The Aurora, Pike, master.

Enemies' license.

The acceptance and use of an enemy's license, on a voyage to a neutral port, prosecuted in furtherance of the enemy's avowed objects, is illegal, and subjects vessel and cargo to confiscation.

It is not necessary, in order to subject the property to condemnation, that the person granting the license should be duly authorized to grant it, provided the person receiving it takes it with the expectation that it will protect his property from the enemy.

Sailing, with an intention to further the views of the enemy, is sufficient to condemn the property, although that intention be frustrated by capture.

This was an appeal from the Circuit Court for the district of Rhode Island. The following were the material facts of the case :

Some months after the declaration of war, the ship Aurora, documented as American property, and owned by Thomas M. Clarke and Ebenezer Wheelright, the claimants, who are American citizens, sailed from Newburyport to Norfolk, in ballast. At the latter place, she took in a cargo consisting of bread, flour, corn, &c., and sailed from thence, on or about the 12th November 1812, ostensibly for St. Bartholomews, a neutral island belonging to the Swedes, for which port she had obtained *her clearance. The cargo was consigned to the supercargo of the ship. On the 26th [*204 November 1812, she was captured by the American privateer schooner, Governor Tompkins, on the high seas. At the time of capture, she was to be leeward of St. Bartholomews, and had on board a British license, which she exhibited to the captors, supposing them to be British. This license consisted of three documents :

1st. A pass for the West Indies, exclusively, from Andrew Allen, his Britannic majesty's consul residing at Boston ; to which was annexed a copy of a letter, under the consular seal, from Admiral Sawyer to Mr. Allen, as follows :

" To the commanders of any of his majesty's ships of war, or of private armed ships belonging to his majesty. Whereas, from a consideration of the great importance of continuing a regular supply of flour and other dry provisions and lumber to the British islands in the West Indies, it has been deemed expedient by his majesty's government, that, notwithstanding the hostilities now existing between Great Britain and the United States of America, every protection and encouragement should be given to American vessels, laden with flour and other dry provisions and lumber, and bound to the British islands in the West Indies. And whereas, in furtherance of these views of his majesty's government, Herbert Sawyer, Esq., vice-admiral and commander-in-chief of his majesty's squadron on the Halifax station, has directed to me a letter, under date of the 5th 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 to the West Indies, which is designed as a perfect safeguard and protection to such vessel in the prosecution of such voyage. Now, therefore, in pursuance of these instructions, I have granted to the American ship Aurora, William Augustus Pike, master, burthen 257 47-95ths tons, now lying in the harbor of Newburyport, and bound to Norfolk for a cargo of flour, corn and other dry provisions, for St. Bartholomews, the annexed document, to avail only in a direct *voyage to the West Indies, and back [*205 to the United States ; requesting all the officers commanding his

majesty's ships of war, or of private armed vessels belonging to subjects of his majesty, not only to suffer the said Aurora to pass without molestation, but also to extend to her all due assistance and protection in the prosecution of her voyage to the West Indies and in her return to the United States laden with merchandise not exceeding the nett amount of her outward cargo, or in ballast only. Given under my hand and seal of office, this first day of October 1812. [SEAL.]

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

To the above pass was annexed the following copy of a letter from Admiral Sawyer, certified under the consular seal, and alluded to in the above document.

"His majesty's ship Centurion,
At Halifax, the 5th of August 1812.

"SIR: I have fully considered that part of your letter of the 18th ultimo, which relates to the means of insuring a constant supply of flour and other dry provisions to 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 so laden and unarmed, *bonâ 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, H. SAWYER, Vice-Admiral."

"Andrew Allen, Esq.
British consul, Boston."

*206] *"Office of his Britannic Majesty's Consul.

"I, Andrew Allen, junior, his Britannic majesty's consul for the states of Massachusetts, New Hampshire, Rhode Island and Connecticut, do hereby certify, that the annexed paper is a true copy of a letter addressed to me by H. Sawyer, Esq., vice-admiral and commander-in-chief of his majesty's squadron on the Halifax station. Given under my hand and seal of office, at Boston, in the state of Massachusetts, this first day of October, in the year of our Lord, one thousand eight hundred and twelve. [SEAL.]

ANDREW ALLEN, jun."

2d. The following certificate of the consul:

"Office of his Britannic Majesty's Consul.

"I, Andrew Allen, junior, his Britannic majesty's consul for the states of Massachusetts, New Hampshire, Rhode Island and Connecticut, do hereby certify, that the ship Aurora, Wm. Augustus Pike, being bound to St. Bartholomews (on account of the existing law of the United States, which prevents her return to the United States from a British port) contemplates fulfilling the object comprised in the accompanying license from H. Sawyer, Esq., vice-admiral and commander-in-chief on the Halifax station, through a neutral port in alliance with Great Britain. Given under my hand and seal of office, at Boston, in the state of Massachusetts, this second day of October, in the year of our Lord, one thousand eight hundred and twelve. [SEAL.]

ANDREW ALLEN, jun."

3d. The following general pass for the West Indies.

"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, request all officers commanding his majesty's ships of war, or private armed ships belonging to subjects of his majesty, to permit the American ship Aurora, William Augustus Pike, master, now lying in the harbor of Newburyport, and furnished with a protection from Vice-admiral Sawyer, for the purpose of carrying flour, corn, lumber and other necessary provisions to the West Indies, and proceeding to Norfolk, in ballast, for a cargo, to pass without molestation. Given under my hand and seal of office, at Boston, in the state of Massachusetts, this first day of October, in the year of our Lord, one thousand eight hundred and twelve. [SEAL.]

ANDREW ALLEN, jun."

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The Aurora was carried into Newport, Rhode Island, and there libelled. The circuit court of that district condemned vessel and cargo as prize to the captors ;[1] from which sentence, the claimants appealed to this court.

Hunter, for appellants.—The libel, in this case, sets forth that the sailing was for the purpose of supplying the British West-India colonies, and that the papers stating the voyage to St. Bartholomews, were fraudulent and collusive ; and urges the condemnation of vessel and cargo, on the following grounds : 1. That the possession of and sailing with a British license is cause of capture and condemnation. 2. That the voyage of the Aurora was intended as an indirect voyage to a British port, through St. Barts. 3. That the real destination of the ship was to a British port.

On the first point, it is contended, on the part of the claimants, that the having on board a British license or *pass, in a lawful trade to a neutral country, could not, before the act of congress of August 2d, 1813, prohibiting the use of British licenses, subject a vessel to capture. This is clear from the act itself, the operation of which is not to commence from its passage, but, with regard to vessels then in port, was to take effect in five days after the promulgation of the act ; with regard to vessels at a distance from the United States, not until the 1st of November ; and in some cases, not before the 1st of December following. Hence, it is evident, that the legislature did not consider this act as merely declaratory of the law of nations on the subject, but as then, for the first time, making the use of a British license by an American vessel, illegal. (3 U. S. Stat. 84.)

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But we are bound to meet the general proposition, which is, that the use of such a license gives a hostile character to the property and the voyage. The doctrine, that any intercourse with the enemy exposes to condemnation, has been supposed to be very ancient ; but we find no case of a decision upon the principle, until the year 1747, when the bill was brought into parliament in consequence of insurance made for enemies. Parl. Debates, vol. 26, p. 178, Sir William Murray's speech, on the subject of insuring enemy property ; and *Gist* v. *Mason*, 1 T. R. 84.

The rule appears to us to be unreasonable and impolitic. Where is the harm of taking advantage of a relaxation of the rights of war by the enemy?

[1] The original condemnation was in the district court, HOWELL, J., whose sentence was affirmed by the circuit court: see 4 Hall's L. J. 473; 1 Car. L. Rep. 204.

How can that be a crime, when granted by the policy of the enemy, which would have been no crime if obtained by force—by conquest? It is not less for our own interest to take advantage of such permission from the enemy, than it is for his interest to grant it. It is a public benefit.

The general rule by which to determine the national character of a vessel, is the domicil of the owner. Here, the owners were American citizens. The case of a vessel sailing under the flag or assumed character of a country, to which she does not belong, is admitted to be an exception to the general rule. But here was no sailing under such assumed character; all the papers *209] of *the Aurora were American. except the one in question, which cannot of itself be sufficient to give a hostile character to the holders of it, nor to the vessel and cargo. *Jenks* v. *Hallet*, 1 Caines 64; Chitty's Law of Nations 58; *Case of the Clarissa* cited in *The Vrow Elizabeth*, 5 Rob. 4.

The only prohibition, existing at the time of the sailing of the Aurora was to take a license to a British port. That was prohibited by the act of July 6th, 1812, § 7. By that act, we admit, all commercial intercourse with the enemy was rendered unlawful; but we contend, that it was not unlawful to use a British license, in a neutral voyage. *The Hoop*, 1 Rob. 167, 200. Suppose, Great Britain should think proper to permit a particular neutral trade; suppose, she were even to protect it by convoy; are we bound to refuse to accept such permission—such protection? Valin laughs at the English for restoring, in the form of insurance, the captures made by their cruizers; but does not censure the French merchant for taking it.

The voyage in this case was not made by the license, but merely made safer by it. The voyage was certainly lawful without it: and a license to pursue a voyage which was lawful without it, cannot make that voyage unlawful. Pamphlet of Cases decided in the District Courts of Pennsylvania and Massachusetts, p. 80, 81;[1] Judge Davis' opinion on the use of British licenses; Judge Peters' opinion; 1 Ves. 317; Du Ponceau's Bynk. 166.

On the second point, viz: That the voyage of the Aurora was intended as an indirect voyage to a British port through St. Barts, it is contended by the claimants, that there is no evidence to justify the fact assumed. Was this a *bonâ fide* voyage to St. Barts? On the decision of this point, the whole case turns. In discussing this question, all the circumstances of the case should be taken into consideration. *Vide* Portalis' opinion in the case *210] of *The Pigou*, contained in a note to the case of *The* *Charming Betsy*, 2 Cranch 98; *Vide* also, Ch. J. Marshall's opinion in the case of *The Matilda*, decided in North Carolina, 4 Hall's Law Journal 487.

With respect to those circumstances attending the transaction, which, on first view, are perhaps calculated to excite a suspicion that this was not a *bonâ fide* voyage to St. Barts, it may be observed, that it was the object of the Aurora to deceive the enemy, and thereby obtain an exemption from capture, during the voyage, by inducing him to suppose that the cargo was ultimately intended for the British. Such an imposition, in a case like the present, we conceive was justifiable. What motive could the Aurora have had for sailing to a British island, rather than to St. Barts? At a British island, she could only take in a cargo of rum; and the importation of such

[1] Now generally known as Fisher's Prize Cases.

a cargo was prohibited by our own laws. At St. Barts, she could take in a general West-India cargo. Motives of interest, therefore, would have induced her to go to the latter place rather than the former. But suppose, the intention was to go to a British port; was that intention executed? It was not. But according to the decision in the case of *The Abby*, 5 Rob. 254, there must be an act of trading as well as an intention, in order to subject the vessel to condemnation.

On the third point, which, it is presumed, constitutes the stress of the case, we contend, that the real destination of the Aurora was not to a British port, and that the condemnation on the ground of a British supply being intended and proceeded in, is erroneous and against proof. That the supply of the British West Indies was the object of Admiral Sawyer in granting the license, we do not deny: but what his intention was, is perfectly immaterial: such was not our intention, in accepting it. Our object was to escape capture; and with that view we obtained a license from the enemy, by inducing him to believe that we intended to furnish supplies to his islands.

*What is said by Allen, the consul, is mere surplusage: his authority extended no farther than to certify Admiral Sawyer's letter: having done this, he was *functus officio*. But suppose, the license granted by Allen to have been valid, it was only for a voyage to St. Barts, and would not have protected the Aurora in any other voyage: that was the voyage insured. [*211

J. Woodward, contrà.—With regard to the act of August 2d, 1813, which has been said, by the counsel for the claimants, to prove that the use of British licenses, previous to the passage of that act, was not unlawful, we are still of opinion, that the act is merely in affirmation of the law of nations. It is also cumulative; it adds penalties to what was before unlawful; but does not make anything unlawful which was not so before. The latter clause in the 3d section of the act, providing "that nothing contained in the said act shall be so construed as to arrest or stay any prosecutions," &c., was intended to guard against the construction which the claimants have now attempted to give it. The several periods of time allowed to vessels in different situations, to obtain notice of the act, were allowed them, in order that they might be enabled to avoid the new penalties.

Trading with the enemy was an indictable offence at common law. 2 Roll. Abr. 173; but it was necessary for congress to fix the penalty for trading on land: this they have accordingly done in the act of July 6th, 1812. By the course of the admiralty, the thing itself was liable to forfeiture for trading with the enemy. The British papers on board the Aurora show a case of supply; and therefore, the question of pass or license is immaterial. The pass was expressly for the purpose of supplying the enemy.

But suppose, the papers do not prove a case of supply, the use of the license on the high seas is, of itself, sufficient to give the property a hostile character. The license in this case is essentially different from a general license by an order in council. There, no special favor—no particular benefit, is granted. *The use of a hostile protection in the prosecution of a neutral trade, gives a hostile character to the voyage. Sailing [*212

under a hostile convoy is good ground of condemnation ; Sir WILLIAM SCOTT denominates it "illicit protection." Sailing under two commissions is also cause of condemnation. Valin, p. 241, lib. 3, art. 9. All these cases are analogous to the present. The Aurora was sailing under the physical force of the enemy. Admiral Sawyer's letter requires the British naval force to assist her in the prosecution of her voyage. She must, therefore be considered as having placed herself under the protection of the enemy, and as having, consequently, abandoned her national character. Trading with an enemy was cause of forfeiture at common law ; and whatever was cause of forfeiture at common law, is good cause of condemnation in the admiralty. *The Walsingham Packet*, 2 Rob. 69, 82. The case of *Jenks* v. *Hallet*, cited by the claimants, is not applicable to the present case : we were not then at war with France.

Sir WILLIAM SCOTT, in the case of *The Vigilantia*, 1 Rob. 11, 13, has laid it down as a known and established rule, that if a vessel is navigating under the pass of a foreign country, she is considered as bearing the national character of that nation under whose pass she sails. Now, what was the license in question but such a pass? The license is not a document under the law of nations. The granting of it is the exercise of a municipal right —a prerogative to the crown. The king, however, has no right to grant licenses to any but his own subjects, without a particular act of parliament authorizing him so to do : there is no case in which he has granted a license to strangers, without such an act of parliament. If a license be granted, without such authority, the person who takes it can take it only as a subject. Chitty's Law of Nations 256 ; Ibid. 316 ; 2 Roll. Abr. 173, tit. Prerogative ; *The Hoop*, 1 Rob. 199, 200 ; 2 Tucker's Bl. Com. 258 ; Chitty's Law of Nations 278 ; Reeves 358.

*213] Any commercial intercourse, direct or indirect, with *the enemy, is illegal, and cause of condemnation : its illegality does not depend on contract. The intervention of a neutral port makes no difference. *Potts* v. *Bell*, 8 T. R. 555 ; *The Jonge Pieter*, 4 Rob. 68–9, 83–4 ; *The Hoop*, 1 Ibid. 165, 196 ; Chitty's Law of Nations 13–15.

When the Aurora was taken, she was out of the course to St. Barts, and very far to the leeward of that island. These circumstances afford a strong suspicion that her destination was to some other port. The return-cargo was British produce, and *primâ facie* British property : if it was not, it is on the claimants to show it. It appears, that the master was kept ignorant of the real destination of the Aurora, and that the supercargo, during his examination *in preparatorio*, was guilty of prevarication. These circumstances alone are good cause of condemnation. Chitty's Law of Nations 314. As to what has been said with regard to the intention not being carried into effect, we contend, that it was carried into effect to every legal purpose. An *overt* act was sufficient to constitute the offence ; and sailing with the license was such an *overt* act.

Pinkney, on the same side.—The rule, that trade with the enemy is illegal, results necessarily from the declaration of war, and is included in it: there was no necessity for any subsequent law to enforce the rule. It has be said, that no judicial decision on this subject is to be found of an earlier date than 1747. It is true, Sir WILLIAM SCOTT, in his enumeration of cases

where this question was agitated, has gone no farther back than that date: but Sir John Nicholls, in his argument in the case of *Potts* v. *Bell*, has cited cases from Sir Edward Simpson's MS. Reports in the Admiralty, where this principle was decided to be correct as early as 1704 and 1707; and it is to be presumed, that those *decisions were founded upon former [*214 cases. See also *Henkle* v. *Royal Exchange Ins. Co.*, in 1749, 1 Ves. 317. The general rule is above all impeachment.

This case may be considered, as it regards, 1st. The license alone: 2d. The license as connected with the transaction itself.

First, then, we contend, that no American citizen, in a time of war, has a right voluntarily to place himself under the protection of the enemy. War exists between the nations in their political capacity, and between the individuals of each nation respectively. The power of making peace follows the power of making war. Individuals cannot lawfully make peace, even for themselves. But the acceptance of a license from the enemy is making a peace with him so far as it goes; it is a partial truce—a partial cessation of hostilities. Transactions of this kind are productive of great evil. The American citizen who accepts a license from the enemy, does that which is highly injurious to the interests of his country: the indulgence of the enemy imposes on him an obligation to act as a neutral, contrary to his duty as a citizen; it is an individual bribe; it has a tendency to poison the whole virtue and patriotism of the country, to undermine the government, to alienate the affections of the citizens, and to place the nation in the power of the enemy.

The circumstance, that acts of congress have been passed prohibiting trade with the enemy, the use of his licenses, &c., has been urged by the claimaints, as evidence that such communication with the enemy was not unlawful, prior to the passage of those acts. But we contend, that it was unlawful under a well-established rule of the law of nations; and that if these acts have not repealed that rule, they cannot aid the claimants in the present case. Sir William Scott's observations in the case of *The Hoffnung*, are in point. 2 Rob. 137, 165.

But we have a special answer to the argument of the *claimants. [*215 The act of July 6th, goes upon the presumption that the intercourse with the enemy which it prohibits, was before unlawful—it does not profess to create a new offence. Considering, then, this point as settled, the argument, that the act of 6th July prohibits the use of licenses to trade with British ports only, falls to the ground.

The case of ransom has been said to militate with the argument we have employed in support of the illegality of sailing under the protection of the enemy. But the cases are widely different. In a case of ransom, the captured vessel is compelled to make an agreement with the enemy; she is under the necessity of accepting their protection; here, the transaction was perfectly voluntary.

The rule of 1756, declaring illegal the coasting trade permitted by the enemy in time of war, which was prohibited by him in time of peace, is founded upon the same general principle. If, then, the permission only of the enemy gives a hostile character to vessels sailing under that permission, *à fortiori*, they require a hostile character by sailing under the protection of the enemy.

But suppose, the claimants in this case did not mean to aid the British, but merely to benefit themselves at the expense of their country and their fellow-citizens; still the object of the license and the obvious consequence of the voyage, was the supply of the British West Indies. This the claimants must have known. They knew also, that the pressure of the West Indies was one of the means which the United States were using to coerce the enemy: yet they become the agents of the British to prevent this pressure. If a neutral carry dispatches for one of the belligerent powers, it affords just cause of condemnation to the other: how much stronger is the case of a citizen of one of the belligerent nations furnishing the other with supplies.

It has been said, that here was only an intent to commit an illegal act *216] (supposing the act contemplated to *be illegal), that there was no *corpus delicti*. But we contend, that the very act of sailing with a view to execute the intention, constitutes the offence. Such is the law in case of blockade: if a vessel sail for a blockaded port, knowing it to be blockaded, she thereby acquires a hostile character.

We might here contend, that the real destination of the Aurora was not to St. Barts, but to a British port; for it appears that, when captured, she was 160 miles to the leeward of that island: but it is unnecessary to say anything on this point, as the principle is the same, and the vessel equally liable to condemnation, whether her destination were to a British port or to St. Barts: in the latter case, the cargo, it was well known, would be obtained by the enemy from the Swedes; so that it was, in effect, the same thing as if it had been carried direct to the enemy.

Dexter, in reply.—It is the universality of the rule in question we mean to controvert; we deny that there is such a general rule. It is not to be found in Puffendorf, Grotius, Vattel or any of the other jurists, excepting Bynkershoek, whose rules of war are written in blood: and even he has qualified the rule—he says himself that the rule prohibiting all commercial intercourse is done away by the laws of commerce. Valin only shows that a particular intercourse is forbidden by the law of France; and in noticing British insurance, he does not condemn the French for procuring it. The case of *Potts* v. *Bell* proves that the doctrine in question has but recently been introduced: it is, however, in that case, admitted, with the exception of those cases where the royal license has been obtained; but this exception must be taken as part of the rule itself: the general principle without the exception would be ruinous to the nation: the inconveniences which would arise from it are incalculable. In 1747, Lord MANSFIELD and Sir Dudley Ryder were of a different opinion as to the policy of the rule, and as to the principle of law. In *Henkle* v. *Royal Exchange Assurance Co.*, Lord HARDWICKE said, "It might be going too far to say, that all trading *217] *with an enemy is unlawful; for the general doctrine would go a great way, even where only English goods were exported, and none of the enemy's imported, which may be very beneficial."

In this country, there has been no decision to establish the rule; and if we take the British rule, we must take it with the power of dispensation: but the president has no such power: the sovereignty has been said to reside in the people: but the remedy by application to congress would be

too slow and uncertain. We must conclude, therefore, that in this country no such rule exists.

It has, nevertheless, been contended by the counsel for the captors, that the rule not only exists, but that it is universal. Is a man, then, bound to abandon all his property which may happen to be in the enemy's country at the breaking out of a war? Such would be the consequence of taking the rule without any exception. Some cases of intercourse with the enemy, it is true, are so palpably illegal, as to admit of no doubt on the subject; such as all traitorous intercourse, and perhaps a direct trade; so also, if the intercourse be in consequence of a new enterprise undertaken since the commencement of hostilities: but many cases must necessarily occur, on the breaking out of a war, which ought certainly to form exceptions: such is the doctrine in England, where the excepted cases are provided for by the royal license, permitting intercourse with the enemy, under certain circumstances and with certain restrictions. In a country, then, where licenses cannot be obtained, all cases where they would be granted, if a power of granting them existed, must be cases of judicial exception to the general rule. Many occasions may and frequently do occur, during war, on which such intercourse with the enemy would be highly expedient, in a political view; occasions where the public good requires an exception; and those, too, cases neither of necessity nor humanity, which must always be excepted.

It is not necessary to inquire, whether the mere acceptance of a license is ground of condemnation; it is the sailing under a license which constitutes the offence: but *in our case, there was no sailing under the [*218
license. The license authorized a voyage to a British, Portuguese or Spanish port: the voyage in the present case was to a port belonging to the Swedes: the letter of Allen, the consul, which has been said to authorize a voyage to a Swedish port also, is entitled to no regard. Admiral Sawyer's letter was the only protection: all the acts of Allen, except certifying that letter, were unauthorized and unofficial; they were no protection to the Aurora. Allen's letter shows, on the face of it, that the voyage to St. Barts was not covered by the license; it merely expresses an opinion, that that voyage would answer the purposes contemplated by the British government, as well as a voyage to a British port.

It has been said, that the real destination of the Aurora was to a British port; and in support of the position, the circumstance of her being considerably to the leeward of St. Barts, when captured, has been urged in proof; but the argument deserves little consideration; it is a very common thing to fall to the leeward: besides, it appears, that the Aurora had been beating to the windward three days before she was captured, although when she first made the land, there were numerous British ports under her lee.

It has also been argued on the part of the captors, that a transshipment from St. Barts to an enemy port was intended: but there is no evidence even of this: nor was there any motive for such transshipment: the cargo would meet with as ready a sale at St. Barts as at a British Island: the superior advantage of taking in a return-cargo at the former place has been already noticed.

But it is said, that it was equally criminal to carry this cargo to St. Barts as to a port of the enemy, because the Swedes would probably dispose of it to the British. This argument also, we conceive to be wholly without foun

dation: no decision to that effect has ever been pronounced: the case of the island of St. Eustatius, in the last war, goes to prove the reverse of this doctrine. Nothing, therefore, as we conceive, having been proved, on the part *219] of the captors, sufficient to subject the *property in question to condemnation, we trust, that the court, on the consideration of the whole case, will decree restitution to the claimants.

Monday, March 7th, 1814. (Absent, Todd, J.) LIVINGSTON, J., delivered the opinion of the court.—The ship Aurora and cargo, owned by the claimants, who are American citizens, and documented as American property, were captured, on the 26th of November 1812, by the private armed ship Governor Tompkins, on an ostensible destination for St. Bartholomews. From the documents on board and the preparatory examinations, it appears, that the ship sailed from Newburyport to Norfolk, in ballast, took in her present cargo, consisting of bread, flour, corn, &c., at the latter place, and sailed from thence on the voyage on which she was captured, on or about the 12th of November 1812. The cargo was consigned to the supercargo of the ship; and the destination thereof, upon the ship's papers, supported by the preparatory examinations, was St. Bartholomews, for which island the ship obtained her clearance. At the time of capture, she was to the leeward of that island; and certain passports or protections from the agents of the British government were found on board, which are familiarly known by the title of British licenses; which documents are as follows: (*a*)

Two questions have been made at the bar. 1. Whether the acceptance and use of an enemy's license or passport of protection, on a voyage performed in furtherance of the enemy's avowed objects, be illegal, so as to affect the property with confiscation? 2. If so, whether there is anything in the present case, to exempt it from the general principle? The first point having just been decided in the affirmative, in *The Julia* (*ante*, p. 181), it only remains to inquire, whether there be anything in this case to exempt it from the general principle.

In the opinion of a majority of the court, it is not easy to discriminate *220] between these cases: both of the vessels *had licenses or passports of the same character, and substantially for the same purpose, except only that the object of the Julia was to supply the allied armies in Portugal, and the original intention of the Aurora was to go to the British West Indies. It is by no means clear, that this destination was ever changed; but admitting that, from an apprehension of seizure, in case of her returning to the United States, after touching at a British port, she, in fact, sailed on a voyage to St. Bartholomews, this can make no substantial difference in her favor. Her object in going there was equally criminal, and subserved the views of the enemy, nearly, if not quite as well, as if her cargo had been landed in a British island; of the real design of the voyage there can remain no doubt; for it abundantly appears, from the license itself, that the professed object of Admiral Sawyer, at least, in granting it, was to obtain a supply of provisions for the enemy; and the court will not easily lend its ear to a suggestion, that notwithstanding the Aurora was found with a British protection on board, of so obnoxious a character, yet her owners

(*a*) See the statement at the beginning of the report of this case.

intended to deceive the enemy, either by going to a port not mentioned in it, or by disposing of her cargo in a way that would not have promoted his views. Without meaning to say, that such conduct may, under no circumstances whatever, be explained, the court thinks that there is no proof, in this case, to show that it was not the intention of the claimants to carry into effect the original understanding between them and Mr. Allen. For although the destination to St. Bartholomews be conceded, it is evident, that Mr. Allen, who acted as British counsel, supposed the views of Admiral Sawyer might be answered, as well in that, as in any other way; nor is it clear, as was said at bar, that the documents which were received from Mr. Allen, which varied more in form than in susbstance from the admiral's passport, would not have protected her against British capture, on a voyage to that island. The protection of Admiral Sawyer extended to unarmed American vessels laden with dry provisions, and *bonâ fide* bound to British, Portuguese or Spanish ports. The only modification or extension introduced by Mr. Allen, was the permission to go to a Swedish island, equally neutral with Spain and Portugal, in the vicinity of the British possessions. Whether all or any of these papers would have saved the Aurora from confiscation, in a British court of admiralty, this court is not bound *to assert; it [*221
is sufficient, if that were the reasonable expectation of the parties, as it certainly was, and it is more than probable that such expectation would have been realized, considering the very important advantage which the enemy was to derive from them. In case of capture, there can be no doubt, that the claimants would have interposed these very papers, which are now supposed to have emanated from unauthorized agents, and probably, with success, as a shield against forfeiture. Why then, should they be permitted to allege here, that they would have been ineffectual for that purpose?

It is also insisted, that in this case, no illicit intercourse had actually taken place; that the whole offence, if any, consisted in intention; and that if a capture had not intervened, there was still a *locus pœnitentiæ*, and no one can say, that even a project of going to St. Bartholomews, might not have been abandoned. In this reasoning the court does not concur; but is of opinion, that the moment the Aurora started on the voyage for St. Bartholomews, with the license in question, and a cargo of provisions, she rendered herself liable to capture by the public and private armed ships of the United States, who were not bound to lie by, and see how she would conduct herself during the voyage, the consequence of which would be, that no right of capture would exist, until all chance of making it were at an end.

Judgment affirmed.