NASSAU, (N. P.) January 31.

## COURT OF VICE ADMIRALTY.

November 12, 1805.

*Before his honor Henry Moreton Dyer, esq. sole judge and commissary.*

SAMPSON, PHIPPEN, master.

*Judgment.*—This is the case of a ship, captured under American colors, on a voyage from Philadelphia to Havana, and in respect of which the captors contend for condemnation, on the ground that the same ship and cargo, originally came from Marseilles to Philadelphia, with an intention to proceed on her present destination.

In the course of the opinion which I am now called upon to give, it appears to be the most convenient arrangement, that I should first state what is the law upon cases of this description; and then proceed to consider how far the facts of the present case warrants the application of the law.

I will begin by merely adverting, as a preliminary proposition, to the rule, that the trade of neutrals, between the mother country and the colony of the enemy is illegal; a principle too plain, I apprehend, to be dissented from, and which it would be needless to enforce by authority or argument.

I conceive it to be a rule equally plain, that a fraudulent stoppage in an intermediate neutral port to break the continuity of a voyage, which, if continuous, would be illegal, must be subject to the same penalties as the continuous voyage itself. Whatever some interested defenders of neutral rights may advance, I apprehend the latter principle to be perfectly as clear as the former; and at least I have not heard it controverted by the argument in this case.

Taking the principle then to be clear, the important question in every case of that sort must be, whether the arrival in the neutral port was merely a stoppage *in transitu*, made with the fraudulent intent of breaking the continuity of the voyage; or whether it effected a complete and *bona fide* importation into the neutral country; it being clearly admitted, that after such a bona fide importation, and an admixture of the articles with the common stock of the country, it is competent to the neutral merchant to transport them forwards, wherever he pleases.

Several cases have occurred before our superior courts of prize, in which these principles have been discussed.

In the Polly, Lasky, (2 Rob. Ad. Rep. 304) which was the case of an American ship taken on a voyage from Marblehead to Bilboa, with a cargo of colonial produce, which had been brought from Havana to Marblehead; it appeared that the goods had been legally imported into America and that the duties had been paid; and under these circumstances, the high court of admiralty, decreed for restitution.

In the Penelope, Flagg, (court of appeals, 10th June, 180 ) the vessel was taken on a voyage from Charleston to Malaga, with a cargo of sugar and tobacco, which had been brought from Havana to Charleston in another vessel belonging to the same American owners. But that cargo appearing by this evidence to have been lawfully imported into America, the lords restored it.

In the Mercury, Roberts, (court of appeals, 28th July, 1800. and 13th Jan. 1804) the voyage was from Charleston to Hamburg, the cargo, sugar, which had been brought in the same vessel from Havana. The manifest described the cargo to be laden at the port of Charleston, and there was an attestation of the master, annexed to the same instrument, that the goods had been legally imported into America, and the duties thereon paid or secured. But it appeared by other and more indisputable evidence that not one article of the cargo had been landed since the ship left Havana, and that the sole purpose of touching at Charleston, had been to obtain a new set of papers for the voyage to Europe. Under these circumstances, the property was condemned.

In the Eagle, Weeks, (court of appeals, 15th May, 1802) there was a voyage from Philadelphia to the Havana, with a cargo of bar-iron and nails, which had been brought from Bilboa to Philadelphia. Further proof was ordered to shew the nature of the importation of those articles into America, and to ascertain the fact whether the duties had been paid. Very full further proof was subsequently exhibited, by which it appeared, that the duties on importation had been actually paid; and that the two voyages were perfectly distinct transactions. And upon this proof the lords pronounced for restitution.

The Essex, Orne, (court of appeals, June, 1805) was the case of an American vessel captured on a voyage from Salem to Havana, with a cargo which had been in the first instance brought from Barcelona to Salem, & there landed and warehoused; and within about three weeks afterwards, reshipped, and sent forward in the same bottom. The usual bond had been given for the duties in America, and there was some appearance that they had been actually paid after the cargo was landed and surveyed; but they had (a very small part excepted) been drawn back on the re-exportation. In that case it would seem, (for no reasons were given) that the lords considered the original intention of the parties to have been not to dispose of the cargo in the neutral country, but to send it on to the colonial port of the enemy—and therefore the property was condemned.

The last cases which have occurred on this subject, are those of the Enoch and the Rowena, before the high court of admiralty, 23d June, 1805. They were two American ships, laden with French colonial produce, bound from Boston to Antwerp. The cargoes had been landed in America in the same manner as in the Essex; but the vessels had come originally from Martinique to America with the same cargoes, on account of the same neutral owners. Sir William Scott, inferred from all the circumstances of these cases, that the original design was a voyage to Europe, and on that ground, (referring to the Essex as an authority) he pronounced both ships and their cargoes to be subject to condemnation.

The rule laid down by the late decisions (and which it is my duty to observe in cases where it applies) I conceive to be this: That it is incumbent on the claimant to shew that the original intention on his part was, that the arrival in the neutral port should completely end the one voyage—and that the subsequent voyage in which he was interrupted, was a new, original and distinct speculation; in short to negative any presumption of a colorable attempt to evade the penalties of a direct trade.

It is no secret that much clamor has been raised against the exhalted court whose recent decisions I have just adverted to; and that these decisions have been arraigned as being inconsistent with the principles laid down in the former case of the Polly, Lasky. —For my own part, I cannot see any just reason for that assertion.

The language which, as a belligerent nation, we have been uniformly authorized by every principle of common sense, and every doctrine of the law of nations, to hold on this subject, may be couched in the following terms:

"You, the neutral, while you shall be protected in all your former rights and privileges, shall not interfere any new trade; which by benefiting our enemy, shall arrest the influction of our force, and disconcert the operations which the law of arms authorizes us to direct against him—in peace, you were not allowed to trade between the parent state and the colony of our enemy; therefore you must not do so in war:—neither shall you be at liberty to carry on covertly and indirectly, that trade which is thus interdicted in its open and direct shape. Carry on that commerce, which you were always permitted, between the parent state and your own country—pursue the same intercourse between your own country and the colony, which was formerly indulged to you. But when we find your vessels carrying to the hostile colony the produce of the mother country, or to the mother country the productions of its colonies, satisfy us plainly, honestly and substantially, that the articles carried in either case were drawn from your common mercantile stock (into which they had been formerly incorporated by a *bona fide* importation) and that they were not originally brought to the neutral port with an intention of transmission to the ultimate point of hostile destination."

In conformity with this doctrine, our courts of prize did certainly at one time, consent to admit, as the test of a *bona fide* importation, that the goods should be landed and the duties upon importation paid in the neutral state. But when in a longer course of experience, cases should arise, in which we find that articles are landed but to be reshipped and that duties are paid, which are presently afterwards drawn back upon re-exportation, or rather that a mere security for the payment is taken, which is only to be enforced in the event of the articles remaining in the neutral state; have we not a just right to say, that we will *no longer* consider those two acts as *exclusive* tests of honest importation, and that we expect the fact of such an importation to be established by other and more convincing evidence? And I should be glad to know on what just grounds of argument we can be said in making this demand, to recede from our original principle? But I forbear to attempt a defence of that most upright and eminent judge, whose talents and whose virtues far transcend my feeble praise, and are best rewarded by the united testimony of an applauding nation.

The principle then, I must assume, remains entire that in cases of this sort, it is necessary to shew that the voyage did end, or was intended to end, in the neutral country, to which the vessel belongs, and that there was no projected communication between the hostile ports.

A distiction, however, is attempted as to this particular case! and it is contended by the claimant's counsel, that, with whatever justice these doctrines may apply to an indirect trade between the mother country, and the colony of *the same enemy*, yet that the case of a circuitous trade from the parent state of *one enemy*, to the colony of *another* is different; that all the *cases* which have been decided, are cases of the former description, and that there is no case of the latter kind.

I am ready to admit that the assertion is right as to those cases which have been cited at the bar, or which the research of the court has discovered. Though I think that cases of the other kind must have arisen, I confess that they have not occurred to my observation. But supposing the fact to be, that no such case has ever been decided and that it is now presented, for the first time, to the view of this or any other court, little anxious as I ever am to establish new doctrines upon my single judgment, I should not hesitate to say, if it were necessary, for the first time, that a colorable stoppage in a neutral port, in the course of a meditated voyage from the mother country of one enemy to the colony of another enemy, allied in war, is illegal.—A direct trade between two such ports of confederate powers, was determined in the Rose, Young, (2 Rob. Rep. 206) and in many other instances, to be equally penal with the direct trade between the parent and colonial ports of the same enemy. That trade between ports of the same enemy, when attempted to be circuitously managed, has been held equally penal with the direct intercouse itself; and I cannot discover that a shade of difference exists, so as to screen the like evasion in the course of a trade between the parent state and the colony of two different nations, who are our common adversaries.

Having thus stated what I conceive to be the law upon questions of this kind, I proceed to consider whether the facts of this case are such as to bring it within the rule.

I will begin with the oral testimony, which has been derived from the examination on the standing interrogatories of five persons, a larger number than is usually required by the court, but an excess which, under all the circumstances of the particular case, and among them the great value of the property, the court very readily approves.

The evidence of the Spanish passenger, who was bound from Philadelphia to Havana, I may at once lay out of the case, as he was wholly unacquainted with the transaction, or any of the parties to it.

Nor does the master himself furnish much more information. It appears by his own declaration, that he was newly appointed, and but little trusted. His first acquaintance with the vessel was but a few days before her departure from Philadelphia. He knows as little as to the cargo; nor says any thing material in respect of that, except that he believes, it was for the most part of *foreign produce*.

The two next witnesses, whose evidence I shall consider, are the cook and the mariner. Upon these persons something of stigma and discredit was attempted to be thrown, but I must say, the attempt was quite unfounded. Nothing has been advanced either against their competency, or their credibility; they appear, throughout their depositions, to speak without prejudice or affection; their evidence will be found to be very substantially fortified by many facts of the case, and I can see no good reason why they are not to be believed.

By the cook we are told, that the name of the master is Thomas Phippen; that he has only known him from the beginning of the present voyage; that he was appointed to the command by capt. Mann; he knows not the precise time, but it was at commencement of the present voyage; that he himself served on board of said ship in the capacity of cook; that he has known the ship from the 2d of April last, when he was first shipped in her; that he saw her first on that day at Marseilles in France; that the ship was then called the Two Friends, but since her return from Marseilles to Philadelphia, she has been called the Sampson; that she carried from Marseilles a cargo consisting chiefly of wine, with some oil he believes, brandy, fruits preserved in brandy, and other articles; that the cargo was landed at Mr. Foussatt's wharf at Philadelphia, *and all put on board again* from the same wharf—that he was informed by Mr. Delaunay, that captain Mann had purchased the ship after her arrival at Philadelphia; that he and Mr. Delaunay were the only persons now on board the ship who came in her from Marseilles.

From the mariner we learn, that he came on board for the first time at Philadelphia, and knew nothing of the former transactions of the voyage, excepting that he assisted to unload the ship on her arrival at Philadelphia from Marseilles; that her cargo then consisted chiefly of wine, and from the marks on the casks he *believes the same cargo* (with perhaps some additions) *is now on board*, having been reshiped in her, and is of the growth and produce either of France or Spain; that the cargo was put on board at Philadelphia, before any of the crew, except the mate, were hired.

The united testimony of these two persons tends to establish the following history of her present transactions: That this ship, then named the Two Friends, commanded by another captain, and with another crew, sailed originally from Marseilles to Philadelphia, with a cargo of wine and other articles, under the charge of the same supercargo who appears here: that arrived at Philadelphia, the cargo was landed at the wharf of the principal owner, Mr. Foussatt; that the former captain and crew were then discharged, new ones appointed, a transfer of the vessel effected to a new set of owners, the same cargo again put on board from the same wharf, (whether after the payment of duties or not, does not appear) and a new voyage to Havana commenced under the direction of the same supercargo, and with only one man besides, accidentally on board of the former crew.

To speak of the case thus made out in the mildest and most favorable terms, it must be admitted to be a case of considerable suspicion. Let us then see how those suspicions are cleared up by the deposition of that person who is most intimately acquainted with the whole transaction. From Mr. Delaunay, the supercargo, who has the best means of knowing, we may expect to receive the fullest information.

The sum of Mr. Delaunay's deposition is this: That he has known the captain only from the beginning of September, (that is the commencement of the present voyage): that he took possession about that time at Philadelphia; that he himself served on board in the capacity of supercargo; that he does not recollect how long he has known the said ship, he first saw her at Philadelphia (from whence of course he would have it understood that he knew nothing of the vessel before her sailing lately from that port): that the ship has been called the Sampson since September, but he cannot recollect her former name; that her last voyage began at Philadelphia and was to have ended there; that he knows not the quality of any cargo the said ship has carried previous to the time of her capture, (that is to say, that he knows nothing of the cargo bro't from Marseilles); that the ship sailed from Philadelphia as her last clearing port, about the 13th September; that for the present voyage she has been under the direction of the owners, Messrs. Foussatt & Mann, with whom he corresponds; but to the question "under whose care and direction the said ship has been during preceding voyages," he refused to depose, notwithstanding that he was reminded by the examiner of his having sworn to depose the whole truth. That the cargo was all put on board at Philadelphia in August and September last, (meaning I presume, to infer, that the cargo was put on board there for the first time); that the ship was sold at Philadelphia to her present owners Foussatt and Mann, but he refuses to answer by whom; that the sale took place in September; he presumes there was a bill of sale, but knows nothing about it, or whether any agreement was entered into concerning the purchase further than what appears upon it; that there were on board, as passengers, the Spaniard, whom I first mentioned, as having been examined, and 3 boys who were going to their father at Havana; that they all came on board at Philadelphia, (here again intending to infer, it must be presumed, that they came on board there for the *first time*. Such indeed was the fact as to the Spanish gentleman; but as to the three boys there is distinct evidence, by the consular passports, that they had come originally from Marseilles—a fact which it is too evident this gentleman wishes to suppress, and has in so doing completely falsified himself). He goes on to say, that he is confident that the sale to the present owners was truly made, and not for the purpose of covering the real property: rather an inconsistent declaration this from a person who before knew nothing about a bill of sale: and finally he avows that he has given every information in his power relative to the present cargo, but he refuses to depose any thing as to preceding ones.

Of this most extraordinary desposition, the decorum of justice restrains me from speaking in the terms which it might deserve; but the energy of justice does not the less require that penal consequences should be fixed to snch improper conduct.

The court is not insensible to the petition on which was presented from Mr. Delaunay, to be permitted to be re-examined upon those interrogatories which he before refused to answer—a petition which was instantly rejected, on a reference to the rule of court, which directs, that where once refusal should take place the examiner should admonish the witness of the oath taken to speak the whole truth, and notice such refusal upon the examination; and also after previous information of the facts from the examiner, and a sub-assurrance from him that the rule had been observed.

This petition and its rejection have been much commented upon, and it has been intimated that the correctness of that refusal may be questioned, together with the whole case, before a higher tribunal. The document itself and the proceeding upon it, being entered on the minutes of the court, the wish of the claimants will for that purpose, be fully attained. What opinion may be formed upon it in that more enlightened court, it would be presumptuous in me to conjecture. I will only say for the party himself, *valet quantum valere potest*. As to the court, whose duty it is to apply its decisions in the first instance, I trust it will at least have the effect of shewing that the humble individual who presides here, does not sleep upon his post, and would not hastily permit so fatal a departure from the regular forms of proceeding.

Mr. Delaunay's deposition has been justified by the argument of his counsel, on the ground that he answered to what he himself thought was necessary, and that he was not bound to reply to every question which he did not deem material. But it is the law, I conceive, and not the individual, which is to prescribe what information is or is not necessary. He who undertakes to satisfy the enquiries of justice, must do so entirely and unfeignedly, if he would avoid the palpable suspicion of interested suppression; still less can I comprehend how he, who has sworn to depose all that he knows, can feel himself justified in withholding a part. Any further observation however, must be unnecessary upon an argument which is so wholly rebutted by every rational and received rule of evidence.

Again, it has been urged that Mr. Delaunay is a man unacquainted with judicial proceedings, and that some irregularities on his part in matters of this sort may be overlooked. Setting aside all that his oath required, passing over the solemn warning of the officer who administered that oath, and supposing that a defect of form is the utmost fault which can be imputed to him, I must at least observe that he is a man of the most *methodical irregularity* I ever knew: because it so happens, that he withholds his information precisely upon those points which were most material. He is ready enough to speak of the voyage from Philadelphia to Havana; but as to any thing which happened prior to the last departure from Philadelphia, which was the important point to be ascertained, he refused to depose. Where a conscientious witness has erred upon matter of form, the court would never be disposed to press a mere omission or irregularity against him; but it must be perfectly obvious how little this gentleman has entitled himself to such excuse.

What then, upon the whole, is the effect of Mr. Delaunay's testimony? I have no hesitation in pronouncing, that it is completely confirmatory of the history made out by the testimony of the two preceding witnesses, and *with this serious addition*—that the penalties of the transaction were well known to the parties concerned in it, and that this gentleman was from beginning to end employed by them to avoid those penalties, by means of fraud and concealment, to his own as well as their advantage.

It has been argued for Mr. Delaunay, that if he had answered those interrogatories fully, he could not have stated any thing to the prejudice of the claim. When we reflect upon what we have heard from the other witnesses, and upon what even Mr. Delauney himself has admitted upon those interrogatories which he did please to answer, I should not claim much credit for penetration, if I were to form a conjecture as to what his answers would have amounted to, if they had been explicit;—but I forbear to enter upon an enquiry which is, in no degree, imposed upon the court. This gentleman, by his improper conduct, compels me to presume every thing against him, and has deprived himself of the benefit of those lenient constructions, (even if any lenity of construction could be strained to serve him) which it is the practice and the pleasure of the court to apply to persons of ingenuous conduct. I must rather observe as to him, what was eloquently said upon another occasion, that "a pertinacious refusal to submit to fair enquiry must infer all the penalties of convicted guilt."

Having drawn this result from the examinations, the documentary evidence becomes of less moment. In a case of this nature, it could scarcely be expected but that some color of fairness should be given to the formal documents. And yet even among those there is nothing contradictory to the oral testimony.

As to the ship, there are the formal papers in proof the property of Mr. Mann; but they are of a most recent date, being in fact no older than the present voyage from Philadelphia. This circumstance combined with the testimony, as to the commencement of the transaction, the change of name, and of captain and crew, the landing and reshipment, leads to no other conclusion than that this change of property was effected for some colorable purpose; and it is equally evident that this purpose was to suppress the former history of the vessel, and to stamp her with new credentials for the present occasion.

As to the cargo, there are bills of lading and invoices in proof of the property of Messrs. Foussatt and Mann, and Mr. Delaunay—but the articles themselves which they enumerate, bespeak French produce or manufacture, as we have before learned was the fact from some of the witnesses. That the articles in Mr. Delaunay's invoice came from France, is further evident from the calculation of prices in francs, which is an ideal denomination of money familiar in French mercantile computation. This is not indeed the case with Mr. Foussaut's invoice—but in that many articles are of a similar nature, and the marks almost indiscriminately the same with Mr. Delaunay's. The articles too, of both invoices are wholly included in the certifice for obtaining the drawback, a paper which, it was justly observed, bespoke a mere entry at Philadelphia for exportation. I cannot but conclude from all these circumstances, that the whole of these articles came from France, and in this vessel.

A question has been made, how far the misconduct of Mr. Delaunay, even if penal as to himself, could affect the property of other persons committed to his charge. I cannot but agree that with captor's advocate in holding this gentleman to be no ordinary supercargo—but one in whom the most unbounded confidence and power have been placed. His employers must therefore be bound by that every general rule of admiralty law, which holds the principal to be affected by the acts of his agents. There are cases indeed, of wilful and unauthorised conduct in the agent, where that rule may seem to be harsh; but no such argument arises in the present case—where the whole plot appears to have been projected by, and known to the employers themselves, as well as their deputed agents.

I beg to be understood as applying these observations, more especially to Messrs. Foussatt & Mann, who are the owners of the ship, and the former, together with Mr. Delaunay, the principal proprietor of the cargo.

There are, however, three smaller shipments claimed on behalf of Mr. Dabadie, Mr. Duval, and Messrs Warder and Sons—as to which considerations of a different nature may be applied.

The chief article in the shipments of both Dabadie and Duval, are ribbons and satins—articles which are most probably of French produce and manufacture, but that circumstance alone is not enough to affect them. It is not improbable but that they had been previously imported *bona fide*, into America. Certain it is that they were not included in the certificate of drawback; so that there is no evidence *prima facie*, of their having been entered for exportation. There is no evidence that they were brought from France in this ship, and it appears by the depositions that articles were on board, besides those which were brought from Marseilles.

If these articles were of that description, and these persons had no connection with Mr. Delaunay previous to the voyage from Philadelphia, I should hold it rather too severe an application of the rule of responsibility by a principal for the acts of his agent to call them *participes criminis* with Mr. Delaunay in respect of his concerns throughout the whole of this transaction. On the other hand, considering the general conduct of Mr. Delaunay, I think it would be too much to decree immediate restitution of property committed to his charge as to which any possibility of doubt can exist. But I shall allow these gentlemen an opportunity of shewing, if they can, by further proof, that they have not been implicated in any of the improper and illegal conduct, which I have found it necessary to animadvert upon, in respect to the ship & general cargo.

The only remaining shipment is that of Messrs. John Warder and Sons, which stands entirely free of all objection. The sole article in their invoice is lard, amounting in value to about 3000 dollars. This is an article which bespeaks itself to be of American origin—It is consigned to a merchant at Havana, having nothing to do with the other parties to this transaction, and the shipper himself is equally free from any such connection. This shipment, therefore, becomes a very fit subject for immediate restitution. But the ship, together with the property of Mr. Delaunay and his employers, I feel that it is my duty at once to condemn.

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CHARLESTON, Feb. 19.

Cleared, ships Eliza Salter, Liverpool; Liverpool Packet, Place, Cowes and a market; William, Perenchiffe, do.; Johanna & Elizabeth, Milde, Hamburg.