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not be retained as well by a prize-master alone, as by a considerable detachment from his crew. The cases cited to this point by the counsel for the captors are entirely satisfactory.

But it has been truly observed, that it is not non-capture, but abandonment, for which the complainants in fact contend. *But while the
*180] whole cargo remains together, claimed by the captor, if it be enemy property, how can any part of it be said to be abandoned? If it was entirely abandoned, for what purpose was one of the crew of the America put on board the Alexander?

With as little reason do the claimants seek to shelter themselves under the instructions of the 28th of August 1812. Those instructions apply, in express terms, to such American vessels as have sailed from Great Britain for the United States, "in consequence of the alleged repeal of the British orders in council." A vessel which sailed while those orders were not alleged to be repealed, cannot bring herself within these instructions. But it is alleged, that these instructions are still issued, and must mean something. Rather than ascribe their continuance to inattention, the counsel for the claimants would give them a construction in direct hostility with their letter and spirit. Were this reasoning even admitted to be correct, which it is not, it would become the duty of the court to be astute in finding some object to which they might possibly apply. It is possible, though certainly it is barely possible, that some vessels which sailed from England while the orders of council were supposed to be repealed, may not yet have reached the United States. It would be more reasonable, to reserve these instructions for such possible case, than to apply them to cases which can neither be brought within their words nor their meaning. The sentence is affirmed, with costs.

Sentence affirmed.

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*The JULIA, LUCE, Master.

War.—Enemy's license.

The sailing on a voyage under the license and passport of protection of the enemy, in furtherance of his views or interests, constitutes such an act of illegality, as subjects the ship and cargo to confiscation, as prize of war.

The Julia and Cargo, 1 Gallis. 594, affirmed.

This was an appeal from the Circuit Court for the district of Massachusetts.

D. Davis, for the claimants.—The brig Julia and cargo, consisting of about three hundred hogsheads of salt, were captured by the United States' frigate Chesapeake, Samuel Evans, commander, about the last of December 1812, and libelled and condemned in the district court of Massachusetts. Upon appeal to the circuit court, the sentence of condemnation was affirmed, and the claimants now appeal to this court.

The allegation, in the libel, is, that the property belongs to British subjects. The facts proved and relied upon by the claimants, and which are fully substantiated by the documents contained in the record, are as follows: That the Julia and cargo were owned wholly by the claimants, who are native American citizens; that she was documented as an American

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ship, for a voyage from Baltimore to Lisbon, with a cargo of corn, flour and bread ; that she sailed with this cargo, from Baltimore to Lisbon, where she arrived in safety ; that the outward cargo was there sold to Portuguese merchants, in that port, and a return-cargo of salt purchased with a part of the proceeds of the outward cargo ; and that, as the Julia was returning to Boston, her port of discharge, with her homeward cargo, she was captured by the Chesapeake ; that all the transactions of the voyage were really and truly for account of the claimants, and that, in point of fact, no connection, intercourse, trade, supply or other matter or thing relative thereto, was ever had, made, intended or contemplated with the enemy, in the whole course of this voyage.

It is admitted by the claimants, that copies of the following documents signed and granted by Admiral Sawyer and Andrew Allen, late the British consul at Boston, were filed in the courts below, and, for the *reasons [*182 stated by the learned judges, admitted in evidence, viz :

1st. A license from Admiral Sawyer, in the words following :

“By Herbert Sawyer, Esq. vice-admiral of the blue, and com-[SEAL.] mander-in-chief of his majesty's ships and vessels employed and to be employed in the river Saint Lawrence, along the coast of Nova Scotia, the islands of Anticosti, Madelaine and Saint John, and Cape Breton and the bay of Fundy, and at and about the island of Bermuda, or Somers' Islands, &c. Whereas, Mr. Andrew Allen, his majesty's consul at Boston, has recommended to me Mr. Robert Ewell, a merchant of that place, and well inclined towards the British interest, who is desirous of sending provisions to Spain and Portugal, for the use of the allied armies in the Peninsula, and whereas, I think it fit and necessary that encouragement and protection should be afforded him in so doing. These are, therefore, to require and direct all captains and commanders of his majesty's ships and vessels of war which may fall in with any American, or other vessel bearing a neutral flag, laden with flour, bread, corn or peas, or any other species of dry provisions, bound from America to Spain or Portugal, and having this protection on board, to suffer her to proceed, without unnecessary obstruction or detention in her voyage ; provided she shall appear to be steering a due course for those countries, and it being understood, this is only to be in force for one voyage and within six months from the date hereof. Given under my hand and seal, on board his majesty's ship Centurion, at Halifax, this fourth day of August, one thousand eight hundred and twelve.

“By command of the vice-admiral.

H. SAWYER, Vice-Admiral.”

WILLIAM AYRE.”

*2d. The following document signed by Andrew Allen.

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“To the commanders of his majesty's ships of war or of private armed ships belonging to subjects of his majesty. Whereas, from the consideration of the great importance of continuing a regular supply of flour and other dried provisions to the allied armies in Spain and Portugal, it has been deemed expedient by his majesty's government, that, notwithstanding the hostilities now existing between Great Britain and the United States, every degree of encouragement and protection should be given to American vessels, laden with flour and other dry provisions, and *bonâ fide* bound to

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Spain or Portugal. And whereas, in furtherance of these views of his majesty's government, Herbert Sawyer, Esq., vice-admiral and commander-in-chief on the Halifax station, has addressed to me a letter, under the date of the 5th of August 1812 (a copy whereof is hereunto annexed), wherein I am instructed to furnish a copy of his letter, certified under my consular seal, to every American vessel so laden and bound, destined to serve as a perfect safeguard and protection of such vessel in the prosecution of her voyage. Now, therefore, in obedience to these instructions, I have granted to the American brig Julia, Tristram Luce, master, of 159 tons burden, now lying in the harbor of Boston, and bound to Baltimore, for the purpose of taking in a cargo of flour and corn, and proceeding thence to a port in Spain or Portugal, not under French domination, the annexed documents, requesting all officers commanding his majesty's ships of war, or private armed ships belonging to subjects of his majesty, to give to the said vessel all due assistance and protection in the prosecution of her voyage to Spain or Portugal, and on her return thence, to her port of original departure, laden with salt or with specie to the net amount of her outward cargo, or in ballast only.

[CONSULAR SEAL] "Given under my hand and seal of office, at Boston,
this eighteenth day of September 1812.

ANDREW ALLEN, jun.,
His majesty's consul."

*184] *3d. A copy of Admiral Sawyer's letters to A. Allen, referred to in the preceding document, and certified under the consular seal; as follows :

(COPY)

"His Majesty's ship Centurion,

At Halifax, the 5th of August 1812.

"SIR : I have fully considered that part of your letter of the eighteenth ultimo, which relates to the means of insuring a constant supply of flour and other dried provisions, to the allied armies in Spain and Portugal, and to the West-India islands; and being aware of the importance of the subject, concur in the proposition you have made. I shall, therefore, give directions to the commanders of his majesty's squadron under my command, not to molest American vessels unarmed and so laden, *bond fide* bound to British, Portuguese or Spanish ports, whose papers shall be accompanied with a certified copy of this letter under the consular seal. I have the honor to be, sir, your most obedient humble servant,

"To Andrew Allen, Esq.,

H. SAWYER, Vice-Admiral."

His majesty's consul, Boston."

"Office of his Britannic Majesty's Consul.

"I, Andrew Allen, jun., his Britannic majesty's consul for the states of Massachusetts, New Hampshire, Rhode Island and Connecticut, hereby certify, that the annexed paper is a true copy of a letter addressed to me by Herbert Sawyer, Esq., vice-admiral and commander on the Halifax station.

[CONSULAR SEAL] "Given under my hand and seal of office, at Boston,
in the state of Massachusetts, this eighteenth day
of September, in the year of our Lord, one
thousand eight hundred and twelve.

ANDREW ALLEN, jun."

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*If the opinions of the courts below, in admitting copies of these documents to be received as evidence, were correct, then it is also admitted, that these licenses and letters had been obtained for, and were found on board the Julia, at the time of her capture.

Upon this statement, and upon the evidence contained in the record, the claimants submit two points to the decision of the court. 1. That the mere acceptance or possession of the British license and documents, do not subject the property to condemnation. 2. That if the peculiar terms of the license in this case create a presumption unfavorable to the other claimants, either of an intention to supply the enemy, or of any unlawful intercourse with the enemy, such presumption is entirely destroyed by the evidence in the case, which shows that no such supply or intercourse did ever, in fact, take place.

As to the first point. The nature and effect of an enemy's license, so far as respected the acceptance, possession or use of such a document by an American citizen, were so fully and ably pointed out in the case of *The Aurora* (post, p. 203), that the counsel for the claimants, is content to rely upon, and to refer the court to the arguments and authorities which were submitted and quoted in that case, upon this point.

But as to the second point. If the Julia had been captured, on her passage to Lisbon, with these British documents on board, there might have been some ground for a condemnation. The suspicious or obnoxious parts of them, such as those which state that "Elwell is well inclined towards the British interest," and that he contemplates furnishing supplies to the allied armies in the Peninsula, might have raised a presumption that such was his intention, and would have cast the *onus probandi* upon him, or upon those in whose hands the license might be found. But it is contended, that if, upon furnishing the proof, it shall appear, that no unlawful intercourse with the enemy ever did, in fact, take place, and, moreover, that no such intercourse was ever even intended *to be held with the enemy, the presumption against the claimants, arising from the terms of the British documents will be entirely destroyed, and the complainants left in a state wholly free from guilt, both legal and moral. [*186

That this is a correct position, the court is referred to the case of *The Matilda*, decided in the North Carolina Circuit, by the chief justice of the United States, and reported in the 4 Hall's L. J. 478. In that case, the license was granted, after the war, and for the express purpose of a trade and supply to the British West India Islands : but there was no evidence that any act of trading had been committed. In that case, the Chief Justice is said to have declared, "that there was no evidence of a criminal intent, except that of the license ; that the obtaining the license was to deceive the enemy, which the claimants lawfully might do ; and that the case was cleared of all doubts by the evidence, which stated the real object of the voyage."

In the case of *The Abby*, 5 Rob. 254, it is expressly stated to be law, "that there must be an act of trading to the enemy country, as well as the intention ; that there must be a legal as well as moral illegality." It is, in the same case, stated, that "no case has been produced, in which a mere intention to trade with the enemy, contradicted by the fact, inures to condemnation." Upon both points (said Sir WILLIAM SCOTT), "I am of opinion, that the claimant is entitled to restitution. On the 1st, there was no illegal act ; on the 2d, there was neither intention nor act."

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There is no principle better known or established by the writers both upon law and ethics, than that there must be both a will and an act to constitute an offence. The act is necessary to demonstrate the depravity of the will : a vicious will, without a vicious act, is no offence.

It is not denied, that the Julia and her outward cargo were the property of the claimants : it is not denied, that the Julia, on her departure from Baltimore, was documented, in every respect, as required by law, as an American ship bound from Baltimore to Lisbon, with a cargo of flour, corn and bread. It is not denied, that the Julia, with this cargo on board, was ordered to proceed, and that she did in fact proceed, to Lisbon ; and that it was the intention of the owners, that the cargo should be there sold, to the best advantage, to merchants or other subjects of that government ; nor is it denied, that the Julia and cargo did, in fact, proceed to Lisbon for these purposes. *It is not denied, that this cargo of corn, flour and *187] bread, was in fact carried to Lisbon, there landed, and sold to a house of merchants of that city. It is also a fact, probably not disputed, that the cargo of salt, with which the Julia was laden, and with which she was captured on her homeward voyage, was purchased with the proceeds of the cargo sold at Lisbon. And it is not pretended, that there was any intercourse with the enemy, at Lisbon, or with any of his agents ; or that there was, in reality, any sale, contract or other transaction by the claimants, or their agents, that any part of the cargo, or the proceeds of it, should, in any manner, serve as a supply or come to the hands and possession of the enemy. On the other hand, it does appear, from all the evidence in the case, that the whole object of the voyage was to export the cargo of the Julia to Lisbon, there to be sold, and the proceeds to be invested in such funds as are pointed out in the owner's letter of instructions to the master. The intention to trade with, or supply the enemy, is proved only from the *primâ facie* evidence of the license and other British documents ; and this evidence is fully explained and counteracted by the whole mass of evidence in the case, showing the real object of the voyage, and that no supply, trading or intercourse were in fact had with the enemy.

If the bare possession or acceptance of a license condemns the property which it purports to protect, the Julia must be condemned ; but if the presumptive or *primâ facie* evidence resulting from the possession of the license, however obnoxious may be the terms of it, can be explained and counteracted by evidence of the facts, the Julia and cargo must be restored. The former position, it is conceived, will never be sanctioned by this court ; and if the latter be not established, the claimants will be severely punished for an act which they never committed, and which they never intended to commit, viz., that of trading with, and supplying the enemies of their country. *The case of the Julia, therefore, turns upon a question of fact. Did *188] the Julia pursue a voyage to a neutral port, and was her cargo disposed of to the subjects of a neutral country, or did she pursue the voyage and furnish the supplies to the enemy, which appear to have been the objects of the British admiral ? It is repugnant to law and reason, that a man shall not be permitted to prove his innocence ; and when he has proved it, that he should be held guilty and punished. If taken with the *mainour*, may he not prove that he came honestly by the goods ?

If a contrary doctrine be established, it will lead to one inevitable result ;

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viz., a prohibition of all trade from this to a neutral country which happens to be in alliance with Great Britain : it will be in fact, declaring that a cargo of flour shall not be exported to Spain or Portugal, because the neutral subjects, to whom it may be there sold, may sell it again to their British allies.

This case is distinguishable from, and stands upon much firmer ground than that of *The Aurora*. In that case, the ship was taken on her outward passage, and (as it was alleged) out of her course to her ostensible port. It was, therefore, impossible for the claimants to remove the presumption against them, arising from the possession of the license, by the subsequent events of the voyage. But in this case, everything is explained, and every doubt or suspicion removed, by the evidence showing the *bonâ fide* objects and ultimate termination of the voyage. The case is thus cleansed of everything that might be presumed to be foul, by the unhappy terms of the license, or the officious and unofficial interpositions of Mr. Allen. The case must turn upon the *bonâ fide* views and intention of the claimants, and upon the evidence that, in point of fact, no unlawful intercourse between them and the enemy ever existed, or was ever contemplated. If they have merely accepted a license, but have made no unlawful use of it, they cannot be injured by it.

Rush, Attorney-General, in behalf of the United States.—It is utterly impossible, that, if any American property, embarked in a trade under an enemy license, can be the subject of prize, this should escape. The transaction is the most obnoxious of its class ; and presents the *leading [*189 question in its most advantageous forms for the captors. The object of the enemy was supply to the allied armies in Portugal and Spain. The engagement to execute that purpose was the consideration of the protection granted by the license. The purpose was executed in fact, and in strict conformity with the engagement. The homeward cargo was purchased with the proceeds of the outward ; and when captured, was still under the protection of the license. If the circumstances in this case do not amount to a trading with the enemy, there is no such thing. If this license (or rather these licenses) should not be held to give to the property a hostile character, no license, whatever may be the facts with which it is combined, can produce that effect.

There can be no foundation for restitution in this case but one. It has been doubted, whether American property can, for any cause, become subject to confiscation as prize, when captured by a privateer ; and it will be contended (as it is understood), in the case of *The Frances*, that it cannot. The capture on this occasion, however, was made by a national vessel, in virtue of the declaration of war, and the public law of the world operating upon it. The attorney-general does not believe that this difference in fact creates any difference in the legal conclusion ; because he supposes that privateers have, upon the sound construction of the act of congress, the same rights of capture with national vessels ; but he contends, that even if it should be held that the rights of capture, vested by their commissions in private armed vessels, are confined to property strictly (not constructively) British, the rights of national vessels are not so restricted.

The court is referred to the opinion at large (in the transcript) of the

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learned judge by whom this cause was decided in the circuit court, for a very able discussion of the doctrine which it involves.

Monday, March 7th, 1814. (Absent, TODD, J.) STORY, J., delivered *190] the opinion of the court, as follows:—*The facts of this case, and the grounds upon which a decree of condemnation was pronounced in the circuit court, fully appear in the opinion of that court which accompanies this record. That opinion has been submitted to my brethren, and a majority of them concur in the decree of condemnation, upon the reasons and principles therein stated. It is not thought necessary to repeat those reasons and principles in a more formal manner; it is sufficient to declare as the result of them, that we hold, that the sailing on a voyage under the license and passport of protection of the enemy, in furtherance of his views or interests, constitutes such an act of illegality, as subjects the ship and cargo to confiscation as prize of war; and that the facts of the present case afford irrefragable evidence of such act of illegality. The judgment of the circuit court is, therefore, affirmed, with costs.

The following is the opinion of the circuit court of Massachusetts, referred to in the foregoing opinion:

"The Julia and cargo was captured, as prize, by the United States' frigate Chesapeake, commanded by Captain Evans, on the 31st December 1812. From the preparatory evidence and documents, it appears, that she sailed from Baltimore, on or about the 31st October 1812, bound on a voyage to Lisbon, with a cargo of corn, bread and flour; and the capture took place on the return-voyage to the United States. The vessel and cargo were documented as American, and as owned by the claimants, who are American citizens. The vessel had on board sundry documents of protection from British agents, which were delivered up to the captors, and together with the other ship's papers, were put on board of the prize, in the custody of the prize-master; and these documents were the unquestionable cause of the capture. It appears, that the American master and crew were left on board the prize, and during the subsequent voyage to the United States, these British documents were taken from the custody of the prize-master, surreptitiously, and without his knowledge as to the time or manner: he alleged *191] expressly that they were stolen, and this allegation seems *admitted by the master, in a supplementary affidavit, who, however, denies any knowledge or connection in the transaction. The prize-master took exact copies of these documents, for the purpose of sending them to the secretary of the navy; which copies have been produced in court, and verified by his affidavit. All the other original documents have been faithfully produced. Upon the examination of the master, upon the standing interrogatories, on the 18th February 1812, although there are several interrogatories, and particularly the 16th and 27th, which point directly to the subject-matter, he did not state the existence of any British document, passport, safeguard or protection; and what is quite as remarkable, he expressly declared, that he knew not upon what pretence, nor for what reason, the vessel and cargo were captured. It was not until after the time assigned for the trial, and on the 8th of March 1813, that the master, by a supplementary affidavit (which was admitted through great indulgence, and contrary to the general practice of prize courts), attempted to explain his omission, and to vindicate

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his misconduct. The apology is equally weak and futile. At the time when these examinations were taken, the interrogatories had been drawn up with care and deliberation. The commissioners were present to explain, to the understanding of every man intent on truth, the meaning of any question which might appear obscure. The master was a part-owner of the vessel and cargo, and the regular depository of all the papers connected with the voyage. It is utterly incredible, that he should not recollect, on his examination, the existence of these British documents. They were put on board for the special safeguard and security of the vessel and cargo. Indeed, independent of them, the risk of capture would have been imminent. A master can never be admitted to be heard, in a prize court, to aver his ignorance or forgetfulness of the documents of his ship. It is his duty to know what they are ; and he cannot be believed ignorant of their contents, without overthrowing all the presumptions which govern in prize proceedings. Looking to the whole conduct of the master, it seems to be irreconcilable with the rules of morality and fair dealing ; and I have great difficulty in exempting him from the imputation of being guilty of a wilful suppression of the truth.

*At the hearing, a preliminary objection was taken to the introduction of the copies of the British documents, upon the ground, [*192 that the originals, as the best evidence, ought to be produced. The rule undoubtedly applies, when the originals are in existence, and in the possession or control of the party. The extraordinary disappearance of these important papers, under the circumstances of this case, I can have little doubt was occasioned by fraudulent subtraction. There is no reason to impute this subtraction to the prize-master. The documents were to him a very important protection ; they constituted the avowed reason of the capture, as the mate and some of the seamen testify. It is true, that the master has declared that he knew not the pretence of capture ; but it can hardly be believed, that he could be ignorant of a fact which so materially affected his interest. I feel myself bound to make very unfavorable inference against him ; and if, *in odium spoliatoris*, I impute the subtraction to some person on board connected with the voyage, and in the confidence of the master, it is measuring out no injustice to one who appears to deem misstatements and concealments no violent breach of good faith. I shall, therefore, admit the copies, verified as they are, as good evidence in these proceedings ; and I will add, that if a single material fact in favor of the claimants had depended upon the supplementary affidavit of the master, I should have felt myself compelled to repudiate it, in order to vindicate the regularity of prize proceedings, and suppress the efforts of fraud to derive benefit from after-thoughts and contrivances. These remarks are not made without regret ; but public duty requires that manifest aberrations from moral propriety should not receive shelter in this court.

"Having disposed of this preliminary objection, I now proceed to consider the two questions which have been so ably discussed in this case. 1st. Whether the use of an enemy's license or protection, on a voyage to a neutral country in alliance with the enemy, be illegal, so as to affect the property with confiscation. 2d. If not, whether the terms of the present license distinguish this case unfavorably from the general principle.

*The British documents which were on board, and which, for con- [*193

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ciseness, I have termed a license, are as follows : [It is thought unnecessary to insert these documents here, as they are to be found at length in the argument of the claimant's counsel in the former part of this report.]

"In approaching the more general question which has been raised in this case, I am free to acknowledge, that I feel no inconsiderable diffidence, both from the importance of the question, and the different opinions which eminent jurists have entertained respecting it.¹ Nor am I insensible also, that it has entered somewhat into political discussions, and awakened the applause and zeal of some, and the denunciations of others, considered merely as a subject of national policy, and not of legal investigation. It has now become my duty to examine it; and, whatever may be my opinion, I feel a consolation, that it is in the power of a higher tribunal to revise my errors, and award ample justice to the parties.

"At the threshold of this inquiry, I laid it down as a fundamental proposition, that, strictly speaking, in war, all intercourse between the subjects and citizens of the belligerent countries is illegal, unless sanctioned by the authority of the government, or in the exercise of the rights of humanity. I am aware, that the proposition is usually laid down in more restricted terms, by elementary writers, and is confined to commercial intercourse. Bynkershoek says, '*Ex natura belli, commercia inter hostes cessare, non est dubitandum. Quamvis nulla specialis sit commerciorum prohibitio, ipso tamen jure belli commercia esse vetita, ipsæ indictiones bellorum satis declarant.*' Bynk. Q. J. P. lib. 1, c. 3. And yet it seems not difficult to perceive, that his reasoning extends to every species of intercourse. Valin, in his commentary on the French ordinance, speaking of the reason of requiring the name and domicil in a policy, says, '*Est encore de connaitre, en temps de guerre, si malgré l'interdiction de commerce, qu' emporte toujours toute declaration de guerre, les sujets du Roi ne font point commerce avec les ennemis de l' Etat, ou avec des amis ou alliés, par l'interposition desquels on* *194] *ferait passer aux ennemis des munitions de guerre et de bouche, ou d' autres effets prohibés ; car tout cela, étant défendu comme préjudiciable à l' état, serait sujet à confiscation, et à être déclaré de bonne prise.*' Lib. 1, tit. 6, art. 3, p. 31. In another place, adverting to a case of neutral, allied, and French property, on board an enemy ship, &c., he declares it subject to confiscation, because '*C' est favoriser le commerce de l' ennemi et faciliter le transport de ses denrées et marchandises, ce qui ne peut convenir aux traites d' alliance ou de neutralité, encore moins aux sujets du Roi auxquels toute communication avec l' ennemi est étroitement défendu sur peine même de la vie.*' Lib 3, tit. 9, art. 7, p. 253. And Valin, *Traité des Prises*, chap. 5, § 5, p. 62.

"From this last expression, it seems clear, that Valin did not understand the interdiction as limited to mere commercial intercourse. In the elaborate judgment of Sir W. Scorr, in *The Hoop*, 1 Rob. 165, 196, the illegality of commercial intercourse is fully established as a doctrine of national law : but it does not appear that the case before him required a more extended examination of the subject. The black book of the admiralty contains an article which deems every intercourse with the public enemy an indictable offence. This article, which is supposed to be as old as the reign of Edw. III., directs

¹ See Fisher's Prize Cases.

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the grand inquest '*Soit enquis de tous ceux qui entrecommunent, vendent ou achètent avec aucuns des ennemis de notre Seigneur le Roi sans license spécial du Roi ou de son admiral.*' But independent of all authority, it would seem a necessary result of a state of war, to suspend all negotiations and intercourse between the subjects of the belligerent nations. By the war, every subject is placed in hostility to the adverse party. He is bound by every effort of his own to assist his own government, and to counteract the measures of its enemy. Every aid, therefore, by personal communication, or by other intercourse, which shall take off the pressure of the war, or foster the resources, or increase the comforts of the public enemy, is strictly inhibited.

"No contract is considered as valid between enemies, at least, so far as to give them a remedy in the courts of either government; and they have, in the language of the civil law, no ability to sustain a *persona standi in judicio*. The ground upon which a trading with the enemy *is prohibited, is not the criminal intentions of the parties engaged in it, or [195 the direct and immediate injury to the state. The principle is extracted from a mere enlarged policy, which looks to the general interests of the nations, which may be sacrificed under the temptation of unlimited intercourse, or sold by the cupidity of corrupted avarice. In the language of Sir WILLIAM SCOTT, I would ask, 'Who can be insensible to the consequences that might follow, if every person, in time of war, had a right to carry on a commercial intercourse with the enemy, and, under color of that, had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme; and where is the inconvenience on the other side, that the merchant should be compelled, in such a situation of the two countries, to carry on his trade between them (if necessary) under the eye and control of the government charged with the care of the public safety?' Nor is there any difference between a direct intercourse between the enemy countries, and an intercourse through the medium of a neutral port. The latter is as strictly prohibited as the former. *The Jonge Pieter*, 4 Rob. 65, 79.

"It is argued, that the cases of trading with the enemy are not applicable, because there is no evidence of actual commerce; and an irresistible presumption arises from the nature of the voyage to a neutral port, that no such trade is intended. If I am right in the position, that all intercourse, which humanity or necessity does not require, is prohibited, it will not be very material to decide, whether there be a technical commerce or not. But it is clear, beyond all doubt, that no inference can arise of an actual commerce? The license is issued by the agents of the British government, and, I must presume, under its authority. It is sold (as it is stated) in the market; and if it be a valuable acquisition, the price must be proportionate. If such licenses be an article of sale, I beg to know, in what respect they can be distinguished from the sale of merchandise? If purchased directly of the British government, would it not be a traffic with an enemy? If purchased indirectly, can it change the nature of the transaction? It has been said, *that if purchased of a neutral, the trade in [196 licenses is no more illegal than the purchase of goods of the enemy fabric, *bond fide* conveyed to neutrals. Perhaps, this may, under circumstances, be correct: but I do not understand that the purchase of goods of

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enemy manufacture, and avowedly belonging to an enemy, is legalized by the mere fact of the sale being made in a neutral port. The goods must have become incorporated into the general stock of neutral trade, before a belligerent can lawfully become a purchaser. If such licenses be a legitimate article of sale, will they not enable the British government to raise a revenue from our citizens, and thereby add to their resources of war? Admit, however, that they are not so sold, but are a measure of policy adopted by Great Britain to further her own interests, and ensure a constant supply of the necessaries of life, either in or through neutral countries; can it be asserted, that an American citizen is wholly blameless, who enters into stipulations and engagements to effect their purposes? Is not the enemy thereby relieved from the pressure of the war, and enabled to wage it more successfully against the other branches of the same commerce, not protected by this indulgence?

"It is said, that the case of a personal license is not distinguishable from a general order of council authorizing and protecting all trade to a neutral country. In my judgment, they are very distinguishable. The first pre-supposes a personal communication with the enemy, and an avowed intention of furthering his objects, to the exclusion of the general trade by other merchants to the same country; it has a direct tendency to prevent such general trade; and relieves the enemy from the necessity of resorting to a general order of protection; it contaminates the commercial enterprises of the favored individual with purposes not reconcilable with the general policy of his country; exposes him to extraordinary temptations to succor the enemy by intelligence; and separates him from the general character of his country, by clothing him with all the effective interests of a neutral. Now, these are some of the leading principles upon which a trade with the enemy has been adjudged illegal, by the law of nations. On the other hand, a general order opens the whole trade of the neutral country to every merchant. It pre-supposes no incorporation in enemy *interests: it enables the whole mercantile enterprise of the country to engage upon equal terms with the traffic; and it separates no individual from the general national character. It relaxes the rigor of war, not only in that particular trade, but collaterally opens a path to other commerce. There is all the difference between the cases, that there is between an active personal co-operation in the measures of the enemy, and the merely accidental aid afforded by the pursuit of a fair and legitimate commerce.

"In the purchase or gratuity of a license for trade, there is an implied agreement that the party shall not employ it to the injury of grantor; that he shall conduct himself in a perfectly neutral manner, and avoid every hostile conduct. I say, there is an implied agreement to this effect, in the very terms and nature of the engagement. I am warranted in declaring this, from the uniform construction put by Great Britain on the conduct of her own subjects acting under licenses. Can an American citizen be permitted, in this manner, to carve out for himself a neutrality on the ocean, when his country is at war? Can he justify himself in refusing to aid his countrymen who have fallen into the hands of the enemy on the ocean, or decline their rescue? Can he withdraw his personal services, when the necessities of the nation require them? Can an engagement be legal, which imposes upon him the temptation or necessity of deeming his personal

interest at variance with the legitimate objects of his government? I confess, that I am slow to believe, that the principles of national law, which formerly considered the lives and properties of all enemies as liable to the arbitrary disposal of their adversary, are so far relaxed, that a part of the people may claim to be at peace, while the residue are involved in the desolations of war. Before I shall believe the doctrine, it must be taught me the highest tribunal of the nation; in whose superior wisdom and sagacity, I shall most cheerfully repose.

"It has been said, that no case of condemnation can be found on account of the use of an enemy license. Admitting the fact, I am not disposed to yield to the inference, that it is, therefore, lawful. It is one of the many novel questions which may be presumed to arise out of *the extra- [*198 ordinary state of the world. The silence of adjudged cases proves nothing either way: it may well admit of opposite interpretations. The case of *The Vrow Elizabeth*, 5 Rob. 2, has been cited by the captors, in support to the more general doctrine. It was a case where the ship had the flag and pass and documents of an enemy's ship; and the court held, that the owner was bound by the assumed character. There is no similarity in the case before the court. The ship and cargo were documented as American, and not as British property. As little will *The Clarissa*, 5 Rob. 4, cited on the other side, apply. It was, at most, but a license given by the Dutch government, allowing a neutral to trade within its own colony: in all other respects, the ship and property were avowedly neutral; and unless so far as the English doctrines, as to the colonial trade could apply, there was nothing illegal or improper in waiving any municipal regulations of colonial monopoly, in favor of a neutral. There was nothing which committed the allegiance or touched the interest of the neutral country. If, however, this license had conferred on the neutral the special privileges of a Dutch merchant, or had facilitated the Dutch policy in warding off the pressure of the war, it would probably have received a very different determination. See *The Vreede Scholty*, 5 Rob. 5, note a; *The Rendsborg*, 4 Ibid. 98, 121. We all know, that there are many acts which inflict upon neutrals the penalty of confiscation, from the subserviency which they are supposed to indicate to enemy interests; the carrying of enemy dispatches; the transportation of military persons; and the adopting of the coasting trade of the enemy. The ground of these decisions is the voluntary interposition of the party to further the views and interests of one belligerent, at the expense of the other: and I cannot doubt that the *Clarissa* would have shared the general fate, but from some circumstance of peculiar exemption.

"By the prize code of Lewis XIV. (which I quote the more readily, because it is, in general, a compilation of prize law as recognised among civilized nations), it is a sufficient ground of condemnation that a vessel bears commissions from two different states. Valin (*Traite des prises*, p. 53) says, '*A l'égard du vaisseau ou se trouverent des commissions de deux differens princes ou *etats, il est également juste qu' il soit déclaré de bonne prise, soit parce qu' il se peut arborer le pavillon de [*199 l'un, en consequence de sa commission, sans faire injurée l'autre, ceci, au reste, regarde les Français comme les étrangers.*' In what consists the substantive difference between navigating under the commissions of our own, and also of another sovereign, and navigating under

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the protection of the passport of such sovereign, which confers or compels a neutral character? Valin, in another place (*sour l'ordonnance, lib. 3, tit. 9, art. 4, p. 241*), declares, '*si sur un navire Français il y a une commission d'un prince étranger avec cette de France, il sera de bonne prise, quoiqu'il n'ait arboré que la pavillion Français.*' It is true, that he just before observes, '*que ce circonstance de deux congès ou passe-ports, ou de deux connoissements, dont l'un est de France, et l'autre d'un pays ennemi, ne suffit pas seule faire declarer le navire ennemi de bonne prise, et que cela doit dependre des circonstances capables de faire decouvrir sa véritable destination.*' But Valin is referring to the case of an enemy ship, having a passport of trade from the sovereign of France. I infer from the language of Valin, that a French ship, sailing under the passport, *congé*, or license of its enemy, without the authority of its own sovereign, would have been lawful prize.

"This leads me to another consideration ; and that is, that the existence and employment of such a license affords a strong presumption of concealed enemy interest, or at least, of ultimate destination for enemy use. It is inconceivable, that any government should allow its protection to an enemy trade, merely out of favor to a neutral nation, or to an ally, or to its enemy. Its own particular and special interests will govern its policy ; and the *quid pro quo* must materially enter into every such relaxation of belligerent rights. It is, therefore, a fair inference, either that its subjects partake of the trade, under cover, or that the property, or some portion of the profits, finds its way into the channel of the public interests.

"It has been argued, that the use of false or simulated papers is allowable in war, as a stratagem to deceive the enemy, and elude his vigilance. However this may be, it certainly cannot authorize the use of real papers *200] of a hostile character, to carry into effect the avowed purpose *of the enemy. We may be allowed to deceive our enemy ; but we can never be allowed to set up, as such a deception, a concert in his own measures for the very purposes he has prescribed.

"An allusion has been made to the passports or safe-conducts granted, in former times, to the fishing-vessels of enemies ; and it has been argued, that such passports or safe-conducts have never been supposed to induce the penalty of confiscation. This will at once be conceded, as to the belligerent nation who granted these indulgences ; but as to the other nation, where such passports were not guarantied by treaty or mutual pacts, I have no authority to lead me to an accurate decision. The French ordinance of 1543 authorized the admiral to make fishing truces with the enemy ; and where no such truces were made, to deliver to the subjects of the enemy, safe-conducts for fishing, upon the same stipulations as they should be delivered to French subjects by the enemy. This, therefore, was an authority to be exercised only in cases of reciprocity ; and it seems to have been abolished, from the manifest inconveniences, which attended the practice. Valin, *sur ord. lib. 1, p. 689, 690*. I do not think that any argument in favor of the validity of the present license (unrecognised as it is by our government) can be drawn from these ancient examples as to fisheries.

"It has been argued, that the voyage was lawful to a neutral port, and the mere use of a license cannot cover a lawful voyage with the taint of illegality. This, however, is assuming the very point in controversy. It is

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not universally true, that a destination to a neutral port gives a *bonâ fide* character to the voyage. If the property be ultimately destined for an enemy port, or an enemy use, it is clear, that the interposition of a neutral port will not save it from condemnation. *The Jonge Pieter*, 4 Rob. 65, 79. Suppose, in the present case, the vessel and cargo had been destined to Lisbon, for the express use of the British fleet there, could there be a doubt, that it would have been a direct trade with an enemy? Whether the voyage, therefore, be legal or not, depends not merely upon the destination, but the ultimate application of the property, or the ascertained intentions of the party. A contract to carry provisions to St. Bartholomews, *for [201 the ultimate supply of the British West-India islands, would be just as much an infringement of the law of war, as a contract for a direct transportation. On the whole, I adopt, as a salutary maxim of war, the doctrine of Bynkershoek '*Vetatur quoquo modo hostium utilitati consulere.*' It is unlawful in any manner to lend assistance to the enemy, by attaching ourselves to his policy, sailing under his protection, facilitating his supplies, and separating ourselves from the common character of our country.

"I am aware, that the opinion which I have formed as to the general nature of licenses, is encountered by the decisions of learned judges for whom I entertain every possible respect. This circumstance alone, independent of the novelty and importance of the question, would awaken in my own mind an unusual hesitation as to the correctness of my own opinion: but, after much reflection upon the subject, I have not been able to find sufficient grounds to yield it; and my duty requires that, whatsoever may be its imperfections, my own judgment should be pronounced to the parties.

"I am glad, however, to be relieved from the painful necessity of deciding the more general question, by the peculiar terms of the present license, which I consider as affording irrefragable proof of an illicit intercourse with the enemy, and a direct contract to transport the cargo for the use of the British armies in Spain and Portugal. The very preamble to the license of Admiral Sawyer shows this in a most explicit manner, and discloses facts which it is no harshness to declare, are not very honorable to the principles or the character of the parties.

"It has been attempted to distinguish the present claimants from Mr. Elwell, to whom the original license was granted. It could hardly have been expected, that such an attempt would be successful. The assignees cannot place their derivative title on a better footing than the original party. They must be considered as entering into the views and contracting to effectuate the intentions of the latter; and, at all events, the illegality of the employment of the license attaches indissolubly to their conduct. If it were material, however, it might deserve consideration, how far an actual assignment is *shown in the case. It rests on the affidavit of one of the claimants, and on the mere face of papers which carry no very [202 decisive character, and are quite reconcilable with concealed interests in other persons, as the records of prize courts abundantly show. However, I only glance at this subject, as it in no degree enters into the ingredients of my judgment.

"A very bold proposition was, at one time, advanced in the argument by the claimants' counsel, that if this cargo had been actually destined to Portugal, for the use of the allied armies of Great Britain and Portugal, or

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even for the use of the British army, it would not be an offence against the laws of war. In the sequel, if I rightly understand, this proposition, in this alarming extent, was not contended for ; and certainly, it is utterly untenable, upon the principles of national law.

"But it was insisted on, that the British armies in Portugal and Spain were to be considered as incorporated into the armies of those kingdoms, and as not holding the British character. If I could so far forget the public facts of which, sitting in a prize court, I am bound to take notice, there is sufficient in the papers before me to prove the contrary of this suggestion. In Admiral Sawyer's license and Mr. Allen's certificate, they are expressly called the allied armies ; thereby plainly admitting a separate character and organization : and so, in point of fact, we all know it to be ; if, indeed, the British character be not predominant throughout these countries. I reject the distinction, therefore, as utterly insupportable in point of fact.

"It has been further argued, that if the conduct be illegal, it is but a personal misdemeanor, in no degree affecting the vessel and cargo ; and at all events, that the illegality was extinguished by the termination of the outward voyage. The principles of law afford no countenance to either part of the proposition. If the property be engaged in an illegal traffic with the enemy, or even in an attempt to trade, it is liable to confiscation as well on the return as on the outward voyage : and it may be assumed as a proposition, liable to few, if any, exceptions, *that the property which is rendered auxiliary or subservient to enemy interests, becomes tainted with forfeiture.

"I cannot but remark, that the license in this case, issued within our own territory, by an agent of the British government, carries with it a peculiarly obnoxious character. This circumstance, which is founded on an assumption of consular authority that ought to have ceased with the war, affords the strongest evidence of improper intercourse. The public dangers to which it must unavoidably lead, by fostering interests, within the bosom of the country, against the measures of the government, and the breach of faith which it imports in a public functionary receiving the protection of the government, can never be lost sight of in a tribunal of justice. I forbear to dwell further on this delicate subject. Upon the whole, I consider the property engaged in this transaction as stamped with the hostile character ; and I entirely concur in the decision of the district judge, which pronounced it subject to condemnation."

Judgment affirmed.