

The Fanny's Cargo.

Harper, for the plaintiff in error, contended, 1. That as it appeared upon the record, that the plaintiff was an alien enemy, and the defendant had had no opportunity to plead that fact, this court ought not to affirm the judgment; and 2. That the omission of the names of the jurors was fatal, inasmuch as it did not appear from the record, that it was the verdict of a legal jury.

March 1st, 1815. (Absent, Todd, J.) MARSHALL, Ch. J., stated the opinion of the court to be, that the omission of the names of the jurors was not material. Nothing was said upon the first point.

Judgment affirmed, with costs.

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UNITED STATES *v.* Cargo of the Ship FANNY, JENNINGS, Master.

Non-intercourse law.

Under the non-intercourse act of 1809, a vessel from Great Britain had a right to lay off the coast of the United States, to receive instructions from her owners in New York; and if necessary, to drop anchor, and in case of a storm, to make a harbor; and if prevented, by a mutiny, of her crew from putting out to sea again, might wait in the waters of the United States for orders.

APPEAL from the sentence of the Circuit Court for the district of Connecticut, restoring the property to the claimants.

The American ship *Fanny* was laden at Greenock, in Scotland, with a cargo of British goods, the property of citizens of the United States, and sailed from thence, on the 4th day of July 1812, after the repeal of the orders in council, and before the war between Great Britain and the United States was known in Greenock. The orders to the master were, to proceed to New York; but unless he was perfectly sure of being allowed an entrance for ship and cargo at New York, he was not to go into the waters of the United States, but to send up a pilot-boat with his letters, so that the consignees might fix upon a port of discharge. The master had no knowledge of the war, until his arrival on the coast, when he received it off Montauk point, from a pilot-boat, who also informed him that several British frigates were off Sandy Hook, capturing American vessels. Whereupon, he dispatched the pilot-boat, with letters for his owners, by the way of New London. Soon afterwards, it became calm, and the ship, drifting too near the shore, he dropped anchor. In the course of the night, it came on to blow a gale, and finding it impossible to lay there, he attempted to get under weigh and stand off, but before he could get up the anchor and make sail, he drifted so far in, that he could not fetch Montauk point, and the pilot informing him that there was good anchorage ground in Fort-pond bay, and that it would not be safe to keep out, he proceeded with the ship to that bay, intending to stand out as soon as the storm abated. Having there cast anchor, and rode out the gale, his crew refused to get under weigh, to go out of the waters of the United States, alleging that they understood he had a British license, and was going to put his ship *under the pro- [*182

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tection of British ships of war, and they were afraid of being impressed. He then determined to come out into the sound, and there wait for orders, without going into any port. He did so, but was boarded about half way from Port-pond bay to the Race, Fisher's Island bearing north, and seized by a revenue-cutter, who carried him into New London, where the cargo was libelled for having been shipped in Great Britain, with the knowledge of the master, with intent to be imported into the United States, contrary to the provisions of the non-intercourse act of 28th June 1809 (2 U. S. Stat. 550). In the district court, the cargo was condemned, but was restored by the circuit court. From this sentence, the United States appealed.

The cause was argued by *Jones*, for the United States, and *Daggett*, for the claimants, in the absence of the reporter.

March 1st, 1815. (Absent, Todd, J.) JOHNSON, J., delivered the opinion of the court, as follows:—This case bears every feature of fairness. The voyage was undertaken upon the repeal of the orders in council. The vessel was laden in the short space of four days, and sailed without a knowledge of the war. Her destination was alternative—to New York, if she could enter; if not, to a British port. Upon arriving off Montauk, she receives notice of the war, and of the danger of capture in prosecuting her voyage to New York. A pilot-boat is then dispatched to New London, by the master, with notice to his owners of his situation, and a request for instructions.

To call off for instructions, was fair and justifiable; and to obtain them it was necessary that he should await the return of the pilot-boat. Thus circumstanced, a calm obliges him to drop anchor to prevent his drifting on shore, and a storm forces him into a bay for shelter. Whilst there, his crew mutiny, and prevent his leaving the bay, in order to lay off, and await *183] the return of his messenger; and whilst plying in the waters between *Montauk and New London, he is seized by the revenue-cutter, and forced into the latter port. We are of opinion, that there was nothing, either in action or intention, which subjected this vessel to municipal forfeiture. A condemnation is claimed on no other ground; and the decree of the circuit court must, therefore, be affirmed.

The claims of the several parcels of merchandise seized in the *Fanny*, rest on the same circumstances, and must likewise be restored.

Decree affirmed.