in motion: and the caſes of the *Twee Geſuſter* (a) in the laſt war, and the *Le Franc*,

(a) This was a caſe of a *Dutch* ſhip, taken 31ſt *Dec.* 1780.

The circumſtances of the caſe were, that on the morning of the 31ſt, the prize in queſtion, of 300 tons and 36 men, was diſcovered by two armed cutters, the *Providence* and *Spitfire*, each manned with 16 men, (the *Providence* being commiſſioned, and the *Spitfire* not commiſſioned, againſt the *Dutch*,) when they immediately chaſed; the *Providence* firſt reached the prize; the *Spitfire* being then diſtant about one *Engliſh* mile, ſoon afterwards came up, and immediately afterwards the prize was ſeized by the *Providence* and the *Spitfire*; her priſoners and papers ſecured, ſome in the *Providence* and ſome in the *Spitfire*; and the maſter of the *Spitfire* was put on board the prize, with ſeveral men, and the *Providence* left the prize with the *Spitfire* to convey her to *Dartmouth*.

Theſe facts were acknowledged, and the *Spitfire* was allowed to have been a joint chaſer by the *Providence*.

The ſentence of the Judge of the High Court of Admiralty, 21ſt *June* 1783, pronounced the *Providence* to be *the captor*, but that the *Spitfire was aiding and abetting*; and decreed the *Spitfire* to take half the ſhare ſhe would have been entitled to, had ſhe had a commiſſion againſt the *Dutch*.

This part of the ſentence being appealed from, on the part of the *Providence*, the Proctor of the Admiralty intervened, 15th *Feb.* 1785, and prayed, that ſuch part of the prize as the *Spitfire* would have been entitled to, if commiſſioned, might be condemned as a droit of Admiralty.

On the 8th of *March* 1785, the Lords of Appeal pronounced for the intereſt of the King, in his office of Admiral; and that ſuch proportion of the prize as would have belonged to the *Spitfire*, if commiſſioned, was liable to confiſcation as a droit and perquiſite of Admiralty, and condemned the prize "*as taken by the private ſhip of war the Providence, and the non-commiſſioned ſhip the Spitfire*;" and directed the ſame to be ſhared in proportion accordingly.—Preſent,

Lord *Camden*,
Lord *Grantly*,
Sir *Joſeph Yorke*,
Sir *Lloyd Kenyon*, Maſter of the Rolls.

A cir-

Franc (*b*), have been relied upon.—I see no ground on which the analogy can be supported: the cases cited

The CAPE OF GOOD HOPE.

Dec. 10th, 1799.

A circumstance not unworthy of notice in this case, though not affecting the judgment, was, that it was stated on the part of the *Spitfire*, "that on the commencement of hostilities against the *Dutch*, the owners of the *Spitfire* fitted her out as a private ship of war, sent her on a cruise against His Majesty's enemies, and applied for letters of marque: that the commissioners of the Admiralty granted a warrant to the Judge of the Admiralty to issue letters of marque and general reprisal against the *Dutch*, to *Tessier* the master of the *Spitfire*, on the 29th of *December* 1780; but by reason of the then great flood of business in the Admiralty Court, the letters of marque could not be obtained under seal, till the first day of *January* 1781, and that this capture was made on the 31st *Dec.*"

This was stated among other points, in the *præsertim* of appeal: but the claim of the non-commissioned captor was not allowed. —From which it appears, that the endeavours of the party to obtain his commission, aided even by the warrant of the Lords of the Admiralty for its passing, will not be sufficient to vest any interest on intermediate captures, till the commission is actually issued.

(*b*) The *Le Franc, Caspé* master.

This was a *French East India* ship taken by several vessels, composing part of a *British East India* fleet, 24th *June* 1793.

Of the ships in question, the *Glatton*, Capt. *Drummond*, had not taken out a letter of marque; the others were commissioned as private ships of war.

On the part of the *Glatton* an appearance was given, praying a decision on the interests on the question of law. The facts being admitted on all sides, "that she was not a commissioned ship, and that she was materially instrumental to the capture," the Proctor of the Admiralty appeared for the King in his office of Admiralty, praying that such proportion of the prize in question as would have been condemned to the *Glatton*, if she had been a commissioned ship, might be pronounced liable to confiscation to the King in his office of Admiralty, as a droit and perquisite of Admiralty.

The sentence of the High Court of Admiralty condemned the prize, as taken by six private ships of war, *and the Glatton*, but condemned

The Cape of Good Hope.

Dec. 10th, 1799.

cited were of a very different nature; in both of them the non-commiſſioned ſhips chaſed *animo capiendi*,

condemned the *Glatton*'s ſhare as a droit and perquiſite of Admiralty.

The facts, as to the ſituation and merits of the *Glatton*, are thus repreſented in the words of the certificate of the commanders of the ſix private ſhips of war, preſented to the Lords of the Admiralty, annexed to the memorial on the part of the *Glatton*, praying to be rewarded.

'We, the ſubſcribed commanders of the ſix duly commiſſioned private ſhips of war, which with the non-commiſſioned ſhip *Glatton*, *Charles Drummond* commander, captured the *French* prize *La Franc*, do hereby certify, that at day-light on the 24th of *June* 1793, the *Glatton* was from 10 to 15 miles to windward of our ſhips, and at the ſame time the prize was upon the *Glatton*'s weather quarter, diſtant about three miles ſteering to the northward; Captain *Drummond* thereupon (ſuppoſing her to be an enemy) kept the wind until he found the *Glatton* could weather her, and then wore, and chaſed the prize until ſhe was brought to by the *Ceres* and ſome of the other ſhips: And we do further certify, that had the *Glatton* not been to windward, it would have been impoſſible for the other ſhips to have come up with the prize, as when ſhe had diſcovered the ſhips to leeward, ſhe might have kept to windward and got off, had ſhe not been prevented by the *Glatton*. Witneſs our hands, the 25th day of *March* 1795."

In the ſame caſe a claim was given for the *Barwel*, and ſeveral other ſhips of this fleet, ſtating, "that they ſailed as an *aſſociated* and *confederated* fleet, for mutual defence, by particular direction of the *Eaſt India* company; that they were altogether on the evening of the 23d *June* 1793; that during the night ſome of the ſhips had ſeparated; that on the morning of the 24th about ſix o'clock, the *Barwel* perceived one of the ſaid ſhips to the eaſtward; that the commodore made ſignal to the *Barwel* to chaſe; that after chaſing three hours, ſhe came completely in ſight of the ſaid ſhips that had ſeparated, and when ſhe came up with them, &c. ſhe found they had taken the prize in queſtion."

The claim on the part of theſe ſhips was rejected

and

The CAPE OF GOOD HOPE.

Dec. 10th, 1799.

and contributed materially, in the case of the *Le Franc*, directly and immediately, to the act of capture. In the present case, these ships approached, it is true, the coast of the *Cape of Good Hope*, but with no *animus capiendi*, with no hostile purpose entertained by themselves; for they were totally ignorant of the objects of the expedition. It is moreover obvious to remark, that all cases of joint chasing at sea, differ so materially from the cases of conjunct operations at land, that they are with great danger of inaccuracy applied to illustrate each other. In joint chasing at sea, there is the overt act of pursuing, by which the design and actual purpose of the party may be ascertained; and much intimidation may be produced: but in cases of conjunct operations at land, it is not the mere intrusion even of a commissioned ship, that would entitle parties to share. The words of the act of parliament direct, "That in all conjunct expedi- "tions of the navy and army, against any fortress "upon the land, directed by instructions from His "Majesty, the flag and general officers, and com- "manders, and other officers, seamen, marines, "and soldiers shall have such proportionable interest "and property as His Majesty, under his sign manual "shall think fit to order and direct." The interest of the prize is given to the fleet and army, and it would not be the mere voluntary interposition of a privateer that would entitle her to share. It would be a very inconvenient doctrine, that private ships of war, by watching an opportunity, and intruding themselves into an expedition, which the public authority had in no degree committed to them, should be at liberty to say, "we *will* co-operate;" and that they

The Cape of Good Hope.

Dec. 10th, 1799.

they ſhould be permitted to derive an intereſt from ſuch a ſpontaneous act, to the diſadvantage of thoſe to whom the ſervice was originally entruſted. Expeditions of this kind, deſigned by the immediate authority of the ſtate, belong excluſively to its own inſtruments, whom it has ſelected for the purpoſe; and it might be attended with very grave obſtruction to the public ſervice of the country, if private individuals could intrude themſelves into ſuch undertakings, uninvited and under colour of their letter of marque. I think, therefore, that the caſes of chaſing at ſea, and of conjunct operations at land, ſtand on different principles; and that there is little analogy, which can make them clearly applicable to each other. It is next ſaid, that they were directed to hoiſt pennants; and that it was the opinion of a very high military (*a*) officer, in a former caſe, that the permiſſion to wear the pennant did give the character of a king's ſhip: but the deciſion, in the very caſe in which that opinion was offered, (in the capture of *Negapatam*), held that a ſhip, which in that caſe had worn a pennant, was not to be conſidered in a military character, but as a tranſport; the mere circumſtance therefore, that theſe ſhips, which were large ſhips, and had before carried pennants, and had taken them down only out of reſpect to the king's ſhips, and

(*a*) The Advocate of the Admiralty had ſaid during the cauſe, that in the caſe of *Negapatam*, he had waited on Lord *Hood*, and had received his Lordſhip's authority to ſtate it, as his opinion, "That the permiſſion of the admiral of the fleet to merchant veſſels to wear pennants, was conſidered as an act, adopting them into the king's ſervice, for that occaſion."

were

were defired to hoiſt them again, I cannot hold to be a ſufficient proof that they were by that act taken and adopted into the military character; I can attribute no ſuch effect to a mere act of civility and condeſcenſion.

In the next place, it is argued, that theſe ſhips were actually employed in military ſervice, although there is no ſuch averment in the plea. It comes out in evidence only, (by which I muſt obſerve the other party is deprived of the opportunity of counterpleading,) that their boats were employed in carrying proviſions and military ſtores on ſhore: that was a ſervice certainly, but not a ſervice beyond the common extent of tranſport duty. They landed them, probably, at the ſame time with the troops for whoſe uſe they were intended; and if not at the ſame time, ſtill it is no more than what they were bound to do with the ſtores and proviſions they carried.

It is likewiſe ſaid, that they received military orders; and if that fact was ſufficiently proved it might be material; but it is obſervable, that not a ſingle order is pleaded in the allegation, except in reſpect to the *Bombay Caſtle*: that veſſel, it appears, was ſent under military orders to create a diverſion; and I think I do not give too much to that ſhip, when I ſay, that this circumſtance was ſufficient to cloath her with a military character, being engaged in a military employment and expoſed to danger: but it is argued, that becauſe orders were given to man this ſhip by detachments from the reſt, that it will make the whole fleet entitled to be conſidered as acting likewiſe in a military capacity. Taking it upon the argument, that this was done by orders directly

The CAPE OF GOOD HOPE.

Dec. 10th, 1799.

from Lord *Keith*, I cannot think it would have that effect; for in the firſt place, can it be denied, that a commander in chief might exerciſe a power of impreſſing a number of their crews, without giving to thoſe ſhips any thing of a military character? It is within the power of commanders on maritime expeditions, to preſs perſons of that deſcription to aſſiſt in any particular ſervice, in ſuch a caſe of public emergency. But no ſuch orders are pleaded, nor by any means proved to have been given: The communication was carried on between Lord *Keith* and one particular perſon, Captain *Rees*, in the ſame manner as it would have been done, if they had been mere tranſport-veſſels; and the only order mentioned was, that the crew of the *Bombay Caſtle* ſhould be increaſed.

The next military orders that are relied on, are thoſe for a draft of twenty men from each ſhip, for the purpoſe of drawing the artillery, &c. and I think the ſame obſervation would apply to theſe alſo; for I have no heſitation in ſaying, that in a remote expedition like this, the commanders of His Majeſty's forces have a right to call into their ſervice, for ſuch purpoſe, the aſſiſtance of *Britiſh* mariners; and I hope and truſt, the time will never come, when *Britiſh* mariners will think they are called beyond the line of their duty, when they receive an order to that effect. The fact is, that it was done rather by invitation, as a better mode of doing it, and the words of Captain *Rees*'s depoſition deſcribe it, as an addreſs for volunteers, rather than as an exerciſe of authority and command. Theſe are the whole military ſervices, with the exception of thoſe indefinite

ſervices,

The CAPE OF GOOD HOPE.

Dec. 18th, 1799.

ſervices, on which much argument has been beſtowed; I mean thoſe referred to in Lord *Keith*'s letter; in which Lord *Keith* acknowledges, that theſe tranſports had contributed to the ſurrender. In the firſt place, a letter of that kind, written in the moment of victory, ſhould not be too ſtrictly interpreted as conveying any opinion of the writer, on the minute parts of the tranſaction; Taking it, however, to be as argued, that it *does* ſhew his ſentiments at that moment on the matter; it is by no means concluſive upon the queſtion. It might be erroneous in fact; much leſs can it be conſidered as concluſive in point of law.—Lord *Keith* is not the only party: on the facts, it is not concluſive againſt *others*: and on the law, it is not concluſive againſt himſelf; for if he ſhould be found to be miſtaken, as to the legal effect of ſuch ſervices, who would ſay that he would be concluded by this admiſſion? However, looking at the letter carefully, I do not ſee that Lord *Keith* might not have written juſt in the ſame manner to a fleet of tranſports doing their duty with alacrity and zeal, as a general expreſſion of thanks for the performance of thoſe ſervices, in which they had been reſpectively employed.

Upon the whole of theſe facts, I feel myſelf obliged to pronounce, that it has not been ſhewn that theſe ſhips ſet out in an original military character; or that any military character has been ſubſequently impreſſed upon them by the nature and courſe of their employment; and therefore, however meritorious their ſervices may have been, and however entitled they may be to the gratitude of their country, it will not entitle them to ſhare in this valuable capture.

Dec. 16th, 1799.

THE FRAU MARIA, JANSEN Maſter.

Commiſſion of appraiſement and ſale is an inſtrument, in the firſt inſtance, taken out by captors: They *primarily* anſwerable for the expence, &c.

THIS was a caſe of a motion for a new commiſſion of appraiſement on the part of the claimant, on ſuggeſtion that the former commiſſion had not been executed by the marſhall; as he had refuſed to return the commiſſion till his expences were paid. It was ſaid, that the commiſſion of appraiſement was an inſtrument taken out by the captors, and therefore that the expences ought to be paid, in the firſt inſtance, by them; that the cauſe of this delay had been unknown to the claimants, that they would have been ready at all times to advance the expences to have prevented the delay, by which the cargo had ſuſtained a deterioration of 40 *per cent.*

The King's Advocate reſiſted the motion, ſaying—That the delay complained of could not have happened but by the laches of the claimants, who were the perſons to look to the due execution of the commiſſion.

Court.—It muſt be allowed, I think, that the parties in this caſe are, *in pari delicto:* but I am deſirous of laying down ſome rule to prevent the ſame inconvenience from happening in future. I am of opinion, that the captor is the perſon who is to make the payment in the firſt inſtance. He is the perſon who puts the commiſſion into the hands of the officer, and

and defires him to execute it. By whom are the other fees of office paid?

The FRAU MARIA.

Dec. 16th, 1799.

Regiſtrar.—By the captor.

Court.—Then what ground is there to pretend there ſhould be any diſtinction? That the claimant may be ultimately intereſted, is a matter of future conſideration. It may be proper that the captor ſhould be indemnified; but I am of opinion that the captor is anſwerable in the firſt inſtance, and I cannot conceive that the marſhall is bound to look elſewhere. Where it is done for the accommodation of the claimant, that will be a matter to be ſettled between them: but I ſhall certainly hold, that the captor is liable for the expences in the firſt inſtance, though they may be ultimately to be divided between both parties. I ſhall direct a new appraiſement in this caſe; and as the commiſſion is prayed by the claimant in this inſtance, it muſt be at his expence—but in future caſes it muſt be as I have intimated.

THE SPECULATION, FEROE Maſter.

Dec. 16th, 1799.

THIS was a caſe of a *Daniſh* veſſel, taken on a voyage from *Dunkirk* to *Bourdeaux*, 13th *June* 1799; and claimed, together with the cargo, for —— *Lund*, deſcribed in ſome of the papers as maſter of the veſſel.

Coaſting trade of *France* expreſsly forbidden to Neutrals, by *French* ordinance. Miſconduct of captors, as to taking depoſitions. Reſtitution. Captors expences forfeited.

For the captors, the King's Advocate ſtated—That the ſhip appeared to have been carrying on the coaſt-

The SPECULATION. Dec. 16th, 1799.

ing trade of *France*; a trade, not only generally forbidden, but expreſsly prohibited to neutral ſhips by the ordinances of *France*, which have iſſued during this war, that ſhe would therefore come under the character of an adopted *French* ſhip; and in regard to the cargo, that there was ſuch a variation reſpecting it, that it muſt of courſe go to farther proof; the bill of a lading being avowedly colourable, deſcribing *Lund* as ſhipper, whilſt he himſelf on his examination deſcribes the cargo to have been ſhipped by a *French* merchant; and, as one of the mariners depoſes, "Mr. ——— of *Dunkirk* was lader and owner."

For the claimant, *Laurence* contended—That the evidence of the mariner, who gave this account of this property, was not entitled to the attention of the Court; that he was not examined till three weeks after the other depoſitions had been brought in; that he had, in the mean time, been a week on board the privateer, and at laſt only ventured to ſpeak *to his belief*, without aſſigning any reaſon for it.

[*Court.*—I perceive theſe examinations are taken at *Jerſey*; the commiſſioners muſt underſtand that this is not the proper mode of proceeding. After the depoſitions have been taken and tranſmitted, the commiſſioners are not to go on examining afterwards; neither is it proper that the captor ſhould take out the whole of the crew, and then come in afterwards with

with a ſubſequent examination (*a*)—I ſhall pay no attention to this man's evidence.]

Counſel.—With reſpect to the ſhip it has not been held in the preſent war, that the mere circumſtance of being engaged in the coaſting trade of the enemy, does amount to that adoption, which will ſubject the

(*a*) The 23d ſection of the prize act provides for the ſpeedy expediting of the proceſs of prize cauſes, in theſe terms:—And for the more ſpeedy proceeding to condemnation, or other determination of any prize ſhip, &c. "That the Judge of the High Court "of Admiralty, and of any other Court of Admiralty, which "ſhall be authorized thereto; or ſuch perſon or perſons who ſhall "be by them *commiſſioned* for that purpoſe, within five days after "requeſt made to him or them for that purpoſe, ſhall *finiſh* the "uſual preparatory examinations of the perſons commonly ex-"amined in ſuch caſes, &c."

And the 2d and 3d articles of inſtructions to cruizers direct, That the commanders of ſhips and veſſels, ſo authorized as aforeſaid, ſhall bring all ſhips, veſſels, and goods which they ſhall ſeize and take, into ſuch port of this our realm of *England*, or ſome *other port of our dominions* as ſhall be moſt convenient for them, in order to have the ſame legally adjudged.

3d article, That after ſuch ſhips, veſſels, and goods ſhall be taken and brought into any port, the taker, or one of his chief officers, or ſome other perſon preſent at the capture, ſhall be obliged to bring or ſend, as *ſoon as poſſibly may be*, three or four of the principal of the company (whereof the maſter, mate or boatſwain, to be always two) of every ſhip or veſſel ſo brought into port before the Judge of the High Court of Admiralty, &c. or his ſurrogate, or ſuch perſons as ſhall be lawfully commiſſioned in that behalf, to be ſworn and examined upon ſuch interrogatories as ſhall tend to the diſcovery of the truth, &c.

For the whole of the inſtructions, ſee Appendix.

The SPECULATION. Dec. 16th, 1799.

property to condemnation. Of the later regulations of the preſent government of *France*, it is not known how far they have been carried into execution; which is a material fact, of which the Court will always expect to be informed, before it proceeds to draw any concluſion from them: they could not at any rate be known to the captors in this caſe; and therefore they are no juſtification, to exonerate them from making the claimant compenſation for this ſeizure.

JUDGMENT.

Sir *W. Scott*.—This is the caſe of a ſhip taken on a voyage from one *French* port to another, which is certainly a ſufficient juſtification of the capture, becauſe the very circumſtance of being engaged in conducting the trade of the enemy from one port to another, will juſtly ſubject the veſſel to enquiry; and perhaps, in ſome future caſe, the court may have occaſion to conſider how far the regulations that have been alluded to, and the acting upon them, (which it may be proper to conſider at the ſame time,) may not make ſuch a trade liable to be conſidered as a caſe of adoption. As to the preſent caſe, I am compelled to obſerve, that although captors may have made a juſtifiable ſeizure, yet they may ſtill forfeit that title by ſubſequent miſconduct; and I think there is miſconduct in this caſe, which may be traced up to them.

The third depoſition is ſtated to have been taken at the inſtance of the captors; and it now appears that they took out all but two perſons from the captured ſhip. I cannot help thinking, that to leave only two perſons,

The SPECULATION. Dec. 16th, 1799.

persons, has the appearance of something very like a management and a tampering with the evidence. From the return of the commission it does not appear that there might not have been more than two on board; therefore it remains wholly unexplained how this evidence has been taken and introduced out of due time. I desire it may be intimated to the commissioners, that they have not acted regularly, and that in future they are not to shew so much facility to captors, if such a thing should ever be required of them again. After this view of the case, I am not disposed to aid the captors more than I am compelled to do; as far as the Court has any discretion they shall have no favour; the attempt to introduce evidence irregularly taken, and liable to the suspicion of being unduly obtained, will always work that consequence at least. As to the property of the ship, no doubt is raised; and the cargo does not appear liable to any solid objection. I am not disposed, therefore, to order farther proof; and I am farther of opinion that the captors are not entitled to that protection which the Court would otherwise have given them on a seizure of this nature, by directing the claimant to pay their costs.

Dec. 19th, 1799.

THE CALYPSO, SCHULTZ, Maſter.

Notification of blockade of *Holland*—time for conſtructive notice at *Rotterdam* 15th *April* 1799—actually known at *Amſterdam* 12th *April*.

THIS was a caſe, ariſing on the blockade of the United Provinces, reſpecting the time allowed for the communication of intelligence, and the conſequence of taking in a cargo, after due notice of the blockade. It appeared that the ſhip ſailed from *Rotterdam* on the 4th of *May*; that the cargo had been begun to be laden on the 4th of *April*, and that remaining parts were taken in ſo late as the 20th.

JUDGMENT.

Sir *W. Scott*.—I think I am under the neceſſity of ſaying, that the notification of the blockade muſt have been known at *Rotterdam* on the 15th of *April*, as it has appeared in evidence in another cauſe, that it was known to the *Pruſſian* conſul at *Amſterdam* on the 12th. I am therefore compelled to ſay, that the continuing to take in a cargo, after the time when the party was bound to take notice of the notification of blockade, will be ſufficient to render the ſhip liable to condemnation: This is the determination which I am bound to make, in conformity to the principles which I have before laid down on the ſubject of blockade.

The maſter was in this caſe claimant of the ſhip; but the Court, exerciſing an indulgence, which it is at all times deſirous of ſhewing to this claſs of men, when their conduct is fair and unimpeachable, in point of good faith, allowed him his private adventure, and all the perſonal expences incurred by his attendance to claim, &c.

THE WAR ONSKAN, BIEDUMPEL Master.

Dec. 19th, 1799.

Salvage, not formerly given on recapture of neutral property, given this war, owing to the rapacious proceedings of *French* cruizers, and *French* Courts of prize.

THIS was a case of a *Swedish* ship, taken by the *French* on a voyage to *Oporto*, and retaken by a *British* cruizer, 26th *October* 1799.

In opposition to the demand of salvage, which had been allowed in *various instances* during the present war, it was said, That it had not been the practice of former wars to grant salvage on the recapture of neutral property; that in the present case there was the less reason for it, as the vessel was seized only on account of the cargo; which, according to the *French* laws, would be a cause of enquiry only and not of condemnation; and that the *French* prize-master had expressly engaged that the vessel should be restored.

JUDGMENT.

Sir *W. Scott.*—I do not mean to lay down any general rule on this subject; nor am I so fond of doing that, as gentlemen may be ready to propose it. It has certainly been the practice of this Court lately to grant salvage on recapture of neutral property out of the *hands of the French*; and I see no reason at the present moment to depart from it. I know perfectly well that it is not the modern practice of the law of nations (*a*), to grant salvage on recapture of neutral

(*a*) In the early periods of *English* history (and perhaps much later) there are to be found traces of a pretension to appropriate to the captor, the ships and goods of neutral merchants that were taken, by one belligerent out of the hands of his enemy. *Litera ad Regem Portugallie, super bonis de guerra lucratis responsiva*, 31 *Ed.* 3. A.D. 1357. *Rym. Fod.* v. 6. *p.* 14.; and again, *an.* 2 *H.* 4. *Rym. Fod.* v. 8. *p.* 203. To the master of the *Teutonic* Order of *Prussia*.

In

The WAR ONSKAN.

Dec. 19th, 1799.

tral veſſels; and upon this plain principle, that the liberation of a clear neutral from the hand of the enemy, is no eſſential ſervice rendered to him; inaſmuch as that ſame enemy would be compelled by the tribunals of his own country, after he had carried the neutral into port, to releaſe him with coſts and damages for the injurious ſeizure and detention. This proceeds upon the ſuppoſition, that thoſe tribunals would duly reſpect the obligations of the law of nations—a preſumption which, in the wars of civilized ſtates, each belligerent is bound to enter-

In the former inſtance a ſtrong remonſtrance had been made on the part of *Portugal*; and the anſwer, aſſerting the property to be legally acquired to the captors, is very full and explicit: In the latter inſtance, an embargo had been laid on *Britiſh* property, on account of the detention by the captors; and this fact of recapture from the enemy was deemed a ſufficient juſtification on the part of the *Engliſh* Monarch, to found a demand that the embargo ſhould be taken off. In later times a more equitable practice has prevailed; and neutral veſſels, taken out of poſſeſſion of the enemy, have been reſtored, *even without ſalvage*, both in our Prize Courts and in *France*, provided the property was affected by no circumſtances that would have incurred condemnation in the Court of the enemy.

Such was the limitation expreſſed in the ordonnances of *France*, *Code des Priſes*, *an* 1784. "Sa Majeſté a jugé pendant la dernière guerre, que la repriſe du navire neutre faite par un corſaire *Francois* (*lorſque le navire neutre n'étoit pas chargé de marchandiſes prohibées, ni dans le cas d'être confiſqué par l'ennemi*) étoit nulle. See various deciſions. *Conſ. des Priſes*, 1784, *vol.* 2. *p.* 725, 1024, and 1049.

Whether the dangers to which neutral property has been expoſed from *French* Courts and *French* cruiſers during this war, have been ſufficient to form an exception from the old rule, the reader will, in ſome degree, be able to judge for himſelf, by a ſummary view of their edicts, and the general character of their cruizers, according to the eſtimation of their own writers, printed in the Appendix.

tain

tain in their reſpective dealings with neutrals. But it being notorious to all *Europe* in the preſent war, that there has been a conſtant ſtruggle maintained between the governing powers of *France*, for the time being, and its maritime tribunals, which ſhould moſt outrage the rights of neutral property; the one by its decrees, or the other by its deciſions; the liberation of neutral property out of their poſſeſſion has been deemed, not only in the judgment of our Courts, but in that of neutrals themſelves, a moſt ſubſtantial benefit conferred upon them in a delivery from danger, againſt which no clearneſs and innocence of conduct could afford any protection; and a ſalvage for ſuch ſervice has not only been decreed, but thankfully paid, ever ſince theſe wild hoſtilities have been declared and practiſed by *France*, againſt all acknowledged principles of the law of nations and of natural juſtice. When theſe lawleſs and irregular practices are ſhewn to have ceaſed, the rule of paying ſalvage for the liberation of neutral property muſt ceaſe likewiſe. But of that fact no evidence whatever is offered, excepting that the *French* prize-maſter ſaid, "That the veſſel would not be prize, only the cargo." A thouſand motives might extract ſuch a declaration as this from him, very little connected with its truth. It might be only to conciliate the maſter, and purchaſe from him a corrupt teſtimony reſpecting the cargo. When the ſhip was once within the gripe of a *French* admiralty court, it was much beyond the power (ſuppoſing it within the inclination) of that maſter to ſay with certainty that ſhe would ever find her way out of it. No proof is offered that the maritime tribunals of *France* have in any

The WAR'ONSKAN. *Dec.* 19th, 1799.

any degree corrected either the ſpirit or the form of their proceedings, reſpecting neutral property generally; and therefore I ſhall not think myſelf authoriſed to depart from the practice that has been purſued of awarding a ſalvage to the captors.

Jan. 15th, 1800.

THE MINERVA, HENRICKSEN Maſter.

Expences allowed on corn ſhips, of which the cargoes had been taken by Government; but only where the original evidence of property was complete, &c,

THIS was a queſtion as to the allowance of expences in the caſe of a cargo of corn, taken 23d *April* 1794 in a *Daniſh* ſhip, on a voyage from *Amſterdam* to *Leghorn.*

It was objected by the *King's Advocate*—That the circumſtances of this caſe did not come within the rule laid down for the allowance of expences in the corn ſhips: That the rule was to grant the expences in thoſe cauſes where the evidence of property was clear and ſufficient to obtain reſtitution on the original evidence; but not to grant them, where there was a defect of evidence, requiring farther proof. In ſuch caſes, it was held, that as the ſeizure was juſtifiable, the parties were not entitled to their expences. In the preſent caſe there was in the original evidence no proof of property, either in the papers or in the depoſitions (*a*).

Court.—Then I fear this caſe does not come within the rule. Expences refuſed.

(*a*) One ſixth part of this cargo was condemned, as the property of the ſubjects of *Holland.*

THE CONQUEROR, TATE Maſter.

Jan. 16th, 1800.

Caſe of property.

THIS was a caſe on farther proof, on the claim of Mr. *Peſchier* of *Copenhagen*, for a cargo of brandies, ſhipped in *France*, as it was aſſerted, for his account, and carried to *Holland*, and from *Holland* ſent to *London*, for the *Engliſh* market; where they were ſeized as prize by the marſhal of the Court of Admiralty.

JUDGMENT.

Sir *W. Scott*.—This queſtion ariſes on a ſeizure made by the marſhal of this Court, in *December* 1794, of ſeveral parcels of brandies, on board this, and two other *Britiſh* ſhips in the port of *London*; and that circumſtance would undoubtedly lead the Court to pay very great attention to any obſervations offered on the part of the claimant; becauſe the *prima facie* preſumption, ariſing on goods found in ſuch a ſituation, is, that they are not the property of an enemy: The marſhal would receive no encouragement from the Court to make haſty ſeizures on light grounds of ſuſpicion; ſuch a practice would manifeſtly operate to the great diſcouragement of the trade of this country; and therefore if it appeared, that a ſeizure was made on light information, it would be treated with no ſort of indulgence, but on the contrary, receive very ſevere reprehenſion. On the other ſide, if it ſhould turn out that the caſe was loaded with difficulties,

The CONQUEROR.

Jan. 16th, 1800.

culties, which appeared hardly conſiſtent with a fair caſe; and if they remain unexplained, after the parties have had all opportunities given them of producing their explanation, with the advantage of having heard the remarks which the Court made on the deficiencies and difficulties of the original caſe; the marſhal, in having made ſuch a ſeizure, will have deſerved the character of a careful and diligent officer of the Court.

In the firſt proceedings of the cauſe, a monition iſſued to bring in the papers, which had been delivered to ſome merchants of this city: among the reſt, the bill of lading was brought in; but as it did not expreſs the account and riſque, the parties had a right to demand to be admitted to farther proof; and they had a right alſo, on the grounds above-mentioned, to expect that their explanations, and farther proof, would be accepted with the moſt favorable conſideration that any caſe could receive.—The farther proof was brought in; but being of a nature calculated to generate new doubts, rather than to remove thoſe which had been originally ſuggeſted, it was pronounced inſufficient; and ſtill further proof was directed to be made. I am now to decide on this proof, and I am not to take up the cauſe on the grounds ſtated, "*reſpecting the perſonal character of the parties;*" nor am I to attend to thoſe conſequences that have been mentioned, "that if this is not a fair caſe, "Mr. *Peſchier* is perjured; and Mr. *Agier* is per- "jured, &c. &c." The true nature of the proceeding is, that *they* exhibit the hiſtory of their caſe, and the proof they make of it; and I am to decide upon that:

that: if it ſhould appear to be loaded with inſurmountable difficulties, how it may hit the character of this or that individual, is a conſideration foreign to the ſubject; I am to decide upon facts, and not upon reputations.

In the firſt proof brought in, which very imperfectly opened the origin of the buſineſs, it appeared, that a ſhip which had been ſent from *Copenhagen*, had found its way into a *French* port; being, as it was aſſerted, captured by a *French* privateer; and that the goods were immediately taken by the *French* government, and payed for by the preſent cargo. If I am right in my recollection, nothing appeared in that proof, either reſpecting the quality of the cargo or the property, or the deſtination to *America*: on all theſe material points, that proof was totally ſilent; the property of *that* outward cargo, was undoubtedly a point very material to be proved; for if *this* was a cargo, taken in payment for that, the owner of that cargo muſt, *prima facie*, be taken to be the owner of the preſent cargo: it was therefore, neceſſary to determine that queſtion. It now appears that the outward cargo conſiſted of *ſaltpetre*, *hemp*, and *iron*, going to *America*, and, as it is now ſtated, not on the account and riſk of the preſent claimant, but on account of other perſons reſident in *America*; who would therefore be, *prima facie*, owners of the preſent cargo, unleſs the former intereſts ſhould appear to be converted by competent authority, and handed over to the preſent claimant. The preſent claimant, before the Court, is Mr. *Peſchier*, of *Copenhagen*; and his atteſtation ſtates, "that in 1794, he received "a letter from Mr. *St. John*, in *America*, informing

The CONQUEROR.

Jan. 16th, 1800.

"him of the high price of these articles in *America*, "and ordering the shipment of a cargo for his ac- "count; and that this letter was destroyed by the "great fire which happened at *Copenhagen* in 1795." This is the reason given for the non-production of that letter, a most material letter, for it lays the foundation of the whole case; I mean of the truth, of the destination of the former cargo to *America*, whither it is asserted to have been going — and in a peculiar manner, on the account of Mr. *St. John* of *New York*, consigned to *other merchants* of the same town; where Mr. *St. John* himself was established as a merchant, and was capable of receiving it himself. This circumstance has furnished an observation on the part of the claimant, that such a complexity, and multiplication of hands, through which the transactions was to pass, gives it the appearance of a fair case; for, that if it were fraudulent, it would have been confined to as few actors as possible — At the same time, there is this difficulty on the other side; that, if it is a fair case, it is not easy to conceive why Mr. *St. John* should go so far out of the ordinary mode of trade, as to direct a consignment on his account, to another person in the same town, where he was acting as a merchant. It is not too much to say, that there is a balance of difficulties on both sides, on the ground of supposition; and therefore, leaving them both out of the question, I can only observe again, that it is to be lamented, that this letter, which was the origin of the transaction, is not exhibited; the reason given, is, that it was destroyed by the fire at *Copenhagen*; at the same time it cannot be, but that an original copy of that letter (if I may so call it),

it), muſt be remaining in the copy book of Mr. *St. John*, in *America*; and indeed, it could hardly have been neceſſary to wait for a return from *America*, to ſupply the proof deſired; for this, I think, muſt have happened, that much ſubſequent correſpondence muſt have taken place; Mr. *Peſchier* muſt have written to inform Mr. *St. John* of the ſailing of this cargo; and there muſt have been other letters from *St. John*, or other merchants on his account, written to Mr. *Peſchier*, in alluſion to theſe original orders; and *they* might have been produced. Theſe would have been very ſatisfactory to the Court, and would in a great meaſure have ſupplied the defect of the original order. But the fact is, that no ſuch letters are produced; and it is an obſervation, that very much affects my mind, that no one letter *from* any merchants in *America*, or *to them* from Mr. *Peſchier*, is brought forward.

It is ſaid, that there could be no reaſon why Mr. *Peſchier* ſhould uſe the name of an *American* merchant; as he would have a perfect right to ſend ſuch a cargo as a neutral merchant, to *America*, in his own name; and it is true. But I think I can ſee a reaſon why, if it was intended to find its way by any pretended accident to *France*, it ſhould go under an *American* character; becauſe, if it was the property of a *Daniſh* ſubject, it was particularly forbidden by the *Daniſh* treaty, to carry ſuch articles to an enemy's ports. However, Mr. *Peſchier*'s atteſtation ſtates, "that in *March* or *April* 1794, in purſuance of "theſe orders, he freighted the ſhip, *Chriſtianſhaven* "of Mr. *Agier*, and ſhipped a cargo of hemp, iron, "and ſaltpetre, conſigned to *Murray* and *Barret*,

The CONQUEROR. Jan. 16th, 1800.

" of *New York*, for the account and risk of Mr. *St.* " *John;* and sent a letter of advice to the con- " signees." Now, this letter, if I am right, is the same letter as was sent on board the vessel, because, it does not appear, from any part of the account, that there was any other letter to Mr. *St. John*, than that to the consignees; and this is, in my opinion, a particular circumstance in the case: that having received an order for a valuable cargo, Mr. *Peschier* should take no other notice of it, than by writing to the consignees on board the ship in which the cargo was going. The letter is to this effect: " By order, " and for account and risk of our common friend, Mr. " *W. A. St. John*, of *New York*, I have the honour of " sending you by *F. Corran*, the bill of lading, &c. " and beg you will procure a good reception for this " loading, and act according to the direction of Mr. " *St. John* respecting it." This is all the information, as far as I can find, that Mr. *Peschier* sent to Mr. *St. John*, in respect to this cargo; a mere letter to the consignees, who were, as far as it appears, not privy to the orders. I cannot help thinking, that this is a very naked circumstance, and not a very probable beginning to such a transaction. The attestation then goes on to state, " that no insurance was made, " as he had received no order to that effect; and " therefore no document of that kind can be ex- " hibited." Now that such a cargo as this should be going across the *Atlantic*, and no insurance be made, is not very probable; that it should be insured in *America*, could scarcely be, as Mr. *Peschier* had not sent any information respecting it; but, if it was going for the *French* government, it is very intelligible, that *they* might stand their own insurers, and

The CONQUEROR. Jan. 16th, 1800.

therefore that Mr. *Peſchier* might receive no inſtruction about it. The atteſtation ſays, "that Mr. "*Peſchier* wrote no other letters than this, to Mr. "*Murray*;" *none* to Mr. *St. John*, who had ſent him a very urgent one, ſtating the price of theſe articles, and the good ſpeculation that they afforded in the *American* market. In return for this letter, and theſe orders, he does not write one ſyllable, to ſay even, that the orders had been executed, or were in a way of being executed, though Mr. *St. John* had attached ſo much importance to them. This, as far as I am able to judge, would be a very unnatural manner of tranſacting ſuch a buſineſs. Mr. *Peſchier* ſays, "he wrote no other letter to *America*, becauſe "he heard the maſter had written, whom he had "intruſted to write in caſe of need; and that the "ſaid maſter was an honeſt man, particularly re-"commended to him." It is to be obſerved, that he is taken up in this buſineſs, very little above the capacity of a common carrier maſter; the veſſel is not Mr. *Peſchier*'s; he charters it, as he would have done any other veſſel; the maſter was not the conſignee, but was to deliver the cargo to *Murray*; then I cannot ſee what truſt was naturally in the courſe of trade repoſed in him, more than in any other ordinary maſter. Mr. *Peſchier* ſays, "that he had in-"truſted him to correſpond with them in caſe of "need." In caſe of capture, it certainly was proper that he ſhould write to the owners of the cargo; it is the duty of a maſter ſo to do; but I cannot underſtand, that he has authority to diſpoſe of the cargo, or to enter into new ſpeculations for the owner. It is ſcarcely poſſible I think, for a man to

The CONQUEROR.

Jan 16th, 1800.

have deviated more from his inſtructions, than this man does: for how does he act? In caſe of accident he was to have written to *America*, with the hope of receiving inſtructions from thence; inſtead of that, he enters into an agreement about the cargo, and writes to Mr. *Peſchier* on the ſubject, although it was a ſpeculation in which Mr. *Peſchier* was no farther concerned.

Mr. *Peſchier* proceeds to ſtate, "that the ſhip, in "the proſecution of her voyage, was forced down "to *Dunkirk*, and taken and carried in by a *French* "privateer; and that he did not give the maſter "directions in writing, becauſe he was particularly "recommended to him as an honeſt and faithful "perſon." If any power was given to him over the cargo, it ſhould have been preſcribed in written inſtructions; and true it is, that the maſter in his proteſt, ſays, "that he had been proceeding in his "voyage according to written inſtructions, given to "him by the freighters (*a*)." To account for this ſort of contradiction, it is ſaid, that Mr. *Agiet*, his owner, and not the freighter, had given written inſtructions, and that he muſt have alluded to them. But I can hardly believe, that (at the moment of the production of theſe inſtructions), he ſhould deſcribe them as given by his freighter and not by his owners.

(*a*) "It was ſtated in the extract from the Regiſter of Reports of *Daniſh* captains, made to the *Daniſh* conſul at *Dunkirk*, *May* 4, 1794, That *Corran* had declared, &c. to have departed from *Copenhagen*, &c. with a loading of ſaltpetre, hemp, and iron, deſtined for *New York*, intending to conform himſelf to *the inſtructions* of his freighter, this day *produced at* the office of this conſulate."

Mr.

Mr. *Peſchier*'s affidavit ſtates farther, "that on the "ſhip being taken and carried into *Dunkirk*, the "cargo was ſeized by the *French* government, and "payment was made by the brandies which were to "be taken in at *Breſt*. That immediately on hearing "of the capture, he charged himſelf with the whole "care of this expedition, to ſave his friend, who was "at a diſtance, a number of troubles and inconve-"niencies, and becauſe he could proſecute the buſineſs "with more ſtrength and energy; and more eſpecially, "becauſe he had not, at the time of capture, had a "convenient opportunity of drawing to the amount "of the cargo on *St. John*, and feared that his bills "would be proteſted, if the news of the capture "ſhould arrive before his bills were accepted."—But, what reaſon could there be, for entertaining any ſuch apprehenſion, if he had the letter of orders by him? At that time it could not have been deſtroyed:—What would have been the natural conduct? undoubtedly, that he ſhould have written to Mr. *St. John*, informing him of the capture and failure of that expedition; and ſtating his hope, to be able to execute the commiſſion, with more ſucceſs at another opportunity. But no ſuch letter appears to have been written;—inſtead of that conduct, which it was almoſt unavoidably neceſſary for him to purſue, Mr. *Peſchier* immediately charges himſelf privately with the whole concern.

The account proceeds to ſtate, "that in *Sept.* 1794, "Mr. *Peſchier* received the account of the ſhipment "of the brandies, from the maſter, and alſo the "invoice and bill of lading of the *French* ſhippers, "and that he waited in expectation of the arrival of

The CONQUEROR.

Jan. 16th, 1800.

"the ſaid cargo at *Altona;* that according to his uſual "cuſtom, he had made no inſurance; and that he "ſince has been informed, and believes that the ſhip "was driven *by bad weather* into the port of *Rotter-* "*dam.*" That is rather a ſingular expreſſion. The account given by the maſter is, "that being in "want of a cable, and the ſhip leaking, he was "induced to put into *Rotterdam.*" To be driven into the port of *Rotterdam*, conſidering the ſituation of that port, is not very intelligible; an inland port very much up into the country. The maſter waits for no directions; but forthwith unlivers the cargo, and puts it into the hands of merchants at *Rotterdam*, where it was prepared for the *Engliſh* market; afterwards put on board other veſſels, and ſent to *London.* This is the account of the tranſaction given, on the part of Mr. *Peſchier*, to ſupply the defect of the former evidence, in reſpect to the quality of the articles, and the deſtination to *France;* which are material points, and which I cannot help thinking, were at firſt with a moſt ſedulous caution kept out of the ſight of the Court. There was a delicacy and a reſerve about mentioning the nature of the cargo, that very much inflamed the curioſity of the Court; it is at laſt extracted with ſome difficulty, that that cargo was *ſaltpetre*, *hemp*, and *iron;* it finds its way into *France* by one accident; and the returned cargo finds its way into *Holland* by another. It is the misfortune of this ſhip never to reach the haven where ſhe would be.

I am now called upon to conſider the correſpondence between the maſter and Mr. *Peſchier;* for as to the perſons in *America*, it does not appear that they received

received the leaſt information from any one perſon. —Mr. *Peſchier* ſays, that the maſter had authority to write to them; but he does not appear to have written, nor does he even deſcribe his cargo as going to *America*.

Then let us look at what muſt be the teſt of every tranſaction; at what would have been *the natural conduct* of any perſon employed as the maſter of a veſſel, with the care of a valuable cargo. It would undoubtedly have occurred to any perſon that it was *his* duty to write to the perſons in *America*, and alſo to the ſhipper in *Europe*. What would be the duty of the *merchant ſhipper?* undoubtedly to write to the merchant in *America;* becauſe, although the expedition had failed, it was ſtill his duty to give him an account of it, and ſtate the meaſures that he had taken to bear him harmleſs. Is it poſſible, that as a diligent merchant and a faithful agent, he ſhould not be deſirous of informing his employer of the friendly interpoſition that he had uſed to protect his intereſt, on failure of the original expedition? Inſtead of that, the merchant in *America* is left to the meagre correſpondence of the maſter, who had no authority to ſay that this cargo was taken back by Mr. *Peſchier*. All that Mr. *Peſchier* does, is to leave his friend in *America* to the correſpondence of this maſter.

The firſt letter that I ſhall obſerve upon, is a letter from the maſter at *Dunkirk* to Mr. *Peſchier* of 15th *May* 1794, informing him of the accident that the ſhip had met with; that his ſhip was in the hands of the national guards:—"We have demanded permiſſion to proceed on our voyage, which has been refuſed

The Conqueror.

Jan. 16th, 1800.

refuſed by the commander in chief of the marine; he ſays, I muſt apply to the commiſſion of commerce for redreſs; and has ordered my whole cargo into requiſition. I conſequently mean to leave this place for *Paris* as ſoon as poſſible, in order to make every neceſſary application; and if an opportunity offers, will adviſe you of the event. *I mean to employ* Mr. *J. Swan*, who is now in *Paris*, and with whom I have been long acquainted in *America*; beſides, I am informed he has great influence."

The ſtyle of this letter is not very natural, for a man under ſuch circumſtances; that he ſhould apply for redreſs is extremely natural; but is it not equally natural, that he ſhould deſire to have ſome inſtruction from Mr. *Peſchier*, in one caſe or the other? If the cargo ſhould be returned, was it not natural that he ſhould ſay, I ſhall purſue my voyage to *America*; or if a *requiſition* was to be put on his cargo, or a *prehenſion*, (as they ſometimes phraſe it), and compenſation was to be made in money or in goods; was it not natural that he ſhould aſk what he was to do with one or the other? Inſtead of that, meaſures are immediately taken to go to *Paris*, and employ *Swan*, without aſking any advice, either as to the ſucceſs or miſcarriage of his application.

The next letter is of the 20th of *June*:—"I have juſt returned from *Paris*, and after many applications, I have obtained promiſe of payment in Cognac brandies, for my whole cargo put in requiſition: I have propoſed to accept half in ſpecie and half in *Bourdeaux* wine; but ſpecie I could not get on any terms. I mean to proceed in the ſhip or ſend her round to *Charante*, and as ſoon as I can get a ſtatement

ment of the buſineſs from the commiſſioner of commerce, will give you a copy of the ſame. I have empowered Meſſrs. *Henneſſey* and *Turner* of *Cogniac*, with whom I have been long acquainted, to receive part of the brandies, and have them prepared for ſhipping."

It is true that the maſter was to act for the beſt, and ſo far he may appear to have done; but the objection is, that having the opportunity of conſulting the opinion of his employer, he never refers to his advice. When a man is placed under neceſſity, he muſt act under neceſſity; but when the neceſſity is removed, he ſtill acts with the ſame ungoverned and uncontrouled authority, never once aſking Mr. *Peſchier* what he was to do, for this *American* friend, nor once mentioning his name.

The next letter is of 24th *Auguſt*, from *Charante*:—"I flattered myſelf, ere this time, to have had the pleaſure of hearing from you in anſwer to mine of 15th *May* and 20th *June*, from *Dunkirk*, and of 26th ultimo from this place." And well might he be ſurprized; for that Mr. *Peſchier* ſhould have ſent a valuable cargo, and have been in danger of looſing it; and that he ſhould not have written, but have reſted on his oars for ſix months together; and more eſpecially conſidering *France* to be as deſtitute of law as it has been for ſome time paſt; and that the maſter had never ſaid what he meant to do with the brandies, is a courſe of conduct ſo irreconcileable to any notion that I can entertain of common mercantile prudence, that I conſider it as utterly inconſiſtent with the feeling of a real proprietor on ſuch an occaſion. The maſter goes on:—"I aſſure you the ſaid

The CONQUEROR.

Jan. 16th, 1800.

ſaid gentlemen have exerted themſelves, not only in procuring for me brandies of the beſt quality, but in getting coopers, &c. which are very difficult to be had here for private buſineſs, as almoſt all workmen and ſmall veſſels are employed on national account: and as ſoon as I ſettle my account here, and get a certificate from the agent national of this place, ſaying the quantity of brandy I have received, and a note of the quantity that remains on your account, I will proceed from hence to *Altona*, where no doubt you will be better pleaſed to have the brandies at that market than at *Copenhagen* at this ſeaſon of the year."

Now, that the maſter ſhould take it into his head to do this; that he ſhould diveſt the *American* merchant of his intereſt, and take on himſelf to ſuppoſe, that the property was to revert back to the account of Mr. *Peſchier*, and talk of it as for the account of Mr. *Peſchier*; that he ſhould go before the conſul of his own country and make oath, that it was for the account of Mr. *Peſchier*, when he muſt have had every reaſon to ſuppoſe it belonged to the merchant in *America*, is utterly inconſiſtent with any fair probability of the good faith of the parties concerned.

The maſter goes on:—"Should I meet with contrary winds I may perhaps go to *Guernſey* or *Jerſey*; and although I have not your orders, if I am permitted, will endeavour to diſpoſe of part of my cargo there on your account."

I have to obſerve, that this was not the buſineſs of a day; months and months elapſe, with abundant opportunity of intelligence; and, as to what is thrown out, that jealouſies might exiſt: what jealouſy could exiſt

exiſt about the exporting a cargo of brandy to *Altona*, more than to any other port? It is impoſſible that any ſuch reaſon could have operated to obſtruct the correſpondence, in the manner in which it appears to have ſtagnated between theſe parties. I now come to the correſpondence on the part of Mr. *Peſchier*. The laſt letter of the maſter was dated the 24th of *Auguſt*. The firſt letter that Mr. *Peſchier* writes in anſwer to thoſe which he had received, bears date of the 21ſt *September* 1794:—"I have received three of your favours, of 15th *May*, 20th *June*, and 22d ultimo, from *Charante;* and note the contents: the latter covering a copy of the accounts you got ſettled with the commiſſion of commerce at *Paris;* which ſettlement I think you were fortunate in obtaining. Your other favour of the 26th *July* I have not received. I hope this will find you ſafe arrived at *Altona* with the whole of your cargo, and that you have not put into *Guernſey* as you intended. I requeſt you will have the cargo landed and nicely prepared, and ſhip them on board an *Engliſh* veſſel for *London:* accompany them there yourſelf, and have them ſold, and remit the proceeds to Meſſrs. *Lubbert* and *Dumas* in *Hamburgh*, for my account."

I cannot help thinking, that Mr. *Peſchier* has left his account of the correſpondence with the maſter in a very imperfect ſtate. This man is not *his* agent, but the maſter of another perſon's veſſel. The firſt expedition was at an end; on what foundation could Mr. *Peſchier* direct him to accompany the brandies to *London?* If he had been his private agent, ſuch an inſtruction

The CONQUEROR. Jan. 16th, 1809.

inſtruction would have been very natural; but, conſidering the maſter in the light in which he is held forward, as the maſter of another perſon's veſſel, how is it to be underſtood, that Mr. *Peſchier* ſhould direct him to go in another veſſel, and accompany his goods to *London?* He goes on:—"I will ſettle with your owner, and when I have the pleaſure of ſeeing you, I will thankfully ſatisfy you for your ſtrict attention to my intereſt. You will ſee that the amount is inſured to *London*, or order, if ſo to be done, and that the brandies are not ſtronger than the *London* ſtandard. I am ſo well ſatisfied with every part of your conduct in this troubleſome buſineſs, that I cannot do better than leave the whole to your management; you will therefore act as you find moſt advantageous to my intereſt."

An obſervation on this part is, that there is no mention of any agent in *London;* but in another letter, written to the maſter at *Rotterdam* on the 7th of *October*, it appears, that Mr. *Peſchier* did direct him to apply to Meſſrs. *Wolff* and *Dorville*:—"You will follow my advice of the 21ſt ultimo, the ſame as if you were at *Altona;* and have only to obſerve, unleſs you have already made choice of a houſe, that you will apply to my friends, *Wolff* and *Dorville*, who have my whole confidence, and will chearfully ſerve you." So that, though the maſter was to come to *London*, where he would be in need of the aſſiſtance of a houſe, it is not till this late period that it occurs to Mr. *Peſchier*.

This letter was written to the maſter at *Rotterdam*, into which port, it appears, he had been driven; and

The CONQUEROR.

Jan. 16th, 1800.

and where, it appears, he had himſelf come to the reſolution of ſending the brandies to *London*, without the direction of Mr. *Peſchier*; and it is on the 26th of *September* that he writes to Mr. *Peſchier*, informing him of the accidents that had carried him thither, in theſe terms:—"No doubt, ere this, you expected me at *Altona*; but a multiplicity of diſappointments and delays had kept me ſo long at *Charante*; and I am ſorry to inform you we are driven into this place very leaky, with loſs of ſails, a cable, and anchor; and muſt have my cargo all taken out, before I can repair. I am afraid the ſeaſon will be far advanced before the neceſſary repairs can be done; conſequently, I have engaged a warehouſe for the brandy; and, was it not for the ſituation of affairs at preſent in this country, a good price might be obtained for part: under theſe circumſtances, I am of opinion, it would be a good plan, to ſend ſome to the *Engliſh* market, as, by the laſt accounts, the prices of good brandy are very high.—*Should I reſolve on this*, I find it will be neceſſary to have them prepared exactly at the ſtrength admitted into that country; nor will ſmall caſks, I am informed, be allowed to be imported. I have taken the aſſiſtance of my friends, *Rocquette*, *Elziviere* and Co. of this place, who have engaged to do the buſineſs for one-half *per cent.* excluſive of duties, cooperage, &c. and to uſe their beſt to give me diſpatch."

Is this ſuch a letter as a man would write to the owner of his cargo? no time, no day mentioned when the accident happened. Certain it is, that he had been in *Rotterdam* ſome days; he had been landing his cargo and ſpeculating on the ſtate of commerce there:

The CONQUEROR.

Jan. 16th, 1800.

there: he ſays, "a good price may be had for a part of it here." Is it not natural that a truſty perſon, meeting with this accident, ſhould write immediately, and ſtate the time when the accident happened? Inſtead of that, he writes, "I find a good price may be obtained in the *London* market; ſhould I reſolve on that, it will be neceſſary to have them repaired here." Was *Holland* in ſuch a ſtate, that the maſter could receive no inſtructions from Mr. *Peſchier?* Is this the ſtyle of a man ſoliciting inſtruction? on the contrary, it is the ſtyle of a man acting with uncontrouled authority, as if the property belonged to himſelf. "Should I reſolve on this, &c."—"I have applied to my friends *R.* and —, who have undertaken it, &c." Is a carrier-maſter to make this election, without reference to his employer? or is Mr. *Peſchier*, who is a man of large and ſpreading concerns over *Europe*, without any correſpondent at *Rotterdam?* or is it for the maſter to take upon himſelf to make choice of agents, without a reference to his employer, in reſpect to the care and judgment of the perſon employed? On the 14th of *October* the maſter writes again to Mr. *Peſchier*, and ſays,— "Your eſteemed favour of the 21ſt ult. for the firſt time, came this day to hand: I am happy that my conduct has procured your approbation."—I may be wrong, but I proteſt it appears to me that his conduct had been directly ſuch as could not meet with approbation. In the ſame letter the maſter ſays, "that "*Rocquette* and Co. had recommended him to *Vandyke* and Co." and in anſwer, Mr. *Peſchier* ſays in his letter of 21ſt *December*, "that he hears his brandies,

"in

in the hands of *Vandyke*, are ſeized in *England*," and directs the maſter to go to *London* immediately, to endeavour to obtain reſtitution, but recommends *Wolff* and *Dorville;* but ſtill the appointment of the maſter prevails. The maſter had written on 22d *October*: — "I alſo obſerve you wiſh Meſſrs. *Wolff* and *Dorville* to have the buſineſs, to which I would gladly comply, had we not already given the whole management to Mr. *Vandyke* and Mr. *Broomfield*, who have orders to remit two-thirds of the value, or honour draft to that amount, on your account." And, notwithſtanding the direction of Mr. *Peſchier*, in his letter of 21ſt *December*, the buſineſs remains in the hands in which the maſter had choſen to place it. Is not this a feature of a moſt extraordinary nature, that a merchant ſhould acquieſce in the adoption of an agent, utterly unknown to him, and obtruded on him by the officiouſneſs of this volunteer agent in *Holland?*

The CONQUEROR. *Jan.* 16th, 1800.

Looking at the whole of this caſe, I find ſo many improbabilities attending it, in every part, that I cannot compel my mind to a belief the property is as claimed; and, adverting carefully to the nature of the ſeizure, (which I have ſaid ought to entitle the parties to every favourable conſideration), I muſt ſtill think, that the proof does in no degree correſpond with the claim. The conſequence will be, that this cargo muſt be pronounced ſubject to condemnation.

Jan. 16th, 1800.

THE HARMONY, Bool Maſter.

Caſe of domicil —reſpecting the national character of a partner in an *American* houſe, *reſiding* for a conſiderable time in the enemy's countries.—His property conſidered as the property of an enemy. Condemned.

THIS was one of ſeveral *American* veſſels in which a claim had been reſerved for part of the cargo, on farther proof to be made of the national character of *G. W. Murray*, who appeared in the original caſe, as a partner of a houſe of trade in *America*, but perſonally reſident in *France;* reſtitution had been decreed in the ſeveral claims to the houſe of trade in *America*, with a reſervation of the ſhare of this partner. — The caſe was argued on this day, and again, on production of further affidavits at ſeveral times.

JUDGMENT — pronounced *November* 19th, 1800.

Sir *W. Scott.* — This is a queſtion which ariſes on ſeveral parcels of property claimed on behalf of *G. W. Murray;* and it is in all of them a queſtion of reſidence or domicil, which I have often had occaſion to obſerve, is in itſelf a queſtion of conſiderable difficulty, depending on a great variety of circumſtances, hardly capable of being defined by any general preciſe rules: The active ſpirit of commerce now abroad in the world, ſtill farther increaſes this difficulty by increaſing the variety of local ſituations, in which the ſame individual is to be found at no great diſtance of time; and by that ſort of extended circulation, if I may ſo call it, by which the ſame tranſaction communicates with different countries, as in the preſent caſes, in which the ſame trading adventures have their origin (*perhaps*) in *America*, travel to *France*, from *France* to *England*, from *England* back to *America*

rica again, without enabling us to aſſign accurately the exact legal effect of the local character of every particular portion of this divided tranſaction.

In deciding ſuch caſes, the neceſſary freedom of commerce impoſes likewiſe the duty of a particular attention and delicacy; and ſtrict principle of law muſt not be preſſed too eagerly againſt it; and I have before had occaſion to remark, that the particular ſituation of *America*, in reſpect to diſtance, ſeems ſtill more particularly to entitle the merchants of that country to ſome favourable diſtinctions. They live at a great diſtance from *Europe*; they have not the ſame open and ready and conſtant correſpondence with individuals of the ſeveral nations of *Europe*, that theſe perſons have with each other; they are on that very account more likely to have their mercantile confidence in *Europe* abuſed, and therefore to have more frequent calls for a perſonal attendance to their own concerns; and it is to be expected that when the neceſſity of their affairs calls them acroſs the *Atlantic*, they ſhould make rather a longer ſtay in the country where they are called, than foreign merchants who ſtep from a neighbouring country in *Europe*, to which every day offers a convenient opportunity of return.

In conſidering this particular caſe, it may not be improper to remark, that circumſtances occur in the evidence that addreſs themſelves forcibly to private commiſeration, remarking, however, at the ſame time, that public duty can allow only a very limited effect to ſuch conſiderations, and ſtill leſs to another that has been preſſed upon me, that the money, if reſtored, is to go in payment of debts due to *Britiſh*

The HARMONY.

Jan. 16th, 1800.

creditors, from the bankrupt eſtate of this unfortunate perſon. My buſineſs is to inquire whether he is entitled to recover it, without regard to the probable application of it, if it finds its way again into his poſſeſſion.

Of the few principles that can be laid down generally, I may venture to hold, that time is the grand ingredient in conſtituting domicil. I think that hardly enough is attributed to its effects; in moſt caſes it is unavoidably concluſive; it is not unfrequently ſaid, that if a perſon comes only for a ſpecial purpoſe, *that* ſhall not fix a domicil. This is not to be taken in an unqualified latitude, and without ſome reſpect had to the time which ſuch a purpoſe may or ſhall occupy; for if the purpoſe be of a nature that *may*, *probably*, or *does actually* detain the perſon for a great length of time, I cannot but think that a general reſidence might grow upon the ſpecial purpoſe. A ſpecial purpoſe may lead a man to a country, where it ſhall detain him the whole of his life. A man comes here to follow a law ſuit; it may happen, and indeed is often uſed as a ground of vulgar and unfounded reproach, (unfounded as matter of juſt reproach though the fact may be true), on the laws of this country, that it may laſt as long as himſelf: Some ſuits are famous in our juridical hiſtory for having even outlived generations of ſuitors. I cannot but think that againſt ſuch a long reſidence, the plea of an original ſpecial purpoſe could not be averred; it muſt be inferred in ſuch a caſe, that other purpoſes forced themſelves upon him and mixed themſelves with his original deſign, and impreſſed upon him the character of the country

country where he reſided. Suppoſe a man comes into a belligerent country at or before the beginning of a war; it is certainly reaſonable not to bind him too ſoon to an acquired character, and to allow him a fair time to diſengage himſelf; but if he continues to reſide during a good part of the war, contributing, by payment of taxes, and other means, to the ſtrength of that country, I am of opinion, that he could not plead his ſpecial purpoſe with any effect againſt the rights of hoſtility. If he could, there would be no ſufficient guard againſt the fraud and abuſes of maſked, pretended, original, and ſole purpoſes of a long continued reſidence. There is a time which will eſtop ſuch a plea; no rule can fix the time *a priori*, but ſuch a time there *muſt* be.

In proof of the efficacy of mere time, it is not impertinent to remark, that the ſame quantity of buſineſs, which would not fix a domicil in a certain ſpace of time, would nevertheleſs have that effect, if diſtributed over a larger ſpace of time. Suppoſe an *American* comes to *Europe*, with ſix contemporary cargoes, of which he had the preſent care and management, meaning to return to *America* immediately; they would form a different caſe from that, of the ſame *American*, coming to any particular country of *Europe*, with one cargo, and fixing himſelf there, to receive five remaining cargoes, one in each year ſucceſſively. I repeat, that time is the great agent in this matter; it is to be taken in a compound ratio, of the time and the occupation, with a great preponderance on the article of time: be the occupation what it may, it cannot happen, but with

The HARMONY. Jan. 16th, 1800.

few exceptions, that mere length of time ſhall not conſtitute a domicil.

The facts of this caſe are, that three parts of the property claimed on the part of the houſe of trade of *Murrays* and *Wheaton* in *America*, have been reſtored: and the preſent queſtion ariſes on the ſhare of Mr. *G. W. Murray*, in reſpect to his national character. A queſtion has been made as to his original *American* character; and it has been contended that he is to be conſidered as a *Britiſh* ſubject, trading with *France* in violation of his allegiance: but I think the facts hardly bring him within the reach of this principle. By the affidavits, it appears, that being born in *England*, he went out very early, deſtined to ſettle in *America* in his childhood; the intention having been fully entertained and decided, at the time of the declaration of independence, and nothing but his extreme youth, or rather childhood, having prevented his migration—This is ſufficiently proved: He went out in 1784; and I ſhould hold that he was equitably entitled to the *American* character. The only queſtion will be, whether he is not to be deemed to have acquired and ſuperadded a *French* character ſince that time; and this queſtion muſt be determined by the affidavits brought in, and by the letters which were on board the ſhip, and which are ſuppoſed to diſcloſe ſufficiently the real deſigns and conduct of the party.

The firſt affidavit of Mr. *J. Murray*, the brother of the claimant, annexed to the claim 27th *July* 1795, ſtates—"That Mr. *G. Murray* is not at this time in *America*; that he came to *Europe* from *New York* in *January* 1794, as ſupercargo, in

in a veſſel belonging to the deponent's houſe, and ſold the cargo of the ſaid veſſel in *France*, and ſome time between *April* and *June* 1794, came to *England* on buſineſs of their ſaid houſe; and from thence, ſome time afterwards, proceeded to *Hamburgh;* and from thence, in *Auguſt* or *September*, to *Paris*, and other parts of *France*, where the intereſts of the ſaid houſe detained him until *May* laſt [1795], when he came again to *England*, and has gone again to *France*, not long ſince; and has by this time probably left *France* for *Hamburgh*, where the intereſts of himſelf and the houſe of *R. Murray* and Co. have called him."

In that affidavit there was no negation of an intention of returning to reſide in *France;* therefore the property could not be reſtored. A ſecond affidavit was then exhibited of Mr. *J. Murray*, 19th *Auguſt* 1795, negativing ſuch an intention, and ſtating, "that the ſaid *G. W. Murray* has not at this time, as the deponent verily believes, nor ever had, any intention of reſiding or making his domicil in *France*, nor in any part of *Europe:* that the ſaid *G. W. Murray*, who is the deponent's brother, has been married in the United States, and has one child now there, and that when he came to *Europe*, early in laſt year, he did not expect to be abſent from home more than ſix months; but that their ſaid houſe of *Robert Murray* and Co. of *New York* having made ſeveral ſhipments to *France*, the ſaid *G. W. Murray*, on account of the diſturbed and critical ſituation of commerce, thought it adviſeable to comply with the requeſt of his ſaid houſe, to ſtay ſome time longer in *Europe*, in order to haſten the ſale of the afore-

The HARMONY. Jan. 16th, 1800.

ſaid cargoes; and to endeavour to cloſe the account reſpecting them; and, that the almoſt total ſtagnation of all mercantile buſineſs in *France*, has prevented a ſale being made of the merchandize which is there, belonging to their ſaid houſe: and the ſaid *G. W. Murray* did often, while in *England* laſt *May*, expreſs to the deponent his deſire and expectation of returning to his family in *America*, in the courſe of the enſuing month of *September*; but he is prevented now from doing the ſame, not having been able to cloſe, in *France*, the affairs of the ſaid *Robert Murray* and Co.; *the expediting of which is the ſole cauſe of his being there*; and that ſo far from his being ſettled or domiciled in that country, he pays the merchants reſident there the uſual commiſſion for tranſacting buſineſs of his ſaid partners: that he well knows it to be the abſolute determination of his ſaid brother, as ſpeedily as poſſible, to return to his reſidence in the United States; but that he, as well as the deponent, on account of the critical ſituation of their property in *Europe*, conſider it their duty to their partners to be ſtill longer abſent from *America*; but that as ſoon as the ſales of their ſaid property are cloſed, and the proceeds received, it is their intention immediately to return home to the United States.

This matter being left in rather an undeterminate ſtate, as to the time of the return, on the 21ſt *Aug.* a third affidavit is brought in, in which Mr. *J. V. Murray*, "referring to his affidavits of the 27th *July* and 19th *Auguſt* inſtant, made oath, that as to the probability of *George William Murray*'s having gone to *Hamburgh*, as ſtated in his affidavit of the 27th of *July*,

July, his aſſertion was owing to information which he received a few days prior thereto, that ſuch a ſtep was neceſſary for promoting the intereſt of their houſe: that he now knows that the ſaid *George William Murray* found it afterwards to be of more importance to the ſhipments, that his ſaid houſe had made for him, to ſtay ſome time longer in *France;* and that he did not conceive that his aforeſaid aſſertion had a relation to, or was contradictory to the wiſh expreſſed by the ſaid *George William Murray* in *May* laſt, to return home in *September*, as he had found it impracticable ſo to do (for the reaſon ſtated in this deponent's affidavit of the 19th inſtant), before he had any thoughts of going to *Hamburgh;* which laſt circumſtance was mentioned by the deponent, merely to ſhew that his ſaid brother was not domiciled in *France:* and he farther expreſsly ſays, that the ſtay of his ſaid brother in *France* at this time is merely on account of the cargoes which had been tranſmitted before; namely, *on the ſole account of thoſe cargoes which* his aforeſaid houſe had ſhipped, and which had arrived prior to the date of his firſt affidavit of the 27th of *July:* that ſo ſoon as the aforeſaid cargoes are ſold, and the proceeds received, his ſaid brother will leave *France*, and will not ſtay a day longer on account of any other that may be ſhipped or arrive, or on any other account whatever." On the 26th of *Auguſt*, Mr. *George William Murray* himſelf appears, and makes an affidavit, conformable to thoſe made by his brother, and ſtating, "that he arrived on *Saturday* evening laſt in *England* from *France*, where he had been, as ſtated in the affidavits of his brother *James Valentine Murray*, for the purpoſe of expediting the ſales

The HARMONY. Jan. 16th, 1800.

ſales of ſhipments, that had been made by their ſaid houſe, as expreſſed in the ſaid affidavits; and having peruſed the ſaid affidavits, dated the 27th *July* laſt, the 19th and 21ſt *Auguſt* inſtant, he ſaith, that the contents of the ſaid affidavits are juſt and true, and that his ſtay in *France*, as mentioned in his brother's affidavits, *was merely on* account of the cargoes which had been tranſmitted before, viz. *on the ſole account of thoſe cargoes* which his houſe had ſhipped from *America* for *France*, and which had arrived prior to the 27th of *July* laſt, being the date of his brother's firſt affidavit: that he has no other buſineſs or concerns to detain him in *Europe*, but the ſettlement of the ſaid affairs, viz. the prior ſhipments depoſed to by his brother; that ſhould even the ſaid ſettlement not be accompliſhed in a ſhort time, viz. within two, or at the utmoſt, three months, he muſt leave them in their preſent ſtate, in order to embark for the United States, where his preſence is abſolutely neceſſary, for the intereſt of his ſaid houſe." Nothing appears here to ſhew that it was his decided intention to remain in *America*.

On the 6th of *October* 1795, Mr. *G. Murray* made another affidavit, which ſtates, "That early in the laſt year, he came from *New York* to *Europe*; that he had not at that time, nor has he ever had, or now has, any intention of reſiding, or making his domicil in any part of *Europe*; that he has been married in the United States, and has one child now there; that this deponent came to *Europe* as ſupercargo of the brig *Peggy*, belonging to his ſaid houſe, and did not expect to be abſent from home, longer than the diſpoſal of the ſaid cargo required;

required; but being unable to get paid for the ſaid cargo, he, in the month of *May*, quitted *France*, and came to *England*, and afterwards went to *Hamburgh*, and again returned to *France* in the month of *September*, to endeavour to obtain payment for the ſaid cargo; that during his ſtay there for that purpoſe, two other cargoes, the one on board the *Mary Ann*, and the other on board the *Six Brothers*, the property of his ſaid houſe, arrived at *Bourdeaux*, conſigned to *Lubbert* and Co., and at the requeſt of the ſaid houſe, and on account of the diſturbed and critical ſituation of affairs in *France*, was induced to prolong his ſtay there, to expedite the ſale of the ſaid cargoes, by the ſaid *Lubbert* and Co., (who were to be paid a commiſſion on the ſaid ſale,) and to cloſe the accounts reſpecting the ſame. That the houſe in *America*, ſuppoſing the deponent might be detained in *France* on the aforeſaid concerns, until the arrival of ſome of their ſubſequent ſhipments, thought it prudent, leſt their former agents might not be in a reſponſible ſituation, on account of the fluctuating ſtate of affairs in *France*, to conſign the ſaid cargoes to the order of this deponent, or to his aſſigns; the ſaid houſe preſuming, that if this deponent had quitted *France*, he would have left an authority with ſome reſpectable houſe, for the receiving and diſpoſing of the ſaid cargoes."—That he had fixed various times for quitting *France*, and returning to *America*, might be; but as to any purpoſe of coming to *England*, not created by the capture of the cargoes, he ſays nothing; that he would have otherwiſe come, is not at all expreſſed in, or

The HARMONY.

Jan. 16th, 1800.

or to be inferred from theſe affidavits. However, he avers fully, his intention of returning to *America*; there is not the leaſt intimation given of any intention of returning back again to *France*; and any one would ſuppoſe, that he had thrown up the buſineſs of theſe two cargoes, and was fully bent on making his final ſettlement in *America*, without caſting an eye back to *France*.

The letters that were found, however, on board one of the ſhips, the *Jefferſon*, expreſs ſomewhat of a different purpoſe; and ſtate, that it was neceſſary for one of the partners to reſide in *France* for ſome time. The caſe which theſe letters rather intimate than diſcloſe, is, that the two brothers, *James* and *G. W. Murray*, were to come to *Europe*, to be differently diſtributed in *England* and in *France*, to conduct the affairs of their houſe; when I ſay this, I ſpeak rather of the intention and wiſh of the partners in *America*, as it appears in *their* correſpondence, for the letters are all from them; there is not one letter introduced from either of the *Murrays* in *Europe*; and therefore, it is open to an obſervation on one ſide, that the *Murrays* in *Europe* poſſibly might not concur in this intention; as it is on the other, that it is highly improbable, that ſuch a plan ſhould be ſo ſtrongly in the contemplation of the partners in *America*, and that they ſhould be writing to theſe gentlemen on the proſpect of a conſtant reſidence in *Europe*, without any privity and concurrence on their part, and whilſt they were intending a ſpeedy return to *America*. Now, ſuppoſing this to have been the caſe, and that there was an intention on the part of Mr. *G. Murray*, of fixing his reſidence in *France*, in the

ſame

ſame manner as Mr. *J. Murray* has reſided here in *Great Britain*, I cannot accede to what has been advanced in argument, that it would not fix on either of them, a *French* or *Britiſh* character. If a houſe of trade ſends a partner to *France*, with an intention even of not mixing in any other trade, than the buſineſs of that houſe; yet I think, that ſuch a circumſtance connected with a permanent reſidence in *France*, would impreſs a national character upon him. It appears that Mr. *J. Murray*, the brother ſtationed here, on the ſame ſort of footing, has been conſidered by the common law of this country, as a *Britiſh* trader, ſubject to the bankrupt laws of this kingdom; and as ſuch, a commiſſion of bankruptcy has iſſued againſt him; and on the ſame reaſoning, if Mr. *G. Murray* has been reſident in *France*, during the greater part of the war, conducting the buſineſs of his houſe, receiving cargoes, and diſpoſing of cargoes, and giving accounts of the markets in *France*, and directing mercantile adventures there; it is, in my apprehenſion, impoſſible not to conſider him as a reſident trader of that country.

Amongſt the letters, there are many, which it will not be neceſſary for me to go through: it will be ſufficient to ſtate, that they all concur in expreſſing a general expectation, that theſe perſons would be reſident in *Europe*. The expreſſions are various in the different letters; but they all concur in pointing to the purpoſe of a general, and continued commercial agency in *Europe*. In the *Jefferſon*, they write, "we "draw on *your capital in Europe*," ſpeaking of it as if it were a diſtinct eſtabliſhment; and there are beſides ſeveral paſſages to the ſame effect. "It will "enable

The HARMONY. Jan. 16th, 1800.

"enable us to form ſome plan for *our next winter's* "*operation.*" — "Advice *reſpecting contracts with* "*government*; — and a recommendation to *purchaſe* "*prize ſhips.*" — "We may look forward to a *time*, "*not very remote*, when the genius of liberty will "bear down all its opponents, and create a cruſh in "commercial *Europe*, never before experienced. *In* "*ſuch an event*, *we are* better circumſtanced than "moſt others; as every thing, being under *your* "*immediate direction*, will prove a great ſecurity." — "*Other* friends hope to be benefited by your ſucceſs "and induſtry in *Europe*;" all ſhewing, on the part of them in *America*, a ſtrong expectation, either that Mr. *G. Murray* would be long reſident in *France*, or that he would have made proviſion for the diſpatch of their buſineſs there. — At the ſame time, it is not to be denied, that there are ſome paſſages which intimate a deſigned return to *America*. There is a paſſage in a letter from Mr. *R. Murray*, to his brother *George*, (dated *New York*, *March* 27, 1795,) alluding to the ſettlement of affairs: "I mean to take up our "books, to get in forwardneſs the object of a "general ſettlement, which we all wiſh to have "effected ſoon after your return:" and there is a reference, likewiſe, to domeſtic incidents: one (ſufficiently affecting) with reſpect to his favourite infant child, expreſſing a hope, "that he would be "able to articulate, and bid his father a welcome on "his return." Theſe are repreſented as inconſiſtent with the view which I am diſpoſed to take of his intention; — but by no means — I think it is perfectly clear that Mr. *G. Murray* meant to go to *America*; and he is entitled to the full benefit of that fact. The miſ-

fortune

fortune is, it is equally clear, that he intended to return again to *Europe*, and, with that intention pointed particularly to *France*:—I do not ſay, that a return to *France* for a ſhort ſpace of time, would have affected him; but it muſt depend on the time, and on the nature of his reſidence, after the return, whether it will have that effect or not; becauſe, if it ſhould appear that he went to *America*, merely for a ſhort time, and then returned to *France*; it can hardly be conſidered as a legal interruption of his reſidence in *France*; his return will connect itſelf with the former reſidence, and it muſt be taken altogether, as conſtituting in law, a continuation of the general reſidence in *France*. The fact is, as it appears from the affidavits of Mr. *Charles Murray*, (another brother of the claimant,) 5th *July* 1799, and 30th *October* 1800, (for Mr. *G. Murray* has not thought proper to give us any information,) that he returned to *France* in *June* 1796; and that he ſtaid there at leaſt, till *Auguſt* 1800; the entire ſpace of four years and more.—Perhaps it would not be too much to ſay, that there is no definite ſatisfactory proof, that he has, even at this moment, quitted *France*; his own letter, dated *Bourdeaux*, 22d of *Auguſt*, which has been brought in, ſtates, "that he had taken his paſſage on board the *Franklin*;" and another letter not from himſelf, but from Mr. *Barnet* of *Bourdeaux*, dated *Auguſt* 27th, to Mr. *Charles Murray*, ſays, "that he had embarked, and was to ſail to-morrow;" and there his hiſtory ends, no proof whatever being offered that that ſhip carrying Mr. *Murray* did ſail. I have no evidence beyond the letter, purporting to be the letter of a *French* merchant, that he had taken

The Harmony. taken his paſſage in a veſſel, which was ſo expected to ſail.

Jan. 16th, 1800. This is the whole evidence, excepting the belief of Mr. *C. Murray*, "that he is actually gone;" and when I recollect that Mr. *C. Murray*, in an (*a*) affidavit made *January* 20th, 1800, ſuppoſed him to be at *Hamburgh* or *Sweden*, in *January*, and ready to depart for *America*; and that ſix months after this, the captors find in a paper on board the *Clariſſa*, and ſigned by him, *March* 1800, that he was remaining in *France* at that time, giving all credit to the ſincerity of Mr. *C. Murray*'s depoſition, I cannot take

(*a*) "That in the month of *October* laſt, he received a letter "from the ſaid *George William Murray*, who was then in *Hamburgh*, informing him of his arrival there, and expreſſing his intention of writing again ſoon; which letter, this deponent does "not now annex hereto, as it relates to private concerns, wholly "unconnected with this, or any other cauſe in this Court, in "which, the ſaid *George William Murray* is intereſted: but, in "caſe the court ſhould require it, this deponent is willing to "ſatisfy it as to the place and time of the date of ſaid letter. "That ſince the receipt of the ſaid letter, he has not further heard "from the ſaid *George William Murray*; but by a letter he received ſoon after from *James Valentine Murray*, he mentions "the expectation of the ſaid *George William Murray*'s proceeding "to *Sweden*. And in another letter received a few days ſince by "this deponent, from the ſaid *James Valentine Murray*, dated "3d of *December* laſt, he informs this deponent, that it was "probable the ſaid *George William Murray* would now ſhortly "return to *America*; and this deponent, from theſe circumſtances, "and well knowing the anxiety of his brother, the ſaid *George* "*William Murray*, to return to his wife the firſt moment in which "circumſtances would admit of it, is induced to believe that the "ſaid *George William Murray*, if he has not already quitted "*Europe* for *America*, is now on the very point of ſo doing."

The HARMONY. Jan. 16th, 1800.

it as a fact clearly proved that he is gone to *America*, much less to remain there; — taking it however most favourably, that he has actually withdrawn himself in 1800, there is a fact of residence from *June* 1796, to *August* 1800, (above four years), connected with a residence of above a year before his return to *America*; and that return, accompanied with a purpose of coming back to *Europe*, that remains to be explained. — Whether any explanation could be given of such a residence so long continued, is, upon the principles laid down, somewhat questionable to me. Time, I have said, is a great agent in these matters, and I should have been glad to have heard any instance quoted, on the part of Mr. *Murray*, in which a residence of four years, connected with a former residence, and which I must consider as a legal uninterrupted residence, was deemed capable of any explanation. But supposing it to be so, it must at least be required, that the explanation be first, clear and satisfactory in itself; and secondly, supported in a satisfactory manner. What is the explanation of this residence? The great point to be explained, will be the employment of that long continued residence: — Was it a residence utterly unconnected with any mercantile operations at that period? The affidavit of Mr. *Charles Murray*, 5th *July* 1799 (*a*), states, that his brother went to *America* in 1795,

(*a*) Affidavit in which *Charles Murray*, referring to conversations with his brother in *September* 1795, says, "That "*George William Murray*'s statement was, that although the

The HARMONY. Jan. 16th, 1800.

1795, to conduct ſome operations which the high price of markets ſuggeſted, and with hopes of returning

" intereſts of his houſe were, at that moment, ſomewhat injured " by the capture and detention of ſeveral of their cargoes, by " *Britiſh* ſhips of war, (of ſome of which captures, the ſaid " *George William Murray* was informed while at *Norwich*), yet " he conſidered that as a temporary inconvenience only; that the " then ſtate of markets in *Europe* ſuggeſted ſome operations " which he conceived would be highly advantageous to the houſe, " in the conducting of which his preſence in *America* would be " neceſſary, and that accordingly he intended to ſail for that " country, in the next month, and hoped by the enſuing ſpring to " be able to return to *England*, for the purpoſe of winding up and " ſettling the whole of the concerns of the houſe in *Europe*; and " that in the event of ſuch a ſettlement, it was his, the ſaid *George* " *William Murray*'s intention, and that of his brother, the ſaid " *James Valentine Murray*, to make *America* their ſole place of " reſidence in future: That in part purſuance of the ſaid *George* " *William Murray*'s intention as aforeſaid, he ſailed for *America* " early in the month of *November* 1795, and arrived there in the " following month; that after his arrival, his ſaid houſe of *Robert* " *Murray* and Co. purchaſed ſeveral cargoes conſiſting chiefly of " rice, and conſigned the ſame to *England* for the purpoſe of " being ſold here, or forwarded to ſome other *European* market " as might be found moſt adviſeable; and the ſaid *George William* " *Murray* (as this deponent believes) in further purſuance of his " aforeſaid intention, after completing the moſt of the ſaid " purchaſes, returned to this country again in the beginning of " *May* 1796, for the purpoſe of ſuperintending the ſale of the " ſaid cargoes, they for the moſt part being conſigned to him: " that on the arrival of the ſaid *George William Murray* here, he " found that an immenſe loſs muſt ariſe upon the ſaid expected " cargoes, beſides which a conſiderable derangement in the affairs " of his houſe had occurred, ariſing, as this deponent has been in- " formed and believes, principally from the delay in payment of " very large ſums due to the ſaid houſe from the *French* govern- " ment, and alſo from the above-mentioned capture of this and

" ſeveral

turning to *England* the enſuing ſpring, for the purpoſe of winding up and ſettling his concerns in *Europe*; and

---

" ſeveral other ſhips, laden with cargoes of proviſions, belonging " to the ſaid houſe, by *Britiſh* cruiſers, which cargoes were " bound to *France*, where they then bore great prices; and it " being repreſented to the ſaid *George William Murray*, that the " moſt outrageous threats had been made againſt him by perſons in " *London*, holding bills of the ſaid houſe, he conceived it moſt " prudent, and was adviſed, not to expoſe himſelf to them until " the funds of the houſe ſhould be ſo centered in this country, as " to enable it to face its engagements; and accordingly the " ſaid *George William Murray*, having firſt transferred the ma- " nagement of the ſale of the ſaid cargoes then expected to " arrive here, to Meſſrs. *Bird, Savage*, and *Bird* of *London*, the " mercantile correſpondents of the ſaid *Robert Murray* and Co. " he ſoon after went to *France*, in order to uſe his utmoſt en- " deavours to procure payment from the *French* government, and " to arrange other outſtanding concerns of the houſe in that " country, with the intent to remit ſuch ſums as he ſhould re- " ceive, to the ſaid houſe of *Bird, Savage*, and *Bird*, and not " with any intent of ſettling as a merchant in *France*, or of em- " ploying the funds which he ſhould ſo collect there, in any manner " whatever in the trade of that country: That certain creditors " of the ſaid *Robert Murray* and Co. at *Hamburgh*, having laid " attachments on all the property of the ſaid houſe in *France*, of " which the ſaid *George William Murray* would otherwiſe have " had the controul, the ſaid *George William Murray* was thereby " rendered unable to fulfil his ſaid intention of remitting funds " from *France* to this country, and the ſaid *Robert Murray* " and Co. have never ſince been able to obtain the command of " that property: That if no other circumſtances had rendered " the return of the ſaid *George William Murray* to *America* unſafe, " he would have returned thither long ago, but the creditors of " his houſe in *America* having thrown *Robert Murray*, one of the " partners, into confinement, the other partners were unwilling " to expoſe themſelves to the like violence; and this deponent " believes that the reſidence of the ſaid *George William Murray*

The HARMONY. Jan. 16th, 1800.

and it is ſaid, in argument, that theſe operations in *Europe*, are to be excluſively confined to operations in *England*; and that ſome cargoes of rice did actually come to *England*. But I cannot help thinking that if ſo, it was an unfortunate circumſtance that he did not come himſelf, except for a very ſhort time; for as the matter ſtands, now it affords a ſuggeſtion that theſe operations were to be extended to *France* full as much as to *England*. It appears beſides, that the rice was deſtined "to *England* or ſome other *European* market:" therefore it is not impoſſible that even this rice might have found its way to *France*. The affidavit ſtates further, "that his return to *America* was delayed by waiting for payment from the *French* government." Now I muſt aſk, what was this contract with the *French* government? there is nothing in his own affidavit which points to any other tranſactions than thoſe reſpecting the cargoes of the ſhips *Mary Ann* and *Six Brothers* that remained unſettled.

The affidavit ſtates further, "that he was alarmed by the outrageous threats of his creditors in this country, and that he was adviſed to go to *France*," as he actually did in *June* 1796; and the affidavit concludes with a belief on the part of Mr. *Charles Murray*, that his brother was not in *France* in a *mercantile* character or for any *mercantile purpoſe*.

"in *France* at any time ſince the ſaid captures, was ſolely a matter "of perſonal and temporary convenience and neceſſity, ariſing "from the ſaid circumſtances of the debts due to his houſe from "the *French* government, and the unfortunate derangement of "the ſaid *Robert Murray* and Co.'s affairs; and that ſuch reſidence was not in anywiſe for the purpoſe of trade or connected with trade, ſave as aforeſaid."

When

The HARMONY. Jan. 16th, 1800.

When I find, that he went there, as a mercantile man, that he ſtaid there four years, and that he was a man who came from *America* for the very purpoſe of mercantile operations in *Europe*, I feel a difficulty in ſaying, that (excluſive of all trading) ſatisfactory reaſons are aſſigned for it; or ſuppoſing him to have gone to *France* for the purpoſe of obtaining payment, I ſhould ſtill find a difficulty in ſaying, that the original purpoſe could privilege a reſidence of four years. Is it poſſible for me to ſay, then, that the explanation which is given in this affidavit is quite ſufficient, ſuppoſing that no objection lay to the mode in which it is offered?

And I come now to obſerve, on what I conſider as the fatal objection, that the whole depends on the ſingle affidavit of Mr. *Charles Murray* the brother. There is not one word coming from Mr. *G. Murray* himſelf to ſhew what was the nature of his connection with *France*: Surely the information of Mr. *Charles Murray* is very incompetent: a ſtriking inſtance of *his* incompetency is that he ſuppoſes his brother gone to *America*, when it appears, that months after that time he was living in *France*. Can I ſuppoſe him ſufficiently inſtructed as to all the courſes of his brother's proceedings, to enable him to ſtate ſatisfactorily to the Court the nature of his engagements in *France*? It is impoſſible that the Court can take the account of ſuch a perſon, that the reſidence of his brother in *France* was not connected with any mercantile engagements, unconfirmed, as it is, by the gentleman himſelf; who, though at hand, as I may ſay, and in a neighbouring country, has not thought fit to give us any explanation. He knows the courſe and nature

The HARMONY.

Jan. 16th, 1800.

of his own tranſactions, and yet he expects reſtitution, without taking the trouble of making ſo much as an affidavit for the purpoſe: After ſix years reſidence (as I muſt deem it) in *France*, and with all poſſible opportunity allowed him for that purpoſe, from *October* 1795 not a ſingle word comes from him till the preſent day of *November* 1799. I own I think it impoſſible that the Court can be expected to reſtore on this evidence. Taking it on the preſent evidence, as to the ſufficiency of the explanation and the mode in which it is offered, it is impoſſible.

Then the only queſtion is, whether I ſhall allow further opportunity to the party, and give time for farther explanation? Conſidering the length of time which the cauſe has continued before the Court, with a degree of indulgence, perhaps open to ſome complaint on the other ſide, and the manner in which it has been put off from month to month, I do not think it any part of my public duty to allow ſuch opportunity. I do not ſay, that before another Court Mr. *Murray* may not ſupply the defects of his caſe, and by his own evidence; but finding myſelf under the neceſſity of determining on the evidence now before the Court, which is, as I have before ſtated, that Mr. *Murray* has been in *France* four years, at leaſt, and that, connected with a former reſidence there; and that there is no direct proof that he has now quitted it; I feel myſelf under the neceſſity (which, if I might be allowed to ſpeak as a private perſon, I ſhould perhaps deſcribe as a painful neceſſity) of condemning his ſhare of the property in theſe ſeveral cargoes.

THE ROSALIE AND BETTY, GEBHADT Maſter.

Feb. 5th, 1800.

THIS was a caſe of a ſhip and cargo, taken on a voyage from the Iſle of *France*, as aſſerted, to *Hamburgh*, 31ſt *May* 1799. The ſhip was claimed for Mr. *Baurman* of *Embden*, and the cargo for Mr. *Kaſter* of *Hamburgh*.

A caſe of property, connected with circumſtances of fraud; Effect on allowance of farther proof; Condemnation.

JUDGMENT.

Sir *W. Scott.* — This is the caſe of a ſhip and cargo, taken on a voyage from the Iſle of *France*, as aſſerted, to *Hamburgh*, and the queſtion is, according to my view of it, a queſtion of property; for I am of opinion, that the queſtion, as to the legality of the trade, does not ariſe; as the cargo, being intended for the port of the owners of the cargo, is entitled to the favourable conſtruction of that order of council, which permits the trade of neutral veſſels from the colony of the enemy to *their own ports;* till I am better inſtructed, I ſhall hold, that the right to engage in ſuch a trade is not vitiated on the part of neutral merchants, by the circumſtance of the cargo being put on board a neutral bottom of another country, and coming to the port of the claimant of the cargo. I have taken ſome time to conſider this caſe, becauſe it is a caſe of great value, and has been very laboriouſly argued: and becauſe, as I underſtand, there are other caſes of a ſimilar nature which are likely to come before the Court; and it may ſave time to deliver the opinion of the Court on what

25th *Jan.* 1798. See Appendix, p. 2.

The Rosalie and Betty.

Feb. 5th, 1806.

will be the effect of similar evidence and similar circumstances in those cases also, if they occur.

In considering this case, I am told, that I am to set off without any prejudice against the parties, from any thing that may have appeared in former cases; that I am not to consider former circumstances, but to suppose every case a true one, till the fraud is actually apparent. This is undoubtedly the duty in a general sense of all who are in a judicial situation; but at the same time they are not to shut their eyes to what is generally passing in the world — to that obvious system of covering the property of the enemy, which, as the war advances, grows notoriously more artificial: higher prices are given for this secret and dishonourable service, and greater frauds become necessary; old modes are exploded as fast as they are found ineffectual, and new expedients are devised to protect the unsound parts better from the view of the Court. Not to know these facts as matters of frequent and not unfamiliar occurrence, would be not to know the general nature of the subject upon which the Court is to decide; not to consider them at all, would not be to do justice. The very nature of the enquiry necessarily suggests something of this kind; for the enquiry is to see, whether the property does, *bona fide*, belong to those, who are ostensibly represented to be the proprietors. It is an enquiry, therefore, which is necessarily attended with some doubt *in limine*. No reasonable man will say, that the Court is to look at cases in the same manner where no special reason for fraud exists, and where the enemy is driven to it by a necessity that is notorious, as the only means of getting home his property; and when such

The ROSALIE and BETTY.

Feb. 5th, 1800.

such artifices are not unfrequently known to prevail; and more especially, when the persons appearing as claimants have been exposed to the experience of the Court, as having engaged in such a trade, and do not stand before the Court with those general credentials which belong to the conduct of a pure and unimpeached neutrality. I am afraid the observation of those who attend this Court will apply these remarks to the owner of the ship. The claimant of the cargo has not, in my recollection, appeared before the Court on any former occasion. I do not say, that the conduct of the owner of the ship will in general affect the cargo; but if the parties appear bound up together in an intimate connection and co-operation in measures which a Court cannot see without disapprobation, such a concurrence cannot but form a foundation for the unfavourable reception of the case of a party so connected in that transaction.

The case sets off in a manner attended with much suspicion; the ship is a *Danish* ship, asserted to have been purchased on a voyage from *Riga* to *Bourdeaux*; but there is no evidence on board that points to it, except the mere recital of a bill of sale. The first evidence that we find respecting the vessel, represents her as lying in a *French* port; and the master cannot say any thing of the purchase, or of the built, or former employment of the vessel; he being, according to his own account, not acquainted with her. The carpenter, however, and the second mate describe her as *French* built. The master and the whole crew were sent to *Bourdeaux* to take possession of the ship, although she is represented as a neutral vessel before; and the former crew, though neutrals, are not

The ROSALIE and BETTY.

Feb. 5th, 1800.

not employed, except in one or two inſtances, in conſequence of the illneſs of ſome of the new crew. — Who is the maſter? He is repreſented as a *Pruſſian*; but in a paper invoked from the *Julie*, he appears to have been habitually trading from *Bourdeaux*; and I think I may infer, habituallly trading to the Iſle of *France*; becauſe the letter of recommendation which he carries with him, ſpeaks of him as an (*a*) old acquaintance, and as a perſon not unknown *there*. There is the old meaſuring bill on board, which, if it applies to this ſhip, deſcribes her as a *Daniſh* ſhip; but how this came to be detained alone, and no other papers, does not appear; the fact is however, that the ſhip is firſt produced to the notice of the Court, lying in a *French* port, and with a new crew; and the maſter unacquainted with her former hiſtory. I cannot help thinking there is an appearance of ſomething like induſtry, or *aſtutia* uſed, to withdraw from the Court circumſtances, of which it ought to be apprized.

With reſpect to the cargo, it is expoſed to theſe general obſervations, that it is put on board in a *French* port of the *Eaſt Indies*, being the proceeds (for I muſt take all the circumſtances together) of a cargo, put on board in a *French* port in *Europe*, not in return for any cargo ſent from *Hamburgh* to *Bourdeaux*, but as an original ſhipment in a *French* port,

(*a*) Letter from a merchant at *Bourdeaux*, to Mr. *Delos*, to the care of a merchant at the Iſle of *France*, after mention of ſeveral letters which he had written — "Since which, I have written to Mr. *Bedel*, by a *Pruſſian* ſhip, and though the captain, *Gebhardt*, is an old acquaintance of mine, I fear he has acted with my letters as they do in general."

to

The Rosalie and Betty. Feb. 5th, 1800.

to be delivered at the Isle of *France*. It will be proper for me to consider also, an observation made on the circumstances under which this cargo was taken: — The ostensible destination is represented to be to *Hamburgh* undoubtedly, and it has been pressed upon me, that the place of capture, on the *English* coast near *Dartmouth*, confirms this account, and shews that the return was not to *Bourdeaux*. It is not clear however, from the place of capture, that the vessel might not have found her way into some *French* port in the channel; considering the situation of *Bourdeaux*, it might be thought too hazardous an enterprize to attempt to get to that port, on account of our fleets and cruizers. It is not clear therefore, from this account, that the return might not be to a *French* port; taking it however, otherwise, and supposing the destination to be to *Hamburgh*, it is said to be a strong proof of the neutral property: but I think that does not amount to much, considering the circumstances of the times, and the exposed state of the *French* ports. If they were not attainable, the next best expedient would be, to get the property to a neutral port; and therefore, I think that circumstance will not weigh so much, as it might at a time, when the ports of *France* were open. So much for the observations arising on the surface of this case. I think, it is one that obliges the Court to look with some suspicion; I do not say, to employ any thing of *astutia*, in opposition to the *astutia* employed against it, (for *astutia* does not belong to a Court of justice) but to exercise its vigilance; and I think, I violate no duty, in coming to the enquiry with a certain degree of jealousy, which

The Rosalie and Betty.

Feb. 5th, 1800.

which the appearances of the case, and the general conduct of the parties have contributed to raise. The material object of enquiry, I think, will be, whether it was the intention of the parties to impose on *English* cruizers, and *English* Courts of justice, in the original shipment *to India*.—This is important, on two points; first, because as the present cargo is the proceeds of that shipment, if there is reason to presume from the fraudulent manner of the transaction, that there were *French* interests concerned in that cargo, there will be great reason to conclude that the same *French* interest have travelled throughout; and secondly, for the purpose of ascertaining the good faith of the agents; because, if I discover a deep laid artifice in the original transaction, it will be difficult to persuade me, that the parties are entitled to the credit of ingenuous dealing, in the subsequent parts of the transaction. The two leading facts are, that the ship went from a *French* port to a *French* settlement; and that the cargo was there disposed of, in the *French* colony. To prevent these acts from being considered as fraudulent, one of these two things must be shewn; either that the destination was avowedly and openly professed (for in such a case, although the trade might be held illegal, it would not be fraudulent); or secondly, that if the ship did not go with this avowed destination, she went thither under some urgent and supervening necessity; because if it was the original intention of the parties, and that intention was dissimulated, it must be considered as a fraud; and that fraud more noxious, on account of the

The ROSALIE and BETTY.

Feb. 5th, 1800.

the contraband nature of several of the articles of the outward cargo (*a*).

On the first point, an open and avowed destination to the Isle of *France*, there can be no dispute; as every paper points to *Tranquebar*, and to no other place; except the certificate granted at *Hamburgh*, on the oath of Mr. *Baker*, which is referred to, as stating a destination to the Isle of *France*; but, unless that can be proved to have been on board in the outward voyage, in a producible form, it might as well have been a thousand leagues off; and if it was not, there is nothing to shew even a contingent intention of going to the Isle of *France*; and therefore, the destination must be deemed dissimulated. That the certificate was on board in a producible form, can, I think, hardly be maintained; for the master was wholly unacquainted with it, and speaks entirely of a destination to *Tranquebar*, without any reference to the Isle of *France*. That it was not produced, appears also from two instances, in which this ship was met by *English* cruizers and examined; and it is hardly credible, that if such a paper had appeared, a cruizer would so far have forgotten his own interest, as well as his duty, as not to have brought the vessel in for adjudication. I am therefore forced to conclude, that this paper could not be on board in any form that

(*a*) The general cargo consisted of a large variety of assorted articles; amongst these—9 cables and 26 small ones, 6 kedge anchors, 704 bars of iron, 163 bundles of hoop, round and square iron, 6 casks of ship tar, 200 casks of pitch.

made

The ROSALIE and BETTY.

Feb. 5th, 1809.

made it producible as a ſhip's paper, during the voyage.

This brings me to the ſecond point, whether the veſſel was driven to unload in the Iſle of *France*, by any emergency ariſing out of the circumſtances of the voyage? It is ſaid, that the parties had a right to clear out for *Tranquebar*, reſerving to themſelves a liberty of touching, in this manner, at any enemy's port, for the purpoſe of refreſhment: But I ſay, that if there is ſuch a reſervation, it ought to be expreſſed in the ſhip's papers; it can leaſt of all be admitted in a caſe where every thing points to a neutral port; where the conſignee is regularly deſcribed; and where every atteſtation, and oath in the caſe, points to a neutral *port only*. As to any plea of neceſſity that can be ſet up to juſtify ſuch a deviation, there muſt be two neceſſities ſhewn, one creating an obligation *to go into* that port, and the other, an obligation to *ſell* in that port; for this laſt is the criminal act, conſtituting the fraudulent departure from the intentions which are held out in every paper in the caſe. It is ſaid, that this deviation was occaſioned by a want of water, and the leaky condition of the ſhip: the experience of the Court, does not induce it to hear theſe excuſes with any great reſpect; eſpecially when there is no intimation in the papers of any ſuch deviation. It does not appear at what time the failure of water was perceived, whether before the ſhip reached *Britiſh* ports or not; or whether due diligence was uſed to ſupply it; therefore, of this I cannot judge. But of damage done to the ſhip, I ſee very little; and that, not till ſhe approached very near the Iſle of

France; that there was any leakage, I do not find in any part of the journal; and in respect to one passage, in a paper relied on, I am convinced by looking to the original, that it refers only to the sea breaking in at one of the port holes; and that no damage had been sustained in the body of the ship. It is still farther proved, by the nature of the very slight repairs which the ship underwent at the Isle of *France*; but giving them the full benefit of this pretence, does it follow that the ship could not have proceeded to *Tranquebar*?—On this point, I have the best witness in the world, the carpenter, who says, "she might have gone on; that the repairs might easily have been made, and water supplied, and four or five Lascars easily procured, in the place of some of the sailors who were ill;" (whose illness is represented as a general sickness of the crew, affording another pretence for this deviation). Then, as to necessity of *selling* the cargo at the Isle of *France*, I do not see that it is even pretended; it is only said, that the opportunity of a better market presented itself. Now, on this part of the case, it may not be unnecessary to look to the authority under which the sale took place; because, if it was done by the master, without any authority from the owners, it might be too hard to press the fraudulent conduct of the master, in respect to the cargo, to their disadvantage. What says the master? He speaks indeed to this effect, and does not pretend to have had any dominion over the goods, but admits himself to be a mere carrier master; and to have taken on himself to dispose of these goods, without the privity or direction of the owner.—But is this true? It is admitted, because it cannot be denied that there had been an actual authority over this vessel previously

The ROSALIE and BETTY.

Feb. 5th, 1800.

viously lodged in Mr. *Saulnier*, who appears to have been the great manager of frauds at this place, in the ſame character in which Mr. *Wilkins Andre* has appeared at *Surinam*. The authority of Mr. *Saulnier* is ſigned before the maſter leaves *Europe*; yet he repreſents himſelf to be entirely ignorant of it; ſo that on the claimant's own ſhewing, the caſe ſtands thus: That if by any accident the ſhip ſhould come into the iſland of *France*, there was an authority given to ſell the cargo, and take in an another for *Europe*; yet the maſter received no intimation of theſe orders; and when at laſt he actually proceeds to ſell the cargo, he does it on a mere ſpeculation of his own, without any authority from *Europe*.

Looking no farther, it is impoſſible not to come to a concluſion on this part of the caſe, that it was a fraudulent tranſaction; for taking it at the weakeſt, there was a poſſible contingent ſale at the Iſle of *France* provided for, without any appearance of ſuch a purpoſe in any of the papers; but is not the Court bound by all fair rules of evidence to go farther, and to aſk, whether the intention was not *entirely confined to the Iſle of France*, without any view to *Tranquebar*, except for the purpoſe of covering the real nature of the tranſaction? It has a right to infer this, and to preſume every thing againſt a caſe, in which ſo evident a ſuppreſſion of a material truth has already appeared; and this ſuſpicion is ſtill farther confirmed by the other circumſtances of the caſe. In the firſt place, we find that the authority was ſigned at *Hamburgh*, before the ſailing of this veſſel; yet the maſter is left in entire ignorance, to be ſurprized with the firſt view of theſe inſtructions, on his arrival in the

Iſle

The Rosalie and Betty. Feb. 5th, 1800.

Ile of *France*? Is it nothing, that it is a shipment from *Bourdeaux*, ostensibly to *Tranquebar*? Is the communication between those ports so open, and so much in the ordinary course of trade, as to afford no ground for suggesting, that it was from the beginning a false and colourable destination? and for supposing that the vessel would not reach *Tranquebar*, without first finding her way into a *French* settlement? more especially, after it *has* appeared, that this fact did actually take place. Again, there is a letter from Mr. *Saulnier*, to the shipper of the outward cargo at *Bourdeaux*; shewing, that they were in the habit of sending backward and forward to each other. Is it not natural to expect, that the master would have written to his employer, informing him of the necessity that he was under to deviate into a *French* port, contrary to his destination, and to sell his cargo there? He is directed "to write on his arrival at *Tranquebar*, that half of the freight might be paid."—Would he not feel the same necessity for writing from the Isle of *France*? Yet, if I understand the master right, he says, on the 23d interrogatory, that he has not written any letter to his employers.—Who is the master? He appears evidently by the letters, to be a person well known at *Bourdeaux*, and to have been employed in the *Bourdeaux* trade to the Isle of *France* and other *French* settlements. What has been the conduct of the master? It is said, and truly said, that in various parts of his evidence he is a gross falsifier, so as effectually to discredit his own testimony. But will this stop here? I apprehend not: it goes much farther, and extends to the character of his employers; for where a master prevaricates so grossly as

The ROSALIE AND BETTY.

Feb. 5th, 1800.

this man does. I cannot ſuppoſe that he would be a voluntary falſifier; or that without an intereſt, or without inſtruction or ſubornation, he would lead himſelf into ſuch a labyrinth of fraud. I cannot help thinking that the conduct of this maſter has been ſuch as will reaſonably affect the credit and the property of his employers. The very celerity with which the ſale is conducted, is, in my apprehenſion, a ſtrong circumſtance to ſhew, that he went out privy to the intention of diſpoſing of his cargo at the Ile of *France*. The very next morning after his arrival, he comes to the reſolution of ſelling his cargo—Was it not natural that he ſhould at leaſt have taken time to reflect whether it was poſſible to go to *Tranquebar*? Would he, at the very inſtant almoſt, a few hours after his arrival, have come to the reſolution to ſell there, in violation of his own engagement, and of the inſtruction of his owner, unleſs he had ſet out with ſome ſecret order to that effect? The letter of authority is not produced; but it is ſaid, the parties are ready to produce it; and I have no doubt of it: The very celerity with which the buſineſs was tranſacted, leaves me no reaſon to ſuppoſe, that the perſons who were concerned in it, would leave that maſter-ſtroke of fraud unexecuted; and it is very probable that they might ſuppoſe it would come with more credit, if called for in this manner, than if it had appeared originally among the ſhip's papers. The letter of Mr. *Henrickſen* gives us reaſon to conclude, that the ſame bye conveyance which carried the inſtructions to *Saulnier*, would carry directions to him, reſpecting the beſt manner of ſupporting the whole

whole of theſe fabricated proceedings, in caſe it ſhould be wanted.

The ROSALIE and BETTY.

Feb. 5th. 1800.

Taking all the parts of the tranſaction together, I have a well grounded conviction that the Iſle of *France* was the original deſtination, and that there was a fraudulent ſuppreſſion of that circumſtance: Then who were the parties to this fraud? The owners of the ſhip, and of the cargo.—The inſtruction to *Saulnier* muſt have come from the owners of the cargo; and it is impoſſible that the owner of the ſhip ſhould not have been apprized of ſo material a deviation from the terms of the charter-party; beſides, the maſter is the agent of the owner of the ſhip, ſo as to bind *him;* and it is hardly credible, that he could have undertaken ſo material a variation without a full aſſurance that he would be ſupported in it.—As to ſaying, that this part of the voyage was a paſt tranſaction, I muſt deny that; for it is an entire contract, of which one part is, that the returned cargo ſhould be taken in at *Tranquebar.* It is not a detached voyage, commencing without any connection with the outward cargo; but it is one entire tranſaction, of which the former part links in with that which is to follow:—a tranſaction, which is falſe in two of its terms; falſe in the original deſtination, and falſe in the repreſentation that the returned cargo was to be taken in at *Tranquebar.* If this is the caſe, the legal concluſion will be at no great diſtance; becauſe, if the proof of property in this caſe is not ſufficient, the parties have forfeited the right of ſupplying farther evidence; and they muſt ſtand or fall by the original evidence of the caſe.

The ROSALIE AND BETTY.

Feb. 5th, 1800.

With respect to the ship, she appears first in a *French* port, for I cannot take the mere recital of a purchase as any proof: the pass is not on the oath of the owner, but on the master, who knows nothing of the transfer; and when I look at the contract of sale, it appears very unnatural that some part of the money should be paid beforehand, whilst the ship was *in itinere;* and under a condition, that the money should be returned with an interest of four *per cent.* if the vessel did not arrive. Certainly this is not a very common mode of transfer; and I think I can see a reason why the payment is put forward in this way; because if no money had been paid, it might be thought, that this Court would not consider it as an executed sale.—That a merchant should actually advance money on such terms, when so much better interest might be made, is not very natural: it is certainly not the habit of that body of gentlemen to do so; and this objection is still farther confirmed by the terms of the attestation: "as *long as the vessel shall continue in our employment.*" It is an attestation merely present, and every thing points to a suspicion, that there was merely a temporary shifting of interests, and *a handing over*, in this asserted transfer; and if it was before a *Danish* ship, one need not look far to find a reason for this; because, if a cargo was to be carried to the Isle of *France*, of the nature of contraband, it might be a very hazardous adventure for a *Dane* to undertake, as expressly prohibited by his own treaty.—This supposition is still farther aided by the instructions given by the owners to the master; for without any probation, (and with so little acquaintance between them, that the master does not know

know the form and ſtyle of his employer's houſe of trade (*a*), they bind themſelves down "to *employ him as long as the veſſel* ſhall continue in their poſſeſſion." That they ſhould bind themſelves in this manner to a mere ſtranger, is not very probable;—whether it is in a *French* or *Daniſh* intereſt, it is not neceſſary for me to enquire; it is ſufficient that the property is not proved to my ſatisfaction, to belong to the perſon claiming it in theſe proceedings.

In reſpect to the cargo:—How is that proved to be the property of Mr. *Kaſter?* It is aſſerted in the documents, and in the ſame inſtruments that deſcribe the outward voyage as being to *Tranquebar;* can the Court admit as complete evidence of the property, thoſe documents, which it is bound to conſider in regard to the deſtination, as totally falſe? The deſtination is deſcribed to *Tranquebar:* Is not that a fraud? Or is it to be allowed to a party to ſay, "It is true, I have been found in an untruth in this part, but in all other parts give me the benefit of a fair claim." The inference is not, that all the other documents muſt be *neceſſarily falſe;* but it renders the truth of them queſtionable, certainly, in the extreme; again, in reſpect to the inſtructions to the maſter, do they not throw diſcredit on the claim for the cargo? Suppoſe the contract of the charter-party to have been executed for the outward and homeward voyage; would it not be natural to expreſs it in the inſtructions to the maſter?—Is it to be ſaid, that the maſter had an

(*a*) The maſter deſcribes himſelf, in fourth interrogatory, as being appointed to the command by *Jean Bauerman* and Son, whereas the houſe of trade is *Hilkary Bauerman* and Son.

The ROSALIE AND BETTY.

Feb 5th, 1800.

opportunity of verbal inſtructions, and, therefore, that he was at liberty to depart from the terms of his written inſtructions? As far as I underſtand the inſtructions, they ſeem to me to refer to another tranſaction. The maſter arrives at *Bourdeaux* in *January*. The lying days, and the ſtate by which he deſcribes his arrival at *Bourdeaux*, do not agree. The inſtructions direct him to take a cargo on freight, on the part of a neutral merchant.—Would it not have been natural to have repeated the terms of the charter-party, and to have told him that he was to look to that, by which the hull of the ſhip was bound to Mr. *Kaſter?* Inſtead of that, his inſtructions are "to go to *Bourdeaux*, and there take a freight on the part of neutral owners." So much for the evidence of the papers. But ſuppoſing them to be liable to no objection, in what manner are they verified? The maſter does not know the name of the lader; then in what way can I give him credit for what he ſays, that the property belongs to a perſon at *Hamburgh?* The numerous prevarications in which he is detected, deprive him of any right to be believed; and they will not only affect *his* perſonal credit, but they muſt fall alſo, in ſome degree, on thoſe by whom he was employed in this tranſaction. With reſpect to the real foundation of this buſineſs, it is not perhaps very eaſy for me to develope it: if it is really a *Daniſh* ſhip, my own opinion is, that it has been handed over for the purpoſe of carrying out contraband articles to the *French* ſettlement; and as to the cargo, when I ſee the outward cargo carried to a *French* ſettlement, and there delivered to *Saulnier*, who is the great agent of frauds there, and with much con-

contrivance; connecting all the circumſtances of *French* agency, throughout the whole tranſaction, I cannot think that it is wholly unconnected with *French* intereſts: in what degree they are mixt in it I cannot ſay; but it is my comfort to think, that it is not neceſſary for me to determine that point; for if Mr. *Kaſter* has *any* property in this cargo, if he has mixed his intereſt in any proportion with the intereſt of the enemy, and reſorts to modes of prevarication, to conceal and protect the enemy's intereſt, ſuch a conduct will affect his own ſhare.—If neutrals will not bring their claims fairly and ingenuouſly before the Court, but reſort to ſuch artifices to cover and protect the property of the enemy, it is a rule of the law of nations, that they ſhall be concluded by the proof they bring. I ſhall therefore not decide this caſe in the affirmative ground, that this ſhip and cargo are proved to belong to the enemy; but on the ground, that the property in them is *not proved* to belong to the perſons claiming them before this Court; and that if it is their property, they have cloathed it with ſuch circumſtances as juſtly exclude them from the opportunity of giving farther proof. I wiſh neutrals to underſtand, that if they mean to avail themſelves of the rights of neutrals, they muſt conduct themſelves as ſuch. It will then be the duty of this Court, and the ambition of it, to exert its utmoſt vigilance to give them the benefit of their neutrality. But on the other ſide, if they diſcredit their caſes by a cloathing of prevarication and falſehood, who is to blame for the inconveniency that may enſue? The rule of this Court is, and framed with as much moderation ſurely as the ſubject will admit, that if their proofs, diſhonored

The Rosalie and Betty.

Feb. 5th, 1800.

by ſuch impure mixture, are nevertheleſs ſufficient to eſtabliſh the truth of their claim, it is well; but if they fall ſhort of this, (and it can hardly happen otherwiſe,) they ſhall not be indulged with the means of ſupplying proofs from ſources which have appeared to be corrupt.

Ship and cargo condemned.

Laurence—Submitted it to the conſideration of the Court, whether it would not be proper to make ſome alteration in the ordinary form of the ſentence. That in this inſtance it would expreſs the direct contrary to what the Court intended to deliver as the grounds of the decree.

Court.—It is not in my power to alter the form: it has been under the conſideration of the Superior Court, and they have declined to do it.

Laurence.—I was not aware that it had been under the conſideration of the Superior Court. The inconvenience ariſing from the uſual form is, that although we underſtand the terms as ſo general and comprehenſive, as to extend alſo to other grounds of deciſion than thoſe ſpecifically mentioned; other Courts, which have frequently occaſion to interpret theſe ſentences in caſe of inſurance, &c., bind down the cauſe of condemnation to the terms of the ſentence.

Court.—I ſhall be very willing to give any relief in my power.

The

The Registrar said, That there had been certificates given, in one instance by himself, with which another Court was satisfied.

The ROSALIE AND BETTY.

Feb. 5th, 1800.

THE POLLY, LASKY Master.

Feb. 5th, 1800.

Colonial produce of the enemy imported into *America*, and afterwards sent on to *Spain*: legality of such a trade, on what considerations depending: Restitution.

THIS was a case of an *American* ship, taken on a voyage from *Marble Head* to *Bilboa*, 16th *October* 1799, with a cargo of fish, sugar, and cocoa: the ship had been restored. — With respect to the cargo, it was said on the part of the captor, that it was a case of farther proof; that it appeared from the deposition of the mate, that the sugar and cocoa had been brought from the *Havannah* to *America*, and from thence sent on for *Spain*; from which a suspicion must necessarily arise, of *Spanish* interest; that, if it was even neutral property, a question of law would arise, whether such a trade was not to be considered as a direct trade between the colony of the enemy and the mother country. It was farther said, that the mate had deposed, that the master had confessed to him, that he had destroyed some papers, which of itself would subject the claimant to the necessity of making farther proof.

On the part of the claimant it was said, That the principal part of the lading consisted of salt fish, for the *Spanish* market; which made it extremely desirable that it should be set at liberty, in order to prosecute the voyage before the beginning of *Lent*. That it was not in the power of the claimant to take the cargo

The POLLY.

Feb. 5th, 1800.

cargo on bail, by ſubmitting to farther proof, as the correſpondents of the owner in this country had refuſed to take the cargo on bail. It was therefore preſſed that the caſe might be heard on the original evidence; which was ſaid to be very full and ſatisfactory, and ſufficient to obtain immediate reſtitution. In reſpect to the tranſhipment, it was ſaid to have been of but a ſmall quantity of cocoa; that the ſugar was part of a whole cargo, which this veſſel had brought on a former voyage from *Havannah* to *Marblehead*; that as to the ſuppreſſion of papers which the mate ſpoke of, it was doubtful what was the nature of the papers; and that it was the act of a man who was inſane, and had ſince deſtroyed himſelf.

Court.—As there has been a ſpoliation of papers, and as the account given of that act is but conjectural, it muſt be a caſe of farther proof. It might be an act of inſanity in the maſter only, but that muſt be made out in proof. It is impoſſible for the Court to relax the rule, that where there has been a ſuppreſſion of papers, there muſt be farther proof.

29th *April* 1800, this cauſe came before the Court again on farther proof.

For the captors, the King's Advocate and Arnold.—When this cauſe firſt came on, it was contended that farther proof could not poſſibly be demanded; but now it appears that the parties themſelves were aware of the difficulties of their caſe, and had actually ſent for farther proof from *America*, before the Court ordered it; the tranſaction which now diſcovers itſelf in the farther proof, gives riſe to a queſtion

The POLLY. Feb. 5th, 1800.

queſtion on the property, and a queſtion on the legality of the trade. It appears that the aſſerted purchaſe at the *Havannah* was made partly by bills, drawn on the *Havannah* by *Gardoqui* of *Bilboa*, and partly by bills drawn at the *Havannah* by the purchaſer on this houſe in *Spain;* that part of the cargo, the ſugar, being the produce of the *Havannah*, was carried by this very ſhip, in *June* 1799, to *America*, and there, after ſome repairs done to the ſhip, re-ſhipped for *Spain* in *Auguſt;* and the cocoa alſo was originally brought from a *Spaniſh* ſettlement of *Laguira*, and tranſhipped from another ſchooner lying at *Marblehead* in *America*, under an original deſtination to *Europe*. Suppoſing this to be a trade between the colonies and the mother country, this mode of communication is natural and intelligible; but if it is conſidered as the foundation of the acquiſition of this property by perſons in *America*, it is quite otherwiſe, and is utterly improbable. It is ſaid, that the owners had received theſe bills in payment for cargoes ſold in *Spain*, but it is ſtill not credible that they ſhould take bills of this nature, drawn on perſons in a colony not generally open to foreign trade. The ſequel is of a ſimilar complexion; the inſtructions of the maſter on this voyage are, "to go to *Bilboa*, and if you meet with no one who will do your buſineſs better, to apply to *Gardoqui* and Co.," from which it is evident that they were deeply involved in the whole tranſaction. There is alſo the account current which Mr. *Gardoqui* ſent to *Hooper* in *America*, in which he debits *Hooper* for two bills on the *Havannah*, at 5 *per cent.* on the ſaid bills, and with his *Gardoqui*'s remittances

in

The POLLY.

Feb. 5th, 1800.

in four bills on the *Havannah*, and 5 *per cent.* on them, with acceptance of bills drawn on him at the *Havannah*. Yet afterwards he credits Mr. *Hooper* with 12 *per cent.* on the two bills (on the *Havannah*) probably for neutralizing this cargo. He credits *Hooper* alſo for the former cargo by Captain *Laſkey*, ſo that the whole of this adventure would appear to be at the riſk of *Gardoqui* and Co. It is ſaid, in an affidavit of 17th *March* from Mr. *Aſa Hooper*, who is a gentleman ſpeaking from a diſtant remembrance of the tranſaction only, and is not himſelf connected with the buſineſs, "that he was informed at the time this tranſaction took place, that the duties were paid, and the goods landed," but there is no trace of that in proof, nor in the affidavit of Mr. *R. Hooper*, the claimant, and his ſons, nor does it appear that the goods were entered for the *American* market: they came from a *Spaniſh* colony, and were landed whilſt the ſhip underwent repair, that ſhe might proſecute her farther voyage acroſs the *Atlantic* to the mother country of the colony. Taking theſe circumſtances all together, this defect of proof, the ſuppreſſion of papers, and the extraordinary nature of the bills of exchange; there is every reaſon to believe that this cargo is not the *bonâ fide* property of the claimants in *America*. But ſuppoſing it to be their property, it would ſtill fall under the ſame principle that has been applied to the trade between the colonies and the mother country: it would be the moſt nugatory thing in the world to ſay that that trade, which is not allowed to be carried on direct, ſhould become legalized or allowable by a mere tranſhipment in *America*. In the caſes of the *Mary*, *Star*, which

which was a trade of a ſimilar nature between *Surinam* and *Holland*, the ſhip and cargo were both condemned.

The POLLY.

Feb. 5th, 1800.

[*Court.* — Is it contended that an *American* might not purchaſe articles of this nature and import them, *bonâ fide*, to *America* on his own account, and afterwards export them?]

It was anſwered — No; that was not contended; but that the truth and reality of the importation for his own account was the point in queſtion; that all the circumſtances in the caſe pointed to a near connection with *Spaniſh* intereſts; and that no proof was brought of the payment of the duties in *America*, nor that the tranſaction was in any way conducted like a *bonâ fide* importation for the *American* market.

[*Court.* — It ſeems to me, that this is the material point, and that it is left ſo bare, that it is almoſt uſeleſs to examine the other facts till that is eſtabliſhed; and that it would be better to reſerve the whole caſe till farther information is produced on that ſubject.]

For the Claimants, Laurence. — The Court will perhaps not think it neceſſary to make that a preliminary queſtion in the preſent caſe, if it conſiders the nature of this cargo, and the circumſtances attending it. The principal part of the cargo is fiſh, to the amount of 1800 quintals, on which no queſtion reſpecting the legality of the trade is raiſed; of the remaining part, conſiſting of ſugar and cocoa, the ſugar is but a ſmall parcel, taken for the purpoſe of making up the lading; and the cocoa is poſitively certified

The Polly. Feb. 5th, 1800.

certified under the hand of the collector of the cuſtoms at *Marblehead*, to have been *imported* into *America*, and to have been entered at his office 17th *Aug.* 1799. The ſame certificate alſo ſtates the ſugars to have been entered at his office in *June* 1799; and it is ſworn by Mr. *Aſa Hooper*, "that he ſaw ſeveral parcels of them in the warehouſe of the claimant, Mr. *R. Hooper*, and that he underſtood they had all paid the duties." If the owners have not given full and entire information on that fact, it is hoped the Court will not think it unreaſonable that ſlighter evidence may be admitted in reſpect to theſe articles, making ſo ſmall a part of the cargo, than if the whole, or the principal part of the cargo, had been expoſed to the ſame objection — as to the property, one circumſtance alone is almoſt ſufficient, *viz.* that the ſhip was furniſhed with a letter of marque againſt *France*; it is not probable that the *Spaniſh* owner would have choſen ſuch a vehicle for the conveyance of his property, ſince that circumſtance alone would have made the whole liable to condemnation by the law of *France*.

JUDGMENT.

Sir *W. Scott.* — This is the caſe of an *American* veſſel, taken on a voyage from *Marblehead* to *Spain*, with a cargo of a mixt nature, conſiſting of fiſh, ſugar, and cocoa. The ſhip has been reſtored, therefore the only queſtion that I have to conſider is reſpecting the property of the cargo, and the legality of the voyage. On the former hearing, it appeared to be a caſe of farther proof, as the cargo was the produce of a *Spaniſh* colony, taken on a voyage to *Old Spain*; and as the maſter had withdrawn ſome of the papers, and had indeed deſtroyed

deſtroyed himſelf before his depoſition was taken; it would therefore be a little extravagant to contend that ſuch a caſe was not a caſe of farther proof. I do not, however, impute it to the parties, as any diffidence in their own caſe, that they had ſent for farther proof before the cauſe came on. They might think that ſome difficulties would ariſe, and it was but a meaſure of prudence to be prepared with farther proof. I am therefore not diſpoſed to draw any inference diſadvantageous to the claim from that circumſtance: I am now to judge of the ſufficiency of the proof brought in, and of the force of the different objections that have been made againſt it.

In reſpect to the fiſh, I do not think that there is any thing that affects that part of the caſe; it is a commerce in which *Americans* deal largely for the ſupply of the ſouthern countries of *Europe*. The whole ſuſpicion and queſtion reſts on the other parts of the cargo, the ſugar and the cocoa: Now, in the firſt place, it appears, from Mr. *Hooper*'s atteſtations, and alſo from thoſe of his two ſons, and of another gentleman of the ſame name, Mr. *Aſa Hooper*, that this ſhip had made a voyage to *Bilboa* before, and had taken payment of her cargo in bills on the *Havannah*. It is objected that this is an extraordinary mode of payment; and ſo it would be for a perſon not being in any courſe of connection with the *Havannah*; becauſe they would be to be diſpoſed of by a diſcount, or other diſadvantageous means. But it appears from Mr. *Hooper*'s atteſtation, that he had been in the habit of carrying on a commerce with *Old Spain*, and alſo with the *Havannah*; therefore it might not be attended with any inconvenience

to

The POLLY.

Feb 5th, 1800.

to him; other parts of the cargo were paid for, it is ſaid, by bills drawn on Mr. *Gardoqui* from the *Havannah*, a mode of payment not very natural: but ſtill, if Mr. *Hooper* was much in correſpondence with this houſe, (as it appears he was, from the accounts current and the correſpondence between them, in reſpect to other cargoes), I do not ſee that it might be more than ſuch a mutual accommodation, as might take place in a fair tranſaction of this ſort. Taking him, therefore, to have been a perſon connected with Mr. *Gardoqui*, there is nothing ſo alarming in this mode of payment, as if the claimant had been a perſon not engaged in ſuch habits of trade before; and on the ſuppoſition, that Mr. *Gardoqui* was his correſpondent, it is no extravagant thing at all, that he ſhould be made his conſignee in *Europe*. This circumſtance has been preſſed againſt the truth of the claim; but on the conſiderations which I have ſtated, I do not think it weighs materially to its diſadvantage; and, conſidering it as connected with the former evidence, and the atteſtations of the claimant, I think there is no reaſon to doubt that the cargo is the property of Mr. *Hooper*.

Then there remains only the queſtion of law, which has been raiſed, whether this is not ſuch a trade as will fall under the principle that has been applied to the interpoſition of neutrals in the colonial trade of the enemy? on which it is ſaid, that if an *American* is not allowed to carry on this trade directly, neither can he be allowed to do it circuitouſly. An *American* has, undoubtedly, a right to import the produce of the *Spaniſh* colonies for his own uſe; and after it is imported *bonâ fide* into his own country, he would be

The POLLY.

Feb. 5th, 1800.

be at liberty to carry them on to the general commerce of *Europe;* very different would such a case be from the *Dutch* cases, in which there was an original contract from the beginning, and under a special *Dutch* licence, to go from *Holland* to *Surinam*, and to return again to *Holland*, with a cargo of colonial produce. It is not my business to say what is universally the test of a *bonâ fide* importation: It is argued, that it would not be sufficient, that the duties should be paid, and that the cargo should be landed. If these criteria are not to be resorted to, I should be at a loss to know what should be the test; and I am strongly disposed to hold, that it would be sufficient, that the goods should be landed and the duties paid.

If it appears to have been landed and warehoused for a considerable time, it does I think raise a forcible presumption on that side; and it throws it on the other party to shew, how this could be merely insidious and colourable. There is, I think, reason to believe that the sugar was *a part* and parcel of a cargo, said to have been brought from a *Spanish* colony in this vessel; and if so, the very distribution of the remainder, is some proof that they were not bought with an intention only of sending them on. But I have besides, positive proof in the affidavit of Mr. *Asa Hooper*, who swears (*a*), "that the duties had been paid

(*a*) Affidavit of *Asa Hooper* of *Marblehead*, master of the ship *Hope*, belonging to *Boston*, and now lying at *Cowes*, states, "that he had been acquainted with Mr. *R. Hooper* ever since he was a child; that he knows the brig *Polly*, and was at *Marblehead* when she sailed for *Bilboa*; and that he was informed by Captain *Lasky* and various other

The POLLY.

Feb. 5th, 1800.

paid for them." Then the only difficulty remains as to the cocoa; and it is ſaid by one of the witneſſes, and by one only, that it was tranſhipped from another veſſel, and that it had been brought into *America* only ten days before; but although there is ſomething of a difficulty ariſing on this ſmall part of the cargo, yet upon the whole, I cannot think it weighty enough to induce me to ſend the caſe acroſs the *Atlantic* for ſtill farther proof, as to the facts of this recent importation and tranſhipment, or of its having been tranſferred to the preſent proprietors, or of its having been exported without a previous payment of import duties. If it had compoſed a larger part of the cargo I might have deemed it reaſonable to have had ſomewhat more of ſatisfaction on ſome of theſe points, which do not appear with ſufficient certainty to found any legal concluſion againſt it. It appears by the collector's certificate, that it had been *entered* (*a*) and *imported*; and I think that theſe words are ſufficient to anſwer the fair demands of the Court.

---

other perſons, that the ſugar, being part of the cargo, was a part of a much larger quantity, the whole of which had been imported, landed, and *the duties paid* at *Marblehead* by the ſaid R. *Hooper*, in the general courſe of trade, &c."

(*a*) The certificate of the collector ſtated, That in *June* the *Polly* entered at his office, with a cargo of 590 boxes of ſugars, the property of *American* citizens;—that 17th *Auguſt*, the ſchooner *William* entered with 67 hogſheads, &c. of cocoa, and certified the clearing out of the *Polly*, &c. for *Bilboa*, with a cargo of 249 boxes of brown ſugars, *imported* in the ſaid brig from the *Havannah*, on the 25th *June*; and of 30 hogſheads, &c. of cocoa, imported in the ſchooner *William*, from *Laguira*, with 1800 quintals of fiſh. Be it known, &c. that this cargo of ſugars, cocoa, and fiſh, cleared out from this port for *Bilboa*, 27th *Auguſt* 1799, is the property of citizens of *America*, &c.

The POLLY.

Feb. 5th, 1800.

The King's Advocate prayed—That the captors might be allowed their expences.

Laurence—Objected that the captors had materially deteriorated the cargo, by perſiſting to unliver the cargo, although they were told that it was unneceſſary, and that the farther proof was arrived; that the cargo belonged to the ſame owner as the ſhip, and that it might ſtay on board the ſhip as a warehouſe; that the commiſſion of unlivery was a matter of form, on ordering of farther proof, but not neceſſary to be carried into execution in ſuch a caſe as this; that the claimants, inſtead of being made ſubject to the expences, ought to be indemnified for the deterioration, which the cargo had ſuſtained.

[*Court.*—Did you object to the Commiſſion?]

Anſwered—That it paſſed in the uſual courſe before a Surrogate.

The King's Advocate replied—That if it had been omitted, the captors would have been liable to demurrage; that the captors had been guilty of no miſconduct; that the commiſſion paſſed in the ordinary form without oppoſition; and that ſo ſoon as the objection was made on the part of the claimants, the captors deſiſted from the unlivery; that it was ſo far from being abſolutely unneceſſary in the preſent caſe, that two lighters of rotten fiſh had been taken out, which had ſpoiled on board.

The POLLY.

Feb. 5th, 1800.

Court.—I ſee nothing to affect the captors with miſconduct; when the ſhip was brought in the claimant refuſed to accept the reſtitution of the ſhip without the cargo, contending that it was not a caſe of farther proof. The Court determined that it was; and it does not appear that any communication was made, after the order for the captors to reſtrain them from proceeding to unlivery. The commiſſion of unlivery paſſed as of courſe, and they proceeded in the execution of it till intimation was given on the part of the claimant, and on the firſt intimation the captors ſtopped their hand. I can impute no blame to the captors: and I ſhall give them what I was diſpoſed to give them before the objection was taken, the expences of farther proof.

Feb. 11th, 1800.

LA ROSINE,—or The King againſt——Boxes of Tin.

Tin plates for canniſter ſhot, put on board a cartel ſhip by a *Britiſh* manufacturer at *Dover*, condemned as Droit of Admiralty.

THIS was a caſe of ſeveral boxes of tin plates, ſaid to be ſuch as are uſed for canniſtering ſhot, ſeized by order of the officers of the *Fife* dragoons, at *Dover*, on information that they had been put on a *French* cartel ſhip, by a brazier of that place. The ſhip had been detained, but was immediately releaſed by an order from the Duke of *Portland*. On application to condemn theſe tin-plates as Droits of Admiralty:—

Court.—There muſt be ſome witneſs who can prove the putting on board. It is a very ſerious thing to ſtop

The R. NE. Feb. 11th, 1800.

ſtop a cartel ſhip, or confiſcate any thing that is on board. If they had ſuch articles on board, without any intention of landing them, there could be no reaſon for ſtopping them. The fact of ſhipping them in *England* is the material circumſtance to be proved. The depoſition of the witneſs, who is a ſerjeant of the *Fife* dragoons, ſtates, "that between eleven and twelve on the night of the 13th *September*, he ſaw ſundry perſons, the crew of the cartel ſhip, carrying boxes from the brazier's, and putting them on board the ſhip, which was lying near the quay, with her ſails ſet, and ready to ſail; that he broke open one of the boxes, and finding it contained tin in ſheets, he immediately detained the ſhip, and placed ſentinels on board, and went and informed his officer; that on returning he found the mayor, and that ſome of the officers of the cuſtoms had got on board, and had taken poſſeſſion of the goods on board, and landed them, &c." This is rather too looſe: He does not ſay the *goods in queſtion*, but the *goods on board*. It might apply to any other goods.—But I perceive there is an affidavit, of the ſame perſon, which is more preciſe: It ſtates, "that they ſearched the *ſaid boxes*, and found they contained each from one to two hundred ſheets of tin, &c.; and that in conſequence thereof, the *ſaid* boxes, ſixty-nine in number, were immediately taken from on board the ſaid ſhip and carried to the cuſtom-houſe." On this evidence I ſhall condemn theſe boxes of tin as Droits of Admiralty.

ORDERS OF COURT,

JANUARY 28th, 1801.

THAT no warrant of arreſt, either of perſons or ſhips, ſhall iſſue out of the Inſtance Court, without an affidavit of debt being previouſly made by the perſon on whoſe behalf ſuch warrant is prayed, or his lawful attorney.

MARCH 13th, 1801.

THAT the caſes of all ſhips detained in the ports, in which claims have been given, ſhall be brought before the Court on the two laſt ſittings in each month, which two laſt ſittings ſhall excluſively be appropriated to ſuch caſes, if they are numerous enough to occupy it entirely.

SUCH detained ſhips, for which claims have been given as are not brought by the captors before the Court on the ſaid two laſt ſittings in each month in which they ſhall have been brought in, ſhall, if they are reſtored at any later ſittings upon the original proof, be entitled to demurrage, to be computed from the time at which they ought to have been brought before the Court, in purſuance of the former part of this Order.

ADDITIONAL NOTE to the War Onſkan, *p.* 300, *comprizing a ſummary review of* French *proceedings in matters of prize during the preſent war.*

IN pointing the attention of the Reader to the ſeries of facts, which have juſtified the change of practice, rather than of principle, that has taken place in our Court of Admiralty during the preſent war, in reſpect to the allowance of ſalvage on recapture of neutral property out of the hands of *French* cruiſers; the Editor is happy to be able to abſtain from any other obſervations, on the proceedings of the cruiſers and the Courts of *France*, than thoſe which are ſupplied by *French* writers, and thoſe, writers of authority on this ſubject.

After deſcribing the acts of violence and outrage againſt the *American* flag, which is ſtill farther evidenced by the acts of hoſtility which have enſued,) the author of *Le dix huit Brumaire*, publiſhed at *Paris*, 1800, reproaches the proceedings of his countrymen in theſe terms: " Le pavillon Danois eſſuya mille avanies; mais ce qu'il y a de remarquable c'eſt que, malgré le grand intérêt, que nous avions a ménager ſa Majeſté *Pruſſienne*, ſon pavillon ne fut pas plus reſpecté, que les autres; ſi elle eût voulu chercher un prétexte pour rompre avec nous, les corſaires *Français* lui en euſſent offert mille, &c.—On ne ſe contenta pas de traiter de la ſorte des puiſſances neutres; l'on en agit encore avec plus de rapacité à l'égard de la République *Batave*, notre alliée, notre amie;—notwithſtanding the ſervices, deſcribed at length, " il falloit encore, que les corſaires *Français* leur enlevaſſent juſque dans leur eaux, juſque ſous le canon de leur places, le peu de petits bâtiments, qu'ils oſoient Vol. 1, p. 286.

oſoient mettre à flots,—envoyoient ils des ſecours en ble dans leurs colonies pour les ſubſtanter, et empecher par la qu'elles ne ſe livraſſent á l'*Angleterre* faute de vivres, des armateurs *Français* interceptoient ces convois, et les faiſoient declarer de bonne priſe, à la faveur des loix vexatoires rendues en cette matière, et dont l'application etoit ſouvent prononcée, dans certains tribunaux de départemens, par des juges, qui avoient un intérêt dans les armemens en courſe." *p.* 168. 170.

If ſuch were the proceedings of the *French* cruiſers, and *French courts of juſtice*; it will be found that the frequent change, or rather confuſion which has taken place in *France*, with reſpect to the prize juriſdiction during the preſent war, has been but ill adapted to correct the abuſe. One of the firſt acts of the revolution was to diſſolve all poſſible connection between the executive power of the ſtate and the adminiſtration of juſtice; and no diſtinction was made between the ordinary adminiſtration of the municipal laws of the ſtate, on which the liberty of the ſtate may very much depend, and the adminiſtration of a branch of law which is, in ſome reſpects *ſui generis*, the public law of prize, adminiſtered to foreign ſtates, in time of war, on the authority of general principles of equity, the immemorial uſage and cuſtoms of the ſea, and the expreſs treaties ſubſiſting with particular countries.

The firſt article of the law of 13th *Auguſt* 1791, had given to the Tribunals of Commerce a general civil juriſdiction over all queſtions of commerce, reſerving, or as it is expreſſed, "without including for the preſent, the juriſdiction over prize matters." *Code des Priſes*, 1799, *v.* 2. *p.* 125. Notwithſtanding this reſervation, many prize caſes were carried before thoſe tribunals immediately on the iſſuing of reprizals on the part of *France*, 31 *Jan.* 1793; although it was not till the 14th *Feb.* that a proviſional decree paſſed, giving them authority in prize matters, *ibid.* On the 21ſt *February* another decree paſſed, juſtifying every thing that had been done by thoſe tribunals on the ſubject of prize, previous to the 14th *February*; and declaring them, "to be rightly ſeized of the prize juriſdiction, and authorized to judge definitively on ſuch caſes." *Ibid.* On the 1ſt of *October* 1793, a farther modification took place; and the juriſdiction was given, "aux juges de paix pour l'inſtruction, [taking examination, &c.] et aux tribunaux de commerce pour le jugement." On the 8th *Nov.*

Nov. 1793, a ſtill more important change was made; the decree of the 14th *Feb.* was expreſsly repealed, and a juriſdiction over all prize cauſes was eſtabliſhed, to be exerciſed "par voie *d'adminiſtration*, par le conſeil exécutif proviſoire." *Ibid. p.* 125.

The Editor of the new code *des Priſes* obſerves on that decree, that it was in one reſpect moſt abſurd; as it repealed the regulation of the 14th *Feb.* which was only proviſional, and left unnoticed the law of the 1ſt of *October*, which was definitive, to the ſame effect; and he adds, "quoiq'il en ſoit de cette confuſion, ou de cette contradiction des lois, celle du premier *Octobre* 1793 eſt reſtée dans toute ſa force, malgré cet étrange décret poſtérieur du 8 *November* 1793, et nous la rapporterons toute entière à ſa date, *comme formant encore actuellement la loi principale ſur la competence des Priſes.*" *Ibid. p.* 126.

However, the power which was given to the executive council by this decree, continued to be exerciſed, on the ſuppreſſion of that board, by the Committee of Public Safety; till the law of 3 *Brumaire, an* 4, (24th *October* 1795,) confirmed by the law of 8th *Floreal*, (27th *April* 1796) gave the juriſdiction of prize again to the ordinary tribunals. *Code des Priſes, v.* 2. *p.* 382. The juriſdiction as it was at that time eſtabliſhed may be thus deſcribed: The Courts of firſt reſort were, the Tribunals of Commerce, or the Courts of the Conſul, or Vice Conſul, in foreign parts, as equivalent to the Tribunals of Commerce; from theſe Courts there lay an appeal to the Tribunals of the Departments. *Code des Priſes, v.* 2. *p.* 254. and in all caſes there was a power of appeal to the *Court of Caſſation*, on points of form or of mere law.

With reſpect to the proceedings under this changeable ſyſtem, we muſt believe, on the word of the Editor of the new *Code des Priſes*, (who was alſo an official perſon in the Court of Caſſation), that during the time of the convention, there was no ſtability or conſiſtency to be found in them; and he dates the commencement of a better order of things only from the commencement of the *conſtitution* of the third year [1795]. "A compter de ce moment ſeulement, on voit enfin paraître dans cette partie, des lois ſtables, et à peu-près complètes. *Tout juſq' alors, s'était reſſenti de la tourmente révolutionaire.*" We find, however, ſo late as 22d *Nivoſe, an* 7, (11th *Jan.* 1799,) that the Executive Directory were

were by no means ſatisfied with the ſtate of the prize juriſdiction, but were projecting other changes. After a clear and detailed account of the *true* intereſts, and it may be added, the only one real principle of *France*, in the management of prize matters, all ſummed up in this ſhort and inſtructive ſentence—"*a mieux apprécier les droits des nations neutres, et à ſentir* que tout ce qui ſerait fait pour elles, *ſerait un coup porté à l'Angleterre:*" they conclude their memorial to the Council of Five Hundred, with theſe words, "Le Directoire Exécutif regarde donc qu'il eſt de ſon devoir de vous inviter ſpécialment à revoir la légiſlation de priſes, et à décider au préalable, come baſe eſſentielle, que dés ce moment, les conteſtations ſur le fait de la validité des priſes, ſeront en derniere analyſe, *terminées adminiſtrativement.*" *Code des Priſes*, v. 2. p. 379. 390.

The note which the Editor of the *Code des Priſes* ſubjoins to ſome of the repreſentations of abuſe contained in this memorial, is too inſtructive to be omitted. "Voilà juſtement ce qui fait, que dans les conteſtations actuelles ſur les priſes, chacun applique a tort, et a travers à ſa cauſe, les anciens réglements, ſans s'inquiéter de ceux abrogés, ou de fait, ou tacitement, par les réglemens poſtérieurs; l'armateur, et le capturé prennent réciproquement dans chaque réglement ce qu'ils croient leur etre utile, et laiſſent à l'écart ce qui peut leur etre contraire. Les Juges euxmêmes ne ſavent le plus ſouvent, a quoi s'en tenir."

It is certain that the Executive Directory did not ſucceed in their attempt to introduce a farther change;—and it is to their failure, that the publication before mentioned, Le dix huit Brumaire, refers, it is apprehended, in theſe words—"En vain pluſieurs membres du directoire voulurent ils eux mêmes faire changer la légiſlation ſur les neutres;—tout fut inutile; Le corps légiſlatif alloit on train.—Beaucoup de députés en participant à l'émiſſion de ſemblables décrets, ignorant la manière dont ſe faiſoit la courſe, croyoient fair du bien à la Republique, et ne tuer que le commerce Anglais. Enfin parmi ces Deputes, (et ceux-ci c'étoient les meneurs, c'étoient ceux que propoſoient les loix,) il y en avoit que étoient corſaires euxmemes, que avoient des bâtimens en mer, ou qui avoient des intérêts ſur les corſaires,—On ſent ſi ces hommes intéreſſés aux captures ſe ſouceoient beaucoup *de ménager* les puiſſances neutres ou alliées!—Ajoutons à cela comme nous l'avons

deja

déjà fait preſſentir plus haut, qu'il y avoit dans certains Tribunals qui jugeoient de la validité des priſes, des juges qui avoient eux mêmes des interets ſur les corſaires, et par conſequent ſur la cargaiſon, dont ils prononcoient le relachement, ou la confiſcation."

P. 171 & 2.

This is the ſhort hiſtory of *the general effect* of the *French* proceedings in matters of prize; extracted from their own writers, and preſenting no inadequate cauſe for all thoſe acts of violence and ſhameleſs rapacity under which the different nations of *Europe* have notoriouſly ſuffered during the preſent war.—It would be to encroach too much on the reader's patience, to advert more particularly to them in detail:—Such was the ſtate of their proceedings till the late change, which has taken place under the preſent government; by which the prize juriſdiction is again exerciſed, par voie d'Adminiſtratur, as it is called, or by means of a particular Court, or Conſeil des Priſes, eſtabliſhed by the Conſuls, 6 *Germ.* 8 year, 26th *March* 1800: in virtue of the law of 26 *Ventoſe*, 16th *March*, preceding.—The effect of theſe eſtabliſhments is yet untried—Except that, as to *America*, they have been again ſuſpended.

It would be improper to cloſe this ſhort account of the *French* proceedings, without noticing one very remarkable and pregnant paſſage in the addreſs of the Executive Directory, before alluded to. It contains theſe memorable words, "Et quand il eſt malheureuſement trop vrai, qu'il n'ya pas *un ſeul vaiſſeau marchand* naviguant ſous pavillon Français, quel autre moyen d'exportation avons nous, que l'emploi des vaiſſeaux neutres?"—And the note to that paſſage adds, "dans la dernier état publié par les gazettes du Nord, du nombre des vaiſſeaux qui ont paſſé le Sund, depuis un an, ou ne trouve *pas un ſeul navire Français.*" From the acknowledgement of this ſtate of facts, one of theſe two concluſions muſt follow—either that the *French* marine is entirely annihilated or ſuſpended; or, that a conſiderable part of *French* commerce (if it ſtill ſurvives) is conducted under the cover and maſk of neutral flags. Taking the juſt meaſure of the right of viſitation and ſearch (*againſt which ſo many objections have lately been made*) at a mean ratio, between the importance of the reſult to be obtained by the belligerent over the commerce of his enemy, and a reaſonable attention

Code des Priſes, Vol. 2. p. 385

to

to the *pre-exiſting* ſtate of neutral commerce, and the convenience of carrying on that commerce, in a *legitimate, bonâ fide, ingenuous, manner*;—What repreſentation of facts can in ſo few words vindicate the neceſſary exiſtence of a right of ſearch? vindicating this right of viſitation on one ſide, on the ground of its effect in annihilating the commerce of the enemy; or on the other, on the ground of juſt and neceſſary controul over the interpoſition of neutral names to protect the trade of the enemy; if in fact *French* trade does exiſt in any conſiderable degree, without the appearance of one *French* merchantman to carry it on.

APPEN-

APPENDIX.

No. I.

ADDITIONAL INSTRUCTION *to the commanders of all our ſhips of war, and* GEORGE R. *privateers that have or may have letters of* (L. S.) *marque againſt* France. *Given at our Court at* Saint James's, *the ſixth day of* November 1793, *in the thirty-fourth year of our Reign.*

THAT they ſhall ſtop and detain all ſhips loaden with goods the produce of any colony belonging to *France*, or carrying proviſions or other ſupplies for the uſe of any ſuch colony, and ſhall bring the ſame, with their cargoes, to legal adjudication in our Courts of Admiralty. Vide ſupra, p. 151, &c.

By His Majeſty's Command,

HENRY DUNDAS.

No. II.

INSTRUCTIONS *to the Commanders of our ſhips of war and privateers, that have or may* GEORGE R. *have letters of marque againſt* France. *Given* (L. S.) *at our Court at* St. James's, *the eighth day of* January 1794, *in the thirty-fourth year of our reign.*

WHEREAS by our former inſtruction to the commanders of our ſhips of war and of privateers, dated the ſixth day of *November* 1793, we ſignified, that they ſhould ſtop and detain all ſhips loaden with goods the produce of any colony belonging to *France*, or carrying proviſions or other ſupplies for the uſe of any ſuch colony, and ſhould bring the ſame with their cargoes to legal adjudication; we are pleaſed to revoke the ſaid inſtruction, and in lieu thereof, we have thought fit to iſſue theſe our inſtructions to be duly obſerved by the commanders of all our ſhips of war and privateers, that they have or may have letters of marque againſt *France*. Vide ſupra, p. 151.

1ſt. That they ſhall bring in for lawful adjudication all veſſels with their cargoes that are loaden with goods the produce of the *French Weſt India* iſlands, and coming directly from any port of the ſaid iſlands to any port in *Europe*.

2d. That they ſhall bring into lawful adjudication all ſhips with their cargoes that are loaden with goods the produce of the ſaid iſlands, the property of which goods ſhall belong to ſubjects of *France*, to whatſoever ports the ſame may be bound.

3d. That they ſhall ſeize all ſhips that ſhall be found attempting to enter any port of the ſaid iſlands that is or ſhall be blockaded by the arms of His Majeſty or his allies, and ſhall ſend them in with their cargoes for adjudication according to the terms of the ſecond article of the former inſtructions, bearing date the 8th day of *June* 1793.

4th. That they ſhall ſeize all veſſels loaden wholly or in part with naval or military ſtores bound to any port of the ſaid iſlands, and ſhall ſend them into ſome convenient port belonging to his Majeſty, in order that they, together with their cargoes, may be proceeded againſt according to the Rules of the law of nations.

By His Majeſty's command.

HENRY DUNDAS.

No. III.

INSTRUCTIONS *for the Commanders of our ſhips of war and privateers, who have or may have letters of marque againſt* France, Spain, *or the* United Provinces. *Given at our Court at* Saint James's *the twenty-fifth day of* January 1798, *in the thirty-eighth year of our reign.*

GEORGE R. (L. S.)

Vide ſupra, p. 151.

WHEREAS by our former inſtructions to the commanders of our ſhips of war and privateers, dated the 8th of *January* 1794, we ſignified, that they ſhould bring in for lawful adjudication, all veſſels with their cargoes that were laden with goods, the produce of the *French Weſt India* iſlands, and coming directly from any port of the ſaid iſlands to any port in *Europe*; and likewiſe all ſhips, with their cargoes, that were laden with goods, the

the produce of the ſaid iſlands, the property of which goods ſhould belong to ſubjects of *France*, to whatſoever ports the ſame might be bound; and that they ſhould ſeize all ſhips that ſhould be found attempting to enter any port of the ſaid iſlands that was or ſhould be blockaded by the arms of His Majeſty or his allies, and ſhould ſend them in, with their cargoes, for adjudication; and alſo all veſſels laden wholly, or in part, with naval or military ſtores, bound to any port of the ſaid iſlands, and ſhould ſend them into ſome convenient port belonging to His Majeſty, in order that they, together with their cargoes, might be proceeded againſt according to the law of nations: And whereas, in conſideration of the preſent ſtate of the commerce of this country, as well as that of neutral countries, it is expedient to revoke the ſaid inſtructions; we are pleaſed hereby to revoke the ſame, and in lieu thereof, we have thought fit to iſſue theſe our inſtructions, to be obſerved from henceforth by the commanders of all our ſhips of war, and privateers that have or may have letters of marque againſt *France*, *Spain*, and the *United Provinces*,

I. That they ſhall bring in, for lawful adjudication, all veſſels, with their cargoes, that are laden with goods, the produce of any iſland or ſettlement belonging to *France*, *Spain*, or the *United Provinces*, and coming directly from any port of the ſaid iſlands or ſettlements, to any port in *Europe*, not being a port of this kingdom, nor a port of that country to which ſuch ſhips, being neutral ſhips, ſhall belong.

II. That they ſhall bring in, for lawful adjudication, all ſhips, with their cargoes, that are laden with goods, the produce of the ſaid iſlands or ſettlements, the property of which goods ſhall belong to ſubjects of *France*, *Spain*, or the *United Provinces*, to whatſoever ports the ſame may be bound.

III. That they ſhall ſeize all ſhips that ſhall be found attempting to enter any port of the ſaid iſlands or ſettlements, that is or ſhall be blockaded by the arms of His Majeſty; and ſhall ſend them in with their cargoes, for adjudication, according to the terms of the ſecond article of the former inſtructions, bearing date the 8th day of *June* 1793.

IV. That they ſhall ſeize all veſſels laden wholly, or in part, with naval or military ſtores, bound to any port of the ſaid iſlands or ſettlements, and ſhall ſend them into ſome convenient port belonging to His Majeſty, in order that they, together with

their cargoes, may be proceeded against according to the rules of the law of nations.

By His Majesty's command,

PORTLAND.

No. IV.

Admiralty Prize Court.

FORTUNA, *Jacob Christian Jebsen* master.

THE claim of *Jacob Christian Jebsen* of *Apenrade* in *Denmark*, a subject of His Majesty the King of *Denmark*, and master of the ship *Fortuna*, on behalf of himself and of *Ambrosius Hanssen Lange*, and others, all of *Apenrade* aforesaid, also subjects of His Majesty the King of *Denmark*, the true, lawful, and sole owners and proprietors of the said ship, her tackle, apparel, and furniture, now detained at *Leith* in *North Britain*; in consequence of the seizure or detention of the cargo of the said ship by the Collector and Comptroller of His Majesty's Customs at *Leith* aforesaid, as set forth in the affidavit hereto annexed; and also on behalf of *Peter Pescheir* of *Copenhagen*, merchant, likewise a subject of His Majesty the King of *Denmark*, the true, lawful, and sole owner and proprietor of the said cargo; for the said ship, her tackle, apparel, and furniture, as the sole property of *Danish* subjects as aforesaid, and for the cargo of the said ship, also as *Danish* property subject to (*a*) a proportion of a certain average due from the said ship and cargo arising from damage sustained by the ship, in consequence whereof he was forced to put into *Leith* as aforesaid; and for such proportion of the said average accordingly, and for all such freight, losses, costs, charges, damages, demurrage, and expences as have arisen, or shall or may arise by reason of the seizure or detention aforesaid.

9th *May* 1795. Vide supra, p 170 and 176.

J. NICHOL. JACOB CHRISTIAN JEBSEN.

(*a*) This form of Claim and Affidavit was inserted to answer the note page 170. — Being the Claim in the *Fortuna Jebsen*, cited page 176. It may, at the same time, serve to state more precisely the particulars of that case. The general average incurred was 335*l.* 14*s.* 6*d.* The proportion, as settled between the parties, on the cargo was 241*l.* 6*s.* 4*d.* There was besides a charge for particular average on the cargo of 24*l.* 15*s.* 8*d.* — amounting altogether to 265*l.* 16*s.* 4*d.* After a deduction of 240*l.* for wheat thrown overboard and brought into the general average, there remained a balance of 25*l.* 16*s.* 4*d.* to be paid by the cargo.

It was this sum, that was deducted by the registrar and merchants, from the estimate of the remaining cargo taken by Government in abatement of the price to be paid to Mr. *Pescheir*.

No. V.

Admiralty Prize Court.

The FORTUNA, *Jacob Chriſtian Jebſen* maſter.

9th *May* 1795.

Supra, p. 170.

APPEARED perſonally *Jacob Chriſtian Jebſen* of *Apenrade* in *Denmark*, and made oath that he is a ſubject of His Majeſty the King of *Denmark*, and maſter of the ſhip *Fortuna*, and that the deponent and *Ambroſius Henricus Lange* and others, all of *Apenrade* aforeſaid, and likewiſe ſubjects of His Majeſty the King of *Denmark*, were, and are the true, lawful, and ſole owners and proprietors of the ſaid ſhip, her tackle, apparel, and furniture; and he further ſaith, that having taken in a cargo of wheat, (the property, as he the deponent verily believes, of *Peter Peſchier* of *Copenhagen*, merchant alſo a ſubject of His Majeſty the King of *Denmark*,) he ſailed therewith early in *November* laſt from *Copenhagen* aforeſaid bound to *Bourdeaux*, but that the veſſel meeting with much bad weather and contrary winds, and having ſprung a leak, he the deponent was forced to make for a harbour, and accordingly put into the port of *Leith* in *North Britain*, where the ſaid cargo was unladen in order to enable the deponent to repair the damage ſuſtained by the ſhip; that the ſaid ſhip was accordingly repaired, and the ſaid cargo having been ſtored in warehouſes at *Leith* under the locks of the Collector and Comptroller of the Cuſtoms there, this deponent on the 2d of *March* laſt applied to the ſaid Collector and Comptroller for permiſſion to re-ſhip the ſame, but that ſuch permiſſion was refuſed; and that the ſaid cargo hath been ever ſince detained, and is now ſeized and detained in the ſaid warehouſe at *Leith* under the authority of the ſaid Collector and Comptroller: and that in conſequence of ſuch ſeizure or detention of the cargo, the ſaid ſhip is alſo now lying at *Leith* unable to proſecute her aforeſaid voyage; and referring to the papers hereto annexed marked from No. 1. to No. 8. inclusive, he ſaith that the ſame are the documents relating to the ſhip and cargo, and were on board at the time of his putting into *Leith* as aforeſaid, and that the ſame are true and genuine; and he further ſaith that no perſon or perſons being a ſubject or ſubjects of *France*, or inhabiting within any of the territories of *France*, nor their factors or agents, nor any others enemies of the Crown of *Great Britain*, had at the time of the ſaid ſeizure or detention,

detention, or now have any right, title, or intereſt in the ſaid ſhip, her tackle, apparel, furniture, or to the knowledge or belief of this deponent in the cargo of the ſaid ſhip or in any part thereof; and that the claim hereto annexed is a true and juſt claim, and that he ſhall be able to make due proof thereof as he the deponent verily believes.

JACOB CHRISTIAN JEBSEN.

Same day ſworn before me, J. FISHER, Surr.

No. VI.

At the Council Chamber *Whitehall*, the 20th of *December* 1799, preſent the Lords of His Majeſty's moſt Honorable Privy Council.

Vide ſupra, p. 71.

WHEREAS by an act of Parliament paſſed in the thirty-ninth year of His Majeſty's reign, intituled "an act to allow the importation of *Spaniſh* wool in ſhips belonging to countries in amity with His Majeſty," it is enacted among other things, that in caſe any ſhip or veſſel having on board any *Spaniſh* wool has been, or may be detained, and it ſhall appear to the ſatisfaction of the Lords of His Majeſty's Council that His Majeſty's licence was granted for the importation of ſuch *Spaniſh* wool before ſuch detention, it ſhall be lawful for the ſaid Lords of His Majeſty's Council, and they are hereby authorized and required to order and direct the immediate reſtoration of all ſuch *Spaniſh* wool under the aforeſaid circumſtances to the reſpective owner or owners, or proprietor or proprietors thereof: And whereas His Majeſty by licence under his royal ſign manual, bearing date the 24th day of *May* 1799, did authorize Meſſrs. *Robarts* and Co. of *London*, merchants, or their agents, or the bearer of their bills of lading, to import on board any neutral veſſels from *Bilboa* to any port in *Great Britain* the quantity of *Spaniſh* wool, and other articles ſpecified in the bills of lading; And whereas it has been repreſented that the ſaid Meſſrs. *Robarts* and Co. did, in purſuance of ſuch licence, cauſe to be put on board the ſhip *Die Beurſe*, *Thomas Shimells* maſter, being a neutral veſſel, the following *Spaniſh* wool, *viz.*

128 bags of *Spaniſh* wool,
12 ditto ditto,

for the purpoſe of importing the ſame into this kingdom under

the authority of such licence: And whereas it has also been represented that the said ship or vessel was seized by the *Telegraph* man of war; and it is alleged that the sole ground of such seizure and detention is, that such ship or vessel had on board such *Spanish* wool as aforesaid. Now under the powers and authorities vested in the Lords of His Majesty's Council by the said act, it is declared, that it has been made to appear to them that his Majesty's licence was granted for the importation of such *Spanish* wool as aforesaid; and it is ordered in Council, in further pursuance of the said act, that the said vessel, and all such *Spanish* wool as aforesaid, be forthwith liberated as far as the same would have been liable to seizure and detention in respect to the *Spanish* wool on board the same in case such wool had been put on board such vessel without such licence having been granted as aforesaid; and the Judge of His Majesty's High Court of Admiralty is to give the necessary directions herein accordingly.

W. Fawkener.

No. VII.

At the Court at *St. James's*, the 19th of *February* 1800, present, the King's most excellent Majesty in Council. Vide supra, p. 171.

WHEREAS by an Act passed in the thirty-ninth year of His Majesty's reign, intituled "an act to allow the importation of *Spanish* wool in ships belonging to countries in amity with His Majesty," reciting that by an act passed in the thirty-third year of His Majesty's reign, to prevent traitorous correspondence with His Majesty's enemies, and by several subsequent acts, trade and intercourse was prohibited between *Great Britain* and the countries in hostility with His Majesty, unless such trade and intercourse should be specially permitted by his Majesty's licence and authority; and also reciting, that, for the encouragement of the manufactures of this country, it was expedient to permit the importation of *Spanish* wool from any place whatever in ships or vessels belonging to any kingdom or state in amity with His Majesty, it was enacted that it should be lawful to and for any person or persons to import into this kingdom *Spanish* wool from any port or place whatever, in foreign parts, in any ship or vessel belonging to any kingdom or state in amity with His Majesty, any thing in the said act passed in the thirty-third year of the reign of his present Majesty, or any other act or acts of Parliament to the contrary in anywise notwithstanding.

And

And whereas doubts have arisen, whether, according to the true construction of the said act of the thirty-ninth year of His Majesty's reign, His Majesty's subjects are thereby authorised to purchase and import *Spanish* wool under circumstances which would make the same liable to capture, as the property of subjects of His Majesty trading with the enemy, unless the licence of His Majesty should be first obtained for that purpose: His Majesty, by and with the advice of his Privy Council, is pleased to order, and it is hereby ordered, that it shall be lawful for any of His Majesty's subjects to purchase and import into this kingdom any *Spanish* wool, in any ship or vessel belonging to any kingdom or state in amity with His Majesty, notwithstanding the purchase and importation thereof may be deemed a trading with His Majesty's enemies, and notwithstanding the same might be liable to capture as the property of His Majesty's subjects trading with the enemy, in case this order had not been made.

And whereas some of His Majesty's subjects may have already purchased for the purpose of importing into this kingdom, and others may have caused to be brought to this kingdom for the purpose of importation, *Spanish* wool, without having obtained His Majesty's special licence for the same, conceiving that such licence had been rendered unnecessary by the said act of the thirty-ninth year of His Majesty's reign, His Majesty is pleased, by and with the advice of his Privy Council, to order, and it is hereby ordered, that in case any person or persons, being a subject or subjects of His Majesty, hath, or have, since the passing of the said act, purchased, for the purpose of importing into this kingdom, or caused to be brought into this kingdom for the purpose of importation, any such *Spanish* wool as aforesaid, without having previously obtained any special licence from His Majesty for so doing; it shall be lawful for such person or persons to import the same, as if such licence had been previously obtained: And this His Majesty's order shall be deemed and taken to be a full and sufficient licence for the purchase and importation of such wool, notwithstanding such purchase or importation might otherwise be deemed unlawful, as a trading with His Majesty's enemies, in case this order had not been made: And the Right Honourable the Lords Commissioners of His Majesty's Treasury, and the Lords Commissioners of the Admiralty, are to give the necessary directions herein, as to them may respectively appertain. *W. Fawkener.*

No. VIII.

INSTRUCTIONS *for the commanders of ſuch merchant ſhips or veſſels who ſhall have letters of marque and repriſals for private men of war againſt the ſhips, veſſels, and goods belonging to the perſons inhabiting the coaſts and* GEORGE R. *ports of* Genoa, *and the territories of the* (*L.S.*) *Pope, ſtiling themſelves the* Ligurian *and the* Roman *Republics, by virtue of our commiſſion granted under our great ſeal of* Great Britain, *bearing date the twenty-eighth day of* September 1798. *Given at our court at* St. James's *the twenty-ninth day of* September 1798, *and in the thirty-eighth year of our reign.*

ARTICLE I.

THAT it ſhall be lawful for the commanders of ſhips authorized by letters of marque and repriſal for private men of war, to ſet upon by force of arms, and ſubdue and take the men of war, ſhips and veſſels, goods, wares, and merchandizes belonging to perſons inhabiting the coaſts and ports of *Genoa*, and the territories of the Pope, ſtiling themſelves the *Ligurian* and the *Roman* republics; but ſo as that no hoſtility be committed, nor prize attacked, ſeized, or taken, within the harbours of princes and ſtates in amity with us, or in their rivers or roads, within the ſhot of their cannon, unleſs by permiſſion of ſuch princes or ſtates, or of their commanders or governors in chief in ſuch places.

II. That the commanders of ſhips and veſſels ſo authorized as aforeſaid, ſhall bring all ſhips, veſſels, and goods, which they ſhall ſeize and take, into ſuch port of this our realm of *England*, or ſome other port of our dominions, as ſhall be moſt convenient in order to have the ſame legally adjudged in our High Court of

Admiralty of *England*, or before the Judges of any other Admiralty Court lawfully authoriſed within our dominions.

III. That after ſuch ſhips, veſſels, and goods, ſhall be taken and brought into any port, the taker, or one of his chief officers, or ſome other perſon preſent at the capture, ſhall be obliged to bring or ſend, as ſoon as poſſibly may be, three or four of the principal of the company (whereof the maſter, ſupercargo, mate, or boatſwain, to be always two) of every ſhip or veſſel ſo brought into port, before the Judge of our High Court of Admiralty of *England*, or his Surrogate, or before the Judge of ſuch other Admiralty Court within our dominions, lawfully authoriſed as aforeſaid, or ſuch as ſhall be lawfully commiſſioned in that behalf, to be ſworn and examined upon ſuch interrogatories as ſhall tend to the diſcovery of the truth concerning the intereſt or property of ſuch ſhip or ſhips, veſſel or veſſels, and of the goods, merchandizes, or other effects found therein; and the taker ſhall be farther obliged, at the time he produceth the company to be examined, and before any monition ſhall be iſſued, to bring and deliver into the hands of the Judge of the High Court of Admiralty of *England*, his Surrogate, or the Judge of ſuch other Admiralty Court within our dominions lawfully authorized, or others commiſſioned as aforeſaid, all ſuch papers, paſſes, ſea-briefs, charter-parties, bills of lading, cockets, letters, and other documents and writings, as ſhall be delivered up, or found on board any ſhip. The taker, 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 found on board, being firſt numbered and their number ſpecified in the affidavit at the time of the capture, making oath that the ſaid papers and writings are brought and delivered in as they were received and taken, without any fraud, addition, ſubduction, or embezzlement, or otherwiſe to account for the ſame upon oath, to the ſatisfaction of the Court.

IV. That the ſhips, veſſels, goods, wares, merchandizes, and effects, taken by virtue of letters of marque and repriſals as aforeſaid, ſhall be kept and preſerved, and no part of them ſhall be ſold, ſpoiled, waſted, or diminiſhed: and that bulk thereof ſhall not be broken before judgement be given in the High Court of Admiralty of *England*, or ſome other Court of Admiralty lawfully authoriſed in that behalf, that the ſhips, goods, and merchandiſes, are lawful prize.

V. That if any ſhip or veſſel belonging to us, or our ſubjects, ſhall be found in diſtreſs, by being in fight, ſet upon, or taken by the enemy, or by reaſon of any other accident, the commanders, officers, and company of ſuch merchant ſhips or veſſels as ſhall have letters of marque and repriſals as aforeſaid, ſhall uſe their beſt endeavours, and give aid and ſuccour to all ſuch ſhip and ſhips, and ſhall, to the utmoſt of their power, labour to free the ſame from the enemy, or any other diſtreſs.

VI. That the commanders or owners of ſuch ſhips and veſſels, before the taking out letters of marque and repriſals, ſhall make application in writing, ſubſcribed with their hands, to our High Admiral of *Great Britain*, or our Commiſſioners for executing that office for the time being, or the lieutenant or judge of the ſaid High Court of Admiralty, or his Surrogate, and ſhall therein ſet forth a particular, true, and exact deſcription of the ſhip or veſſel for which ſuch letters of marque and repriſals is requeſted, ſpecifying the burthen of ſuch ſhip or veſſel, and the number and nature of the guns, and what other warlike furniture and ammunition are on board the ſame, to what place the ſhip belongs, and the name or names of the principal owner or owners of ſuch ſhip and veſſel, and the number of men intended to be put on board the ſame, and for what time they are victualled, alſo the names of the commander and officers.

VII. That the Commanders of ſhips and veſſels having letters of marque and reprizals as aforeſaid, ſhall hold and keep, and are hereby enjoined to hold and keep a correſpondence, by all conveniences and upon all occaſions, with our High Admiral of *Great Britain*, or our commiſſioners for executing that office for the time being, or their ſecretary; ſo as from time to time to render and give him or them not only an account or intelligence of their captures and proceedings by virtue of ſuch commiſſions, but alſo of whatever elſe ſhall occur unto them, or be diſcovered and declared to them, or found out by them, or by examination of, or conference with, any mariners or paſſengers or of or in the ſhips or veſſels taken, or by any other ways and means whatſoever, touching or concerning the deſigns of the enemy or any of their fleets, ſhips, veſſels, or parties: and of the ſtations, ſea-ports, and places, and of their intents therein; and of what ſhips or veſſels of the enemy bound out or home, or where cruizing, as they ſhall

hear of; and of whatever elſe material in theſe caſes may arrive at their knowledge; to the end ſuch courſe may be thereupon taken and ſuch orders given, as may be requiſite.

VIII. That no commander of any ſhip or veſſel having a letter of marque and reprizal as aforeſaid, ſhall preſume, as they will anſwer at their peril, to wear any jack, pennant, or other enſign, or colours uſually borne by our ſhips; but that, beſides the colours uſually borne by merchants ſhips, they do wear a red jack, with the union jack deſcribed in the canton at the upper corner thereof, near the ſtaff.

IX. That no commander of any ſhip or veſſel having a letter of marque and repriſals as aforeſaid, ſhall ranſom or agree to ranſom, or quit or ſet at liberty, any ſhip or veſſel, or their cargoes, which ſhall be ſeized and taken.

X. That all captains or commanding officers of ſhips having letters of marque and repriſals, do ſend an account of, and deliver over, what priſoners ſhall be taken on board any prizes, to the commiſſioners appointed, or to be appointed, for the exchange of priſoners of war, or the perſons appointed in the ſea-port towns to take charge of priſoners; and that ſuch priſoners be ſubject only to the orders, regulations, and directions of the ſaid commiſſioners; and that no commander, or other officer of any ſhip having a letter of marque and repriſal as aforeſaid, do preſume, upon any pretence whatſoever, to ranſom any priſoners.

XI. That in caſe the commander of any ſhip having a letter of marque and reprizal as aforeſaid, ſhall act contrary to theſe inſtructions, or any ſuch further inſtructions, of which he ſhall have due notice, he ſhall forfeit his commiſſion to all intents and purpoſes, and ſhall, together with his bail, be proceeded againſt according to law, and be condemned in coſts and damages.

XII. That all commanders of ſhips and veſſels having letters of marque and reprizals ſhall, by every opportunity, ſend exact copies of their journals to the ſecretary of the admiralty, and proceed to the condemnation of their prizes as ſoon as may be, and without delay.

XIII. That commanders of ſhips and veſſels having letters of marque and reprizals, ſhall upon due notice being given to them, obſerve

obſerve all ſuch other inſtructions and orders, as we ſhall think fit to direct from time to time, for the better carrying on this ſervice.

XIV. That all perſons who ſhall violate theſe, or any other of our inſtructions, ſhall be ſeverely puniſhed, and alſo required to make full reparation to perſons injured contrary to our inſtructions, for all damages they ſhall ſuſtain by any capture, embezzlement, demurrage, or otherwiſe.

XV. That before any letter of marque or reprizals for the purpoſes aforeſaid, ſhall iſſue under ſeal, bail ſhall be given with ſureties, before the Lieutenant and Judge of our High Court of Admiralty of *England*, or his ſurrogate, in the ſum of three thouſand pounds ſterling, if the ſhip carries above one hundred and fifty men; and if a leſs number, in the ſum of fifteen hundred pounds ſterling, which bail ſhall be to the effect and in the form following:—

"WHICH day, time, and place, perſonally appeared

and
who ſubmitting themſelves to the juriſdiction of the High Court of Admiralty of *England*, obliged themſelves, their heirs, executors, and adminiſtrators, unto our ſovereign lord the King, in the Sum of
Pounds of lawful money of *Great Britain*, to this effect: That is to ſay, that whereas

is duly authorized by letters of marque and repriſals, with the ſhip called the of the burthen of about tons, whereof he the ſaid goeth maſter, by force of arms to attack, ſurpriſe, ſeize, and take all ſhips and veſſels, goods, wares, and merchandizes, chattels and effects, belonging to the perſons inhabiting the coaſts and ports of *Genoa*, and the territories of the Pope, ſtiling themſelves the *Ligurian* and the *Roman* republics, excepting only within the harbours or roads within ſhot of cannon of princes and ſtates in amity with His Majeſty. And whereas the ſaid

hath a copy of certain inſtructions, approved of and paſſed by His Majeſty in council, as by the tenor of the ſaid letters of marque and reprizals, and inſtructions thereto relating, more at large appeareth. If therefore nothing be done by the ſaid

or any of his officers, mariners, or company, contrary to the true meaning of the ſaid inſtructions, and of all other inſtructions which may be iſſued in like manner hereafter, and whereof due notice ſhall be given him, but that the letters of marque and reprizals aforeſaid, and the ſaid inſtructions, ſhall in all particulars be well and duly obſerved and performed, as far as they ſhall the ſaid ſhip, maſter, and company any way concern; and if they ſhall give full ſatisfaction for any damage or injury which ſhall be done, by them, or any of them to any of His Majeſty's ſubjects, or of foreign ſtates in amity with His Majeſty; and alſo ſhall duly and truly pay, or cauſe to be paid, to His Majeſty, or the cuſtomers or officers appointed to receive the ſame for His Majeſty, the uſual cuſtoms due to His Majeſty, of and for all ſhips and goods ſo as aforeſaid taken and adjudged for prize: And moreover if the ſaid ſhall not take any ſhip or veſſel, or any goods or merchandizes, belonging to the enemy, or otherwiſe liable to confiſcation, through conſent, or clandeſtinely, or by colluſion, by virtue, colour, or pretence of his ſaid letter of marque and reprizal, that then this bail ſhall be void and of none effect; and unleſs they ſhall ſo do, they do all hereby ſeverally conſent that execution ſhall iſſue forth againſt them, their heirs, executors, and adminiſtrators, goods and chattels, wherefoever the ſame ſhall be found, to the value of the ſum of pounds before mentioned: And in teſtimony of the truth thereof they have hereunto ſubſcribed their names.

By His Majeſty's command,

PORTLAND.

No. IX.

No. IX.

A PROCLAMATION for granting the diſtribution of prizes. [11th November, 1807.]

GEORGE R.

WHEREAS by our order in Council (1), dated the 4th of *November* inſtant, We have ordered that general repriſals be granted againſt the ſhips, goods, and ſubjects of the King of *Denmark* (ſave and except any veſſels to which our licence has been granted, or which have been directed to be releaſed from the embargo, and have not ſince arrived at any foreign port): And whereas by our order in council of the ſame date, we have ordered that general repriſals be granted againſt the ſhips, goods, and inhabitants of the territories and ports of *Tuſcany*, the kingdom of *Naples*, the port and territory of *Raguſa*, and thoſe of the iſlands lately compoſing the republick of the *Seven Iſlands*, and all other ports and places in the *Mediterranean* and *Adriatic* ſeas, which are occupied by the arms of *France* or her allies, ſo that as well our fleets and ſhips, as alſo all other ſhips and veſſels that ſhall be commiſſioned by letters of marque, or general repriſals, or otherwiſe, by our commiſſioners for executing our office of Lord High Admiral of *Great Britain*, ſhall and may lawfully ſeize all ſhips, veſſels, and goods belonging to the King of *Denmark*, or to any of the territories, ports, or places aforeſaid, or to any perſons being ſubjects to the King of *Denmark*, or inhabiting within any of the territories of *Denmark*, or within any of the territories, ports, or places aforeſaid, and bring the ſame to judgement in any of the courts of Admiralty within our dominions, duly authorized and required to take cognizance thereof. We, being deſirous to give due encouragement to our faithful ſubjects who ſhall lawfully ſeize

(1) This proclamation has been compared with the proclamations of 7th July 1803, and 23d December 1807, and the 31ſt January 1805; with the former two it is found to agree verbatim. Some variations occur in the proclamation of 1805, which are diſtinguiſhed in their reſpective places.

the ſame, and having declared in council by our order of the 4th of November inſtant, our intentions concerning the diſtribution of all manner of captures, ſeizures, prizes, and repriſals of all ſhips and goods, during the preſent hoſtilities, do now make known to all our loving ſubjects, and all others whom it may concern, by this our proclamation, by and with the advice and conſent of our privy Council, that our will and pleaſure is, That the neat produce of all prizes taken, the right whereof is inherent in us and our crown, be given to the takers (ſave and except the produce of ſuch prizes as are or ſhall be taken by ſhips or veſſels belonging to, or hired by, or in the ſervice of, our commiſſioners of cuſtoms or exciſe, the diſpoſition of which we reſerve to our further pleaſure; and alſo, ſave and except as herein-after mentioned), but ſubject to the payment of all ſuch, or the like cuſtoms, and duties, as the ſame are now or would have been liable to, if the ſame were or might have been imported as merchandizes; and that the ſame may be ſo given in the proportion and manner herein-after ſet forth, that is to ſay,

That all prizes taken by ſhips and veſſels having commiſſions of letters of marque and reprizals, (ſave and except ſuch prizes as are or ſhall be taken by the ſhips or veſſels belonging to, or hired by, or in the ſervice of, our commiſſioners aforeſaid), may be ſold and diſpoſed of by the merchants, owners, fitters, and others, to whom ſuch letters of marque and reprizals are granted, for their own uſe and benefit, after final adjudication, and not before.

And We do hereby further order and direct, that the neat produce of all prizes, which are or ſhall be taken by any of our ſhips or veſſels of war, (ſave and except when they ſhall be acting on any conjunct expedition with our army, in which caſe we reſerve to ourſelves the diviſion and diſtribution of all prize and booty taken, and alſo ſave and except as herein after mentioned) ſhall be for the entire benefit and encouragement of our flag officers, captains, commanders, and other commiſſioned officers in our pay, and of the ſeamen, marines, and ſoldiers, on board our ſaid ſhips and veſſels at the time of the capture; and that ſuch prizes may be lawfully ſold and diſpoſed of by them and their agents, after the ſame ſhall have been to us finally adjudged lawful prize, and not otherwiſe.

The

The diſtribution ſhall be made as follows.—The whole of the neat produce being firſt divided into eight equal parts:

The captain or captains of any of our ſaid ſhips or veſſels of war, who ſhall be actually on board at the taking of any prize, ſhall have three-eighth parts.—But in caſe any ſuch prize ſhall be taken by any of our ſhips or veſſels of war, under the command of a flag or flags, the Flag Officer or Officers being actually on board, or directing and aſſiſting in the capture, ſhall have one of the *three-eighth* parts; the ſaid one-eighth part to be paid to ſuch Flag or Flag Officers in ſuch proportions, and ſubject to ſuch regulations, as are herein-after mentioned.

The captains of marines and land forces, ſea lieutenants, and maſter on board, ſhall have one eighth part, to be equally divided amongſt them.—But that every phyſician appointed or hereafter to be appointed to a fleet or ſquadron of our ſhips of war, ſhall, in the diſtribution of prizes which ſhall hereafter be taken by the ſhips in which he ſhall ſerve, or in which ſuch ſhip's company ſhall be entitled to ſhare, be claſſed with the ſea lieutenants, with reſpect to the ſaid *one-eighth* part, and be allowed to ſhare equally with them: Provided ſuch phyſician be actually on board at the time of taking ſuch prizes.

The lieutenants and quarter maſters of marines, and lieutenants, enſigns, and quarter maſters of land forces, ſecretaries of admirals, or commodores with captains under them, ſecond maſters of line of battle ſhips, boatſwains, gunners, purſers, carpenters, maſters mates, chirurgeons, pilots, and chaplains, on board, ſhall have *one-eighth* part, to be equally divided amonſt them.

The midſhipmen, captains clerks, maſter ſailmakers, carpenters-mates, boatſwains-mates, gunners-mates, maſters at arms, corporals, yeomen of the ſheets, coxſwains, quarter maſters, quarter maſters-mates, chirurgeons-mates, yeomen of the powder room, ſerjeants of marines, and land forces on board, ſhall have *one-eighth* part, to be equally divided amongſt them. The trumpeters, quarter-gunners, carpenters crew, ſtewards, cook, armourers, ſtewards-mates, cooks-mates, gunſmiths, coopers, ſwabbers, ordinary trumpeters, barbers, able ſeamen, ordinary ſeamen, and marines, and other ſoldiers, and all other perſons doing duty and aſſiſting on board, ſhall have *two-eighth* parts, to be equally divided amongſt them.

And

And we do hereby further order, That in the caſe of cutters, ſchooners (*a*), and other armed veſſels, commanded by lieutenants, the ſhare of ſuch lieutenants ſhall be three-eighth parts of the prize, unleſs ſuch lieutenants ſhall be under the command of a flag officer or officers; in which caſe the flag officer or officers ſhall have one of the ſaid three-eighths, to be divided among ſuch flag officer or officers, in the ſame manner herein-before directed, in the caſe of captains ſerving under flag officers. Secondly, we direct, That the ſhare of the (*b*) [maſter or other perſon acting as ſecond in command, and the pilot, if there happens to be one on board, ſhall be one-eighth part, to be divided into three equal parts, of which two-thirds ſhall go to the maſter, or other perſon acting as ſecond in command, and the remaining one-third to the pilot; but if there is no pilot, then ſuch eighth part to go wholly to the maſter, or perſon acting as ſecond in command.]—That the ſhare of the chirurgeon, or chirurgeon's mate (where there is no chirurgeon), midſhipmen, clerk, and ſteward, ſhall be one-eighth.—That the ſhare of the boatſwains gunners, and carpenters mates, yeomen of the ſheets, ſail maker, quarter maſter, and quarter-maſter's mate, ſhall be one-eighth.—And the ſhare of the ſeamen, marines, and other perſons on board aſſiſting in the capture, ſhall be two-eighth parts.

But it is our intention nevertheleſs, that the above diſtribution ſhall only extend to ſuch captures as ſhall be made by any cutter, ſchooner, (*c*) or armed veſſel, without any of our ſhips or veſſels of

---

(*a*) Procl. 1805. [Brigs.]

(*b*.) The directions following ſtand in the place of thoſe between brackets in the text.

In Procl. 1805. [Sub-lieutenant, maſter, and pilot ſhall be one-eighth, the ſaid eighth, if there be all three ſuch perſons on board to be divided into four parts, two parts to be taken by the ſub-lieutenant, one part by the maſter, and one part by the pilot; if there be only two ſuch perſons on board, then the eighth to be divided into three parts, of which two-thirds ſhall go to the perſon ſecond in command, and one-third to the other perſon: if there be only a ſub-lieutenant or a maſter and no pilot, then the ſub-lieutenant or maſter to take the whole eighth.]

(*c*) Procl. 1805, [Brigs], and in the ſeveral enumerations following.

war being preſent, or within ſight of, and adding to the encouragement of the captors, and terror of the enemy; but in caſe any of our ſhips or veſſels of war ſhall be preſent, or in ſight, that then the officers, pilots, petty officers, and men, on board ſuch cutters and ſchooners, or armed veſſels, ſhall ſhare in the ſame proportion as is allowed to perſons of the like rank and denomination on board of our ſhips and veſſels of war (*d*); and ſuch cutters, ſchooners, or armed veſſels, ſhall not, in reſpect to ſuch captures, convey any intereſt or ſhare in the flag eighth to the flag officer or officers, under whoſe orders ſuch cutters, ſchooners, and armed veſſels, may happen to be (*e*).

And whereas it is judged expedient, during the preſent hoſtilities, to hire into our ſervice armed veſſels, to be employed as cruizers againſt the enemy, which veſſels, are the property of, and their maſters and crews are paid by the merchants of whom they are hired, although ſeveral of them are commanded by our commiſſioned officers in our pay; it is our further will and pleaſure, that the neat produce of all prizes taken by ſuch hired armed veſſels (except as herein-after mentioned, ſhall be for the benefit of our commiſſioned officers in our pay, and of the maſters and crews on board the ſaid hired armed veſſels at the time of the capture, and that ſuch prizes may be lawfully ſold and diſpoſed of by them and their agents, after the ſame ſhall have been to us finally adjudged lawful prize, and not otherwiſe; the diſtribution whereof ſhall be as follows:

The whole of the neat produce being divided into eight equal parts;—our officer commanding any hired armed veſſel, who ſhall be actually on board at the taking of any prize, ſhall have three-eighths; but, in caſe ſuch hired armed veſſel ſhall be under the command of a flag or flags, the flag officer or officers being actually on board, or directing and aſſiſting in the capture, ſhall have one of the ſaid three-eighth parts, the ſaid one-eighth part to be paid

(*d*) Procl. 1805. [The ſub-lieutenant and maſter to be conſidered as warrant officers.]

(*e*) Procl. 1805. [And we further order, that the directions herein given, with reſpect to the ſhares of ſub-lieutenants, maſters, and pilots on board veſſels commanded by lieutenants, be applied to captures made from *France* and the *Batavian Republic*.]

to

to ſuch flag or flag officers in ſuch proportions, and ſubject to ſuch Regulations, as are herein-after mentioned.—In caſe there be acting on board ſuch hired armed veſſel, beſides our officer commanding the ſame, one or more of our commiſſioned ſea lieutenants in our pay, ſuch lieutenant or lieutenants ſhall take one-eighth.—One-eighth ſhall belong to the maſter and mate, of which the maſter ſhall take two-thirds and the mate one-third; but in caſe there ſhall be acting on board ſuch hired armed veſſel one or more midſhipmen, or other perſon in our pay, of thoſe who are claſſed with midſhipmen in the former part of this our proclamation, in that caſe the maſter ſhall take one-half of the eighth, and the other half ſhall be equally divided between the mate, midſhipmen, and ſuch other perſons in our pay.—Three-eighths ſhall belong to, and be divided among the other officers and the reſt of the crew.—And in the caſe of prizes taken by any hired armed veſſel not commanded by any of our commiſſioned officers, one-eighth ſhall belong to the flag officers, to be divided as aforeſaid, in caſe ſuch hired armed veſſel ſhall be under the command of a flag.—Two-eighths ſhall belong to the maſter and mate, of which the maſter ſhall take two-thirds and the mate one-third.—Three-eighths ſhall belong to and be divided among the other officers and the reſt of the crew, in manner aforeſaid.—The ſurplus, the diſtribution of which is not herein directed, ſhall remain at our diſpoſal; and if not diſpoſed of within a year, after final adjudication, the ſame ſhall belong and be paid to *Greenwich Hoſpital*.—And in the caſe of prizes taken jointly, by any of our ſhips of war and any hired armed veſſel, our commiſſioned officer or officers on board ſuch hired armed veſſel, ſhall ſhare with our commiſſioned officer or officers of the ſame rank on board our ſhip or ſhips of war, being joint captors; the maſter of ſuch hired armed veſſel ſhall ſhare with the warrant officers; the mate of ſuch hired armed veſſel with the petty officers; and the ſeamen of ſuch hired armed veſſel with the ſeamen on board our ſaid ſhip or ſhips of war; ſave and except, that in caſe ſuch hired armed veſſel ſhall be commanded by one of our commiſſioned officers, having the rank of maſter and commander, and there ſhall be none of our lieutenants on board, or in caſe ſuch hired armed veſſel ſhall be commanded by the maſter, in both thoſe caſes the maſter of ſuch hired armed veſſel ſhall ſhare with the lieutenants of our ſhips of war, and the mate with the warrant officers.—And in caſe any difficulty ſhall ariſe in reſpect

to

to the ſaid diſtribution, not herein ſufficiently provided for, the ſame ſhall be referred to our Lords Commiſſioners of the Admiralty, whoſe direction thereupon ſhall be final, and have the ſame force and effect as if herein inſerted.

Provided, that if any officer being on board any of our ſhips of war, at the time of taking any prize, ſhall have more commiſſions or offices than one, ſuch officer ſhall be entitled only to the ſhare or ſhares of the prizes, which, according to the above-mentioned diſtribution, ſhall belong to his ſuperior commiſſion or office.

Provided alſo, that in all prizes taken by any of our ſquadrons, ſhips, or veſſels, while acting in conjunction with any ſquadron, ſhip, or veſſel of any other power that may be in alliance with us, a ſhare of ſuch prizes ſhall be ſet apart, and be at our further diſpoſal, equal to that ſhare which the flag and other officers and crews of ſuch ſquadron, ſhips, or veſſels, would have been entitled to if they had belonged to us.

And we do hereby ſtrictly enjoin all commanders of our ſhips and veſſels of war taking any prize, to tranſmit as ſoon as may be, or cauſe to be tranſmitted to the commiſſioners of our navy, a true liſt of the names of all the officers, ſeamen, marines, ſoldiers, and others, who were actually on board our ſhips and veſſels of war, under their command at the time of the capture; which liſt ſhall contain the quality of the ſervice of each perſon on board, together with the deſcription of the men, taken from the deſcription books of the capturing ſhip or ſhips, and their ſeveral ratings; and be ſubſcribed by the captain or commanding officer, and three or more of the chief officers on board. And we do hereby require and direct the commiſſioners of our navy, or any three or more of them, to examine or cauſe to be examined, ſuch liſts, by the muſter-books of ſuch ſhips and veſſels of war and liſts annexed thereto, to ſee that ſuch liſts do agree with the ſaid muſter books and annexed liſts, as to the names, qualities, or ratings of the officers, ſeamen, marines, ſoldiers, and others belonging to ſuch ſhips and veſſels of war; and upon requeſt, forthwith to grant a certificate of the truth of any liſt tranſmitted to them, to the agents nominated and appointed by the captors to take care and diſpoſe of ſuch prize. And alſo upon application to them the ſaid commiſſioners they ſhall give, or cauſe to be given, to the ſaid agents, all ſuch liſts, from the muſter books of any ſuch ſhip of war, and annexed liſts, as the ſaid agents ſhall find requiſite for their direction

tion in paying the produce of ſuch prizes; and otherwiſe ſhall be aiding and aſſiſting to the ſaid agents, in all ſuch matters as ſhall be neceſſary.

We do hereby further will and direct, that the following regulations ſhall be obſerved, concerning the one-eighth part, hereinbefore mentioned, to be granted to the Flag, or Flag Officers, who ſhall actually be on board at the taking of any prize, or ſhall be directing or aſſiſting therein.

Firſt, That a captain of a ſhip ſhall be deemed to be under the command of a flag, when he ſhall actually have received ſome order directly from, or be acting in execution of ſome order iſſued by a flag officer, and ſhall be deemed to continue under the command of ſuch flag, ſo long as the flag officer by whom the order was iſſued, or any other flag officer acting upon the ſame ſtation, ſhall continue upon ſuch ſtation; or until ſuch captain ſhall have received ſome order directly from or be acting in execution of ſome order iſſued by ſome other flag officer, or the Lords Commiſſioners of the Admiralty.

Secondly, That a Flag Officer Commander in Chief, when there is but one Flag Officer upon ſervice, ſhall have to his own uſe, the ſaid one-eighth part of the prizes taken by ſhips and veſſels under his command.

Thirdly, That a flag officer, ſent to command on any ſtation, ſhall have no right to any ſhare of prizes taken by ſhips or veſſels employed there, before he arrives within the limits of ſuch ſtation, and actually takes upon him the command, by communicating orders to the flag officer previouſly in command: ſave only that he ſhall be entitled to a ſhare of prizes taken by thoſe particular ſhips, to which he ſhall actually have given ſome order, and taken under his command, within the limits of ſuch ſtation.

Fourthly, That a commander in chief or other flag officer, appointed or belonging to any ſtation, and paſſing through or into any other ſtation, ſhall not be entitled to ſhare in any prize taken out of the limits of the ſtation to which he is appointed or belongs, by any ſhip or veſſel under the command of a flag officer of any other ſtation, or under Admiralty orders, unleſs ſuch commander in chief, or flag officer, is expreſsly authorized, by the Lords Commiſſioners of the Admiralty, to take upon him the command in that

that ſtation, in which the prize is taken, and ſhall actually have taken upon him ſuch command, in manner aforeſaid.

Fifthly, That when an inferior flag officer is ſent to reinforce a ſuperior flag officer on any ſtation, the ſuperior flag officer ſhall have no right to any ſhare of prizes taken by the inferior flag officer, before the inferior flag officer ſhall arrive within the limits of the ſtation, and, moreover, ſhall actually receive ſome order directly from, or be acting in execution of ſome order iſſued by him.

Sixthly, That a Chief Flag Officer quitting a ſtation either to return home, or to aſſume another command, or otherwiſe, except upon ſome particular urgent ſervice, with the intention of returning to the ſtation, as ſoon as ſuch ſervice is performed, ſhall have no ſhare of prizes taken by the ſhips or veſſels left behind, after he ſhall have paſſed the limits of the ſtation, or after he ſhall have ſurrendered the command to another Flag Officer, appointed by the Admiralty to be Commander in Chief upon ſuch ſtation.

Seventhly, That an inferior flag officer quitting a ſtation except when detached by orders from his Commander in Chief out of the limits thereof upon a ſpecial ſervice, with orders to return to ſuch ſtation as ſoon as ſuch ſervice is performed, ſhall have no ſhare in prizes taken by the ſhips and veſſels remaining on the ſtation, after he ſhall have paſſed the limits thereof: And in like manner the Flag Officers remaining on the ſtation, ſhall have no ſhare of the prizes taken by ſuch inferior Flag Officer, or by the ſhips and veſſels under his immediate command, after he ſhall have quitted the limits of the ſtation, except when detached as aforeſaid.

Eighthly, That when veſſels under the command of a Flag which belong to ſeparate ſtations, ſhall happen to be joint captors, the captain of each ſhip ſhall pay one-third of the ſhare, to which he is entitled, to the flag officers of the ſtation to which he belongs. But the captains of veſſels under Admiralty orders, being joint captors with other veſſels under a flag, ſhall retain the whole of their ſhare.

Ninthly, That if a flag officer is ſent to command in the outports of this kingdom, he ſhall have no ſhare of the prizes taken by ſhips or veſſels which have ſailed, or ſhall ſail, from that port by order from the Admiralty.

Tenthly, That when more flag officers than one ſerve together, the eighth part of the prizes taken by any ſhips or veſſels of the fleet,

fleet, or ſquadron, ſhall be divided in the following proportions; *videlicet*, If there be but two Flag Officers, the Chief ſhall have two-third parts of the ſaid one-eighth, and the other ſhall have the remaining third part: But if the number of flag officers be more than two, the Chief ſhall have only one-half, and the other half ſhall be equally divided among the other Flag Officers.

Eleventhly, That commodores, with captains under them, ſhall be eſteemed as flag officers, with reſpect to the eighth part of prizes taken, whether commanding in chief or ſerving under command.

Twelfthly, That the firſt captain to the admiral, and Commander in Chief of our fleet, and alſo the firſt captain to our flag Officer appointed, or hereafter to be appointed, to command a fleet or ſquadron of ten ſhips of the line of battle, or upwards, ſhall be deemed and taken to be a flag officer, and ſhall be entitled to a part or ſhare of prizes, as the junior Flag Officer of ſuch fleet or ſquadron.

INDEX.

A

B

C

E

F

I

the

L

M

INDEX.

N

O

P

R

S

Statutes —

END OF VOLUME THE SECOND.

Printed by A. Strahan, Law-Printer to His Majeſty,
Printers-Street, London.