*Otis *v.* Watkins. (*a*)

Issue.—Embargo law.—Justification of seizure.

If the facts stated in a special plea do not amount, in law, to a justification, yet, if issue be joined thereon, and the facts be proved, as stated, it is error in the judge, to instruct the jury, that the facts so proved do not in law maintain the issue on the part of the defendant.[1]

If a collector justify the detention of a vessel, under the 11th section of the embargo law, of the 25th of April 1808, he need not show that his opinion was correct, nor that he used reasonable care and diligence in ascertaining the facts upon which his opinion was formed. It is sufficient, that he honestly entertained the opinion upon which he acted.[2]

Quære? Whether, under that act, the collector was bound to transmit to the president a statement of the facts upon which he formed his opinion, that the vessel intended to violate the embargo laws; and whether he was bound in law to use reasonable care and diligence in ascertaining the facts thus to be laid before the president?

Whether the collector had a right, under that act, to remove a vessel from one harbor to another, as well as to detain her?

Watkins *v.* Otis, 2 Pick. 88, affirmed.

Error to the Supreme Judicial Court of the commonwealth of Massachusetts, under the 25th section of the judiciary law of the United States (1 U. S. Stat. 85), in an action of trespass, by Watkins against Otis, a deputy-collector for the district of Barnstable, for taking, carrying away and destroying the plaintiff's schooner Friendship, and her cargo of cod-fish.

The defendant pleaded, that he was a deputy-collector for the district of Barnstable; that by the 11th section of the act of congress of the 25th of April 1808 (2 U. S. Stat. 501), it is enacted, "that the collectors of the customs be and they are hereby respectively authorized to detain any vessel ostensibly bound with a cargo to some other port of the United States, whenever, in their opinions, the intention is to violate or evade any of the provisions of the acts laying an embargo, until the decision of the president of the United States be had thereupon." That the schooner Friendship, with her cargo, was lying in the harbor of Provincetown, in the district of Barnstable, ostensibly bound to some other port in the United States, in the opinion of the collector, with an intent to violate or evade the provisions of the acts aforesaid; whereupon, the collector, by the defendant, his deputy, caused the said vessel and her cargo to be detained, and removed from the port and harbor of Provincetown, to the port and harbor of Barnstable, that she might be securely kept; and there also caused her to be detained, as it was lawful for him to do, so that the decision of the president of the United States might be had thereupon; and that the president, afterwards, on the 3d of January 1809, upon the report and representation of the said collector, approved and confirmed the detention; all which is the same taking, &c.

To this plea, there was a general replication and issue; upon the trial of which, a bill of exceptions was taken, which stated, that the defendant, in order to show that the collector had reasonable ground to believe that this
*340] vessel intended to violate or evade the embargo laws, *offered in evidence the deposition of an inspector of the customs, who testified, that

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(*a*) March 10th, 1815. Absent, Todd, Justice.

[1] In Moore *v.* Houston, 3 S. & R. 175, Chief Justice Tilghman says, that the plaintiff "having joined issue, cannot prevent that from going to the jury, which tends to prove the issue on the part of the defendant." And see Howell *v.* McCoy, 3 Rawle 268; Stanley *v.* Southwood, 4 Phila. 291, 305.

[2] Otis *v.* Walter, 2 Wheat. 18.

he went on board the schooner, at Provincetown, which was wholly laden with fish in bulk, and a barrel of beef and a number of packages of small stores, and three or four barrels of water. That he supposed she was bound to sea, and gave information thereof, and of his suspicions, to the collector. That she had also a number of kegs of pickled oysters on board; and that he judged that the groceries were sufficient for the crew of such a vessel for thirty days, and that he had no doubt of her being bound to sea; which was the reason of his giving the information. Upon cross-examination, he said, he had never lived in the county of Barnstable, and did not know the course and manner of their trade and navigation.

It further appeared in evidence, that on the 19th of December 1808, written orders were given, by the collector, to one Andrew Garrett, to detain the schooner, then lying in Provincetown harbor, and bring her to the port of Barnstable, and there secure her in the best manner possible. That the distance from Provincetown to Barnstable is about thirty miles by water. That on the voyage, she accidentally ran on a point of land, and could not be gotten off, until she was frozen up in the ice, and there remained until March following, when she was gotten off, and brought up to the wharf, and her cargo unladen and safely stored. That about seventy quintals of cod-fish were damaged, but the residue was in good order. That when she was so detained, she had nine barrels of water on board, but no bread. That her sails were on shore.

That on the 24th of December 1808, the collector wrote to the secretary of the treasury, that he had detained the schooner Friendship, loaded with dry cod-fish, and evidently intended for a foreign port, as she had an unusual quantity of small stores on board, sufficient for such a voyage, and fully watered, that their plea was, that she was intended for a store ship, and a neighboring market, both of which it was sufficiently evident were without foundation. That on the 3d of January, the secretary answered, that the detention of the schooner was approved and confirmed by the president. That the collector had used due care and diligence in the preservation of the vessel and cargo. That on the 30th of January 1809, the secretary of the treasury wrote to the collector, authorizing him to release all vessels detained by him under the *said 11th section of the act aforesaid, on bond being given, in the manner and to the amount provided by the 2d section of the act of January 9th, 1809. That on the 15th of February 1809, the collector sent the following written notice to the plaintiff, Watkins, dated at the custom-house: [*341

"Sir:—I hereby request of you, as the owner of the schooner Friendship, of Provincetown, detained by order under the 11th section of the embargo law of the 25th of April 1808, at Barnstable, to give bond here, within three days after giving this notification, agreeable to the second section or the act to enforce the embargo, passed on the 9th ultimo. I am, sir, your humble servant, JOSEPH OTIS, Collector."

But that Watkins wholly refused to give such bond. That on the 21st of March 1808, the collector wrote to the comptroller of the treasury, stating that on the 24th of December, he had detained the schooner Friendship, under the embargo law, for loading with cod-fish, without a permit, which detention was approved and confirmed by the president. That on the pas-

sage of the act of the 9th of January 1809, he notified the owner, that if he would give bond agreeable to the second section of the same, he would give her up to him, which he utterly refused to do, or to unload his vessel, for more than a fortnight. That he wished to know, whether she ought not to be libelled. To this letter, the comptroller replied, referring the collector to the attorney for the district. That the vessel was afterwards libelled in the district court, for having taken her cargo on board, in the night, without a license, and without the inspection of the proper inspecting officers of the port. Upon trial, she was acquitted.

The plaintiff also produced a laborer, who stowed the fish on board the schooner, who testified, that the vessel "was destined to Boston, for a market," and that the vessel and cargo were much injured, in consequence of the detention. He also produced testimony, that it was usual for vessels going from Provincetown to take water enough on board to last them to Bos-
*342] ton, and for two *or three weeks, because the people did not like the Boston water. That it was usual, to take eight or ten barrrels on such a voyage. Whereupon, the judge who tried the cause (Chief Justice Parsons) charged the jury, "that the several matters and things so given in evidence by the defendant, Otis, did not in law maintain the issue on his part; and also, that it was the duty of the collector, as collector, to have used reasonable care in ascertaining the facts on which to form an opinion; and to transmit to the president a statement of those facts for his decision." The verdict and judgment being against the defendant, he brought his writ of error.

The case was submitted to this court, by *J. Law*, for the plaintiff in error, and by *J. Read*, of Massachusetts, for the defendant, upon written notes of argument.

J. Law, for the plaintiff in error.—The question for consideration by this court, on this appeal, arises on the bill of exceptions taken to the opinion and instruction of the judge before whom the trial was held in the state court. It divides itself into two branches. 1. Whether the several matters, given in evidence by Otis, and spread on the record, maintain the issue on his part? 2. Whether it was his duty to have used reasonable care in ascertaining the facts on which to form an opinion; and to transmit a statement of those facts to the president for his decision?

1. On the first point, it will be observed, that the issue joined is, that at the time of the detention the vessel was ostensibly bound to some other port of the United States, in the opinion of the collector, with an intent to violate or evade the provisions of the act of April 25th, 1808; that the vessel was removed from Provincetown to Barnstable, that she might be securely kept, until the decision of the president thereon; and that the president approved and confirmed the said detention.

*343] *Is there any evidence to show that the collector did not entertain an opinion, that the said vessel was ostensibly bound to some other port, in violation of the embargo? The information he received came from an agent of the government, Isaac Cooper, who was inspector of customs. He stated to the collector, not merely his suspicions, but his belief. He also stated, as the grounds of his belief, that the vessel was fully watered, and contained a sufficient quantity of groceries, stores and provisions for a

foreign voyage—information which is satisfactorily proved to have been correct, and which was sufficient to excite a just suspicion of the intention of the owners of the vessel. At any rate, these circumstances of suspicion were sufficiently strong to repel any implication of *mala fides* in the collector, in forming his opinion.

It is, however, contended, on the part of Watkins, that information, coming from such a source, is not to respected, because Cooper was unacquainted with the course of trade from Provincetown to Boston; and the quantity of water on board the schooner was only such as is generally taken in such voyages. The fact whether Cooper was acquainted or not with the course of trade, is immaterial. The only question is, did Otis believe he was competent to give correct information on the point? He certainly did think so; at any rate, there is no evidence to the contrary; and the circumstance of Cooper's being an inspector of the customs, would be alone sufficient to accredit his information.

But even admitting the fact, that the quantity of water on board the schooner is accounted for, no explanation is given of the quantity of groceries, small stores and provisions on board. Although it may be contended, that the water at Provincetown is better than that at Boston, it will not, I presume, be contended, that the groceries and small stores would be better and cheaper at the former place than at the latter.

The circumstance of the sails belonging to the vessel not being on board, at the time of the detention, can have no weight against the collector, because it was not to be supposed, he was to wait, until the vessel was on the very point of sailing, before he acted on his opinion.

*That the collector was justified in removing the vessel to Provincetown, that she might be safely kept; and afterwards in unloading her, when the owner refused to give bond, is settled by the decision of this court in the case of *Crowell and Hawes* v. *McFadon* (8 Cr. 94). "The landing and storing the cargo, whether to preserve it from injury, or to secure it from rescue, was a necessary consequence of the detention." The removal, therefore, of the vessel from Provincetown, which is at the very extremity of Cape Cod, to Barnstable, where the collector resided and had his office and his agents, was a necessary consequence of the detention, to guard against a rescue, and to save the expense of engaging an adequate guard to take care of the vessel. There is, in fact, no evidence to prove that such was not his real motive for causing the removal, and for unloading the vessel. [*344

2. The second branch of the judge's instruction and opinion is exceptionable in many respects. It implies, that reasonable care had not been used by the collector in ascertaining the facts, on which to form an opinion. He had sufficient evidence on which to form an honest opinion, and he was not bound to go beyond that evidence, if it was satisfactory to him.

This instruction of the judge also implies, that the collector is answerable for the correctness, or incorrectness, of his opinion. Such a position cannot be admitted. If public officers were to be answerable for error of judgment, few would be venturous enough to engage in so perilous a service; and it would be in vain to submit the performance of any duty to the exercise of a sound discretion. Such a doctrine would establish a new criterion of innocence and guilt; and judges would be engaged in measuring

the mental capacities of men. Yet such would be the consequence of punishing an officer who had discretionary powers, if the examination was not into the purity of his intention, but into the correctness of the judgment which influenced his conduct.

But the principles of law and the obvious import of the embargo act, refute such a doctrine. It is not the injury done to an individual, or error of judgment, but malice alone, that is the *gist* of prosecutions against a *345] *public officer, at common law, for malfeasance in office. Gross and flagrant misconduct may justify a presumption of malice; but even such misconduct, if it is proved to be the result of mental imbecility or good-intentioned ignorance, is pardonable. In the present case, a collector, exercising the odious and unpopular duty imposed upon him by the act, ought surely to receive similar indulgence; and the words of the act, in authorizing him to detain vessels, according to his opinion of their destination, give him this indulgence. In acting over an extensive district, he is not to be questioned, whether he could have got better information, or ought to have acted on the information he received, if he acted honestly and conscientiously.

But this point is put at rest by the opinion of the court in the case of *Crowell and Hawes* v. *McFadon*, 8 Cr. 94. It was there decided, that the law placed a confidence in the opinion of the officer, and he is bound to act according to his opinion; and when he honestly acts, as he must do, in the execution of his duty, he cannot be punished for it. The instruction, therefore, of the judge was erroneous; as it was calculated to mislead the jury, and to establish another test of his conduct than the honesty of his opinion.

The last branch of the instruction excepted to is, that it was the duty of the collector, to transmit to the president, for his decision, a statement of the facts which had been thus ascertained with care. In this case, it is contended by Otis, that a sufficient statement was made to the president for his decision; although the instruction implies, that the judge was of a contrary opinion. In his letter to Mr. Gallatin, of the 24th December 1808, he states, as the ground of his opinion, that the schooner had an unusual quantity of small stores on board, sufficient for a foreign voyage, and was fully watered. This statement the president thought a sufficient foundation for his decision; and accordingly, approved of the detention.

It has already been shown, that the facts stated by the collector, as the foundation of his opinion, were true. Admitting, however, that the statement was incorrect, or the facts capable of explanation, was it not the duty *346] *of Watkins, to address the president concerning the detention of his vessel, to correct any mis-statements, and explain any dubious facts? Did he do so, and can he now, after such supine or sullen negligence on his part, complain of the conduct of the collector, who stated fairly what he heard, or of the conduct of the president, who decided upon it? It is his fault only, if he made no defence, and took no steps to recover his vessel. The same sullenness of conduct induced him to refuse to give bond for the release of his vessel, when such a proposition was made to him. The case of *Bacon* v. *Otis* has nothing to do with this case.

J. Read, of Massachusetts, for the defendant in error.—It is understood,

that the supreme court of the United States has no authority, under the law which authorizes this appeal, to notice any errors except such as appear on the face of the record, and immediately respect the the questions of validity of construction of the constitution, treaties, statutes, commissions or authorities in dispute. This being the case, it is presumed, the principal question for the decision of the court, in the cause now under consideration, is, was the charge given by Chief Justice PARSONS, in the supreme court of Massachusetts, on the final trial of the cause now under consideration, in conformity with a correct and valid construction of the laws of the United States?

He charged the jury, "that it was the duty of the collector, as collector, to have used reasonable care in ascertaining the facts on which to form an opinion, and to transmit to the president a statement of those facts, for his decision."

Collectors of customs were authorized by the 11th section of the statute of April 1808, to detain any vessel, ostensibly bound, with a cargo, to some other port of the United States, whenever, in their opinion, the intention is to violate or evade any of the provisions of the acts laying an embargo, until the decision of the president of the United States be had thereupon.

*The collector of customs was bound to have some rational ground for his opinion, otherwise, he might seize all vessels, under any circumstances, and it would always be a complete justification, on his part, merely to say that, in his opinion, the vessels seized were ostensibly bound, with a cargo, to some other port of the United States, and were about to violate or evade some of the provisions of the embargo laws. Such a defence, it is apprehended, would not amount, in all cases, to a justification. The power and authority of a collector is confined to a vessel ostensibly bound, &c. The collector should have had rational ground to induce him to believe that the vessel was ostensibly bound, &c.; that there was an intention of violating the embargo laws. In the case of *Otis* v. *Bacon*, 7 Cranch 589, this court determined, that Otis detained the vessel of Bacon unlawfully, because, in their opinion, there was no rational ground of suspicion of an intended violation of the embargo laws; and the court, in that case, went into an examination of the facts, in order to determine whether Otis had rational ground of suspicion. The result of their investigation was, in their own words, "all rational grounds of suspicion of an intended violation of the embargo laws is then done away, &c." [*347

If it then be admitted, that a collector was bound, when acting under the authority of the embargo laws, and especially of the 11th section of the law of 25th April 1808, to have rational ground for his opinions and suspicions; it is confidently believed, it was the duty of such collector to have used those means to ascertain facts, without which there can be no rational grounds of belief. "It was the duty of the collector, as collector, to have used reasonable care in ascertaining the facts on which to form an opinion," as directed by the judge in the court of Massachussets. It was his duty, as an honest man; as an officer in whom the government had placed the highest confidence; on whose suspicions depended the property of hundreds.

It is also believed, that it was the duty of the collector, not only to have used reasonable care in ascertaining the facts on which to form an

opinion, but to transmit to the president a statement of those facts, for his decision.

*348] *Collectors were intrusted with great and unprecedented power, under the embargo laws. They were under the highest obligations to execute the trust reposed in them honestly and faithfully. The power of collectors consisted principally in the influence their statement or representation must necessarily have on the mind of the president. Collectors were authorized, in certain events, to seize and detain; but could detain only until the will of the president could be known. His approbation was requisite to a continuation of the detention. The president was, by law, constituted the sole judge whether a vessel seized and detained by a collector should be restored or not. On what evidence was the opinion of the president in such cases to be founded? The opinion of the president must, from the necessity of the case, be founded almost universally on the statement or representation of the collector. The collector, under the embargo law, after he had seized a vessel, became a witness—and sole witness in the case; and a witness not in a situation to be cross-examined. On the statement or representation of the collector, the president founded his opinion. Then, it follows, irresistibly, that it was the bounden duty of a collector, so situated, to have transmitted to the president a statement of facts in the case, on which the opinion of the president was asked. If the collector was bound to represent the facts in the case to the president, he must have been bound to have used reasonable care in ascertaining those facts, not only as the foundation of his own opinions or suspicions, but also as the foundation upon which the ultimate decision of the president must rest.

If the opinions of the judge, in the court below, were considered unsound, and were not established, it is apprehended, the greatest injustice might be practised; and as no case can readily be imagined, where the conduct of a collector could have been more reprehensible, than in the case now under consideration, we beg the court again to advert to some facts in the case now under consideration. From the decision of the district court, when the schooner Friendship, &c., was libelled and tried before that court (here, perhaps, I ought again to note, that after Otis seized Watkins's vessel, &c., and was directed, on certain conditions, to deliver her up, and Watkins refused to accept her, Otis libelled her and pretended that

*349] *he had seized her for loading without a permit), the judge of that court certified, that at the time Otis first seized the vessel (December 24th, 1808), Watkins was loading his vessel in bulk, in the day-time, with dried cod-fish, avowedly for the Boston market. It also appears, that some water and small stores were carried on board, not, however, so much as was usually put on board to go to Boston. Otis, it seems, obtained the information he possessed, from a stranger to the place and to their course of business. If he knew not what quantity of water and small stores were usual, he could not know what was unusual. He immediately sent a number of men to seize and detain the vessel, and had he done no more, the injury would probably have been trifling. But he ordered them not only to seize and detain, but to bring away and remove the schooner from Provincetown, one of the safest and best harbors in the world, to Barnstable, a distance of more than thirty miles. In attempting to obey his commands, the vessel was run aground and much injured, and the cargo nearly ruined. He after-

wards got the vessel to the wharf and unloaded it. What statement did he make to the president? What information did he give? Did he say, he had removed the vessel thirty miles? Did he say, he had run the vessel aground and ruined the cargo? No! He studiously avoided saying one word on the subject. He stated to the president, that the vessel was evidently intended for a foreign port, for, said he, she had an unusual quantity of small stores on board; sufficient for such a voyage; and was fully watered. He also stated, that the plea of Watkins, that his vessel was intended for a store ship, and a neighboring market, was without foundation; did he represent things truly?

Afterwards, on the 30th day of January 1809, Otis was directed by the secretary of the treasury to give up the vessel and cargo to Watkins. Here the affair would have ended, but the vessel and cargo had been ruined, by running aground, and Watkins refused, under all the circumstances, to accept her; Otis then wrote to the comptroller of the treasury, on the 21st of March, a few days after he had unladen the vessel, and stated, that he had detained the vessel on the 24th day of December (being the same day on which he originally seized and removed the said vessel), because she was loading, without a *permit. He wrote to the president, that [*350 he had seized and detained her, because, in his opinion, she was intended for a foreign port. Thus, it is evident, that Otis made one statement to the president, and a very different statement to the comptroller. Both statements could not be true; and he carefully avoided stating to either, the removal of the vessel and the consequent ruin of the property.

Our attention is called to a case decided at the last term of this court, *Crowell* v. *McFadon*, 8 Cranch 94. The court observed, "the law places a confidence in the opinion of the officer, and he is bound to act according to his opinion, and when he honestly exercises it, as he must do, in the execution of his duty, he cannot be punished for it." It is believed, the above opinion does not change the principle laid down in the case of *Bacon* v. *Otis* nor is it believed to be against the charge of the judge, in the court below, in the present cause.

It is not contended, that an officer is bound to be right and correct in his opinions and suspicions; but is not an officer bound to examine? Is he not bound to inquire? Is he not bound to have rational ground for his opinions? Was not a collector, in the execution of the embargo laws, bound to use reasonable care in ascertaining the facts on which his own opinion and that of the president must depend? If, in the discharge of so important a trust, he does not use reasonable care in ascertaining facts, can he be said honestly to exercise his opinion? We think not.

The original action against the collector is for taking, carrying away and destroying the vessel and cargo, &c., of Watkins. If the collector should be able to justify himself, under the 11th section of the embargo act of April 25th, in seizing and detaining; still, he has no justification in removing her, with her cargo, from a safe and secure port to a distant one, running her on shore and destroying the cargo, and unlading her. It is not believed, that the president himself had, under that act, any authority to remove the vessel and cargo, as it was removed, much less, had the collector any such authority. But the president gave no order for such removal, nor [*351 *did he approve or confirm such removal, for he was kept ignorant

of it. The question then rests on the power of the collector, and is too plain to justify the detention of the court, in attempting to elucidate it. An authority to detain is not an authority to remove or unload, especially, if there be no necessity so to do, for security and preservation. Congress thought proper, in this section, to vest collectors with power to detain vessels, under certain circumstances, until the decision of the president could be had, but they gave them no power to remove or unload; and the court will not, by construction, give them power which congress have withheld.

While acting fairly and with good faith within the limits of the power thus delegated to them, the collectors are to be protected, but when they transcend those limits, they must be answerable for the consequences. The collector, in the present case, must, of course, be answerable for all the damages sustained by Watkins, in consequence of the removal and unlading and destroying his vessel and cargo; by which he has been deprived of the earnings of many years devoted to industry and economy, and it is believed, he has been so deprived wantonly, and unjustly, by the gross misconduct of Otis, under color of authority vested in him as deputy-collector of customs: the charge and direction of the judge, therefore, to the jury, in the court below, on the facts disclosed, was correct.

It is urged, on the part of Otis, that admitting that Otis's statement to the president was incorrect, it was the duty of Watkins to have addressed the president on the subject, to correct any mis-statement of facts, &c.; and because he neglected it, he is accused of sullen silence. 1. It is probable, the patient acquiescence (not sullen silence) of Watkins was owing to his ignorance of the provisions and details of the embargo laws. 2. If he had knowledge of the subject, ought he to presume that Otis would neglect to state all the facts to the president? And besides, he had no opportunity; Otis wrote to the president on the 24th of December, and the president approved the detention on the 3d of January; ten days after. It is urged,
*352] Otis lived in Barnstable, and it was, *therefore, proper to remove the vessel, to save expense, that he might have her under his own eye, &c. If it were necessary to rebut the statement, it is a fact, that the town of Barnstable is twelve miles long, and Otis did not live or keep his office within four miles of the harbor.

It is also contended, that the case of *Crowell and Hawes* v. *McFadon*, does not support the point contended for in favor of Otis in the present case. In the case of McFadon, the agent of McFadon consented to the landing and storing the cargo; but on the supposition that no such consent had been given, "the court, in that case, observe, that the landing and storing the cargo, whether to preserve it from injury or secure it from rescue, was a necessary consequence of the detention. Has Otis, in the present case, produced any evidence to show that it was necessary to remove the vessel of Watkins, to preserve or secure the property? In the case above-mentioned of *Crowell and Hawes* v. *McFadon*, the vessel of McFadon was not removed from the harbor of Hyannis, where she was first detained; but was merely brought to a landing-place or wharf, about one-half mile from the place where first detained.

In the case now before the court, the vessel of Watkins was removed from Provincetown to Barnstable, a distance more than thirty miles. The harbor of Provincetown is one of the safest in the world; that of Barn-

stable less secure. By the removal and running aground, the vessel and cargo of Watkins were principally lost. If necessary to unlade and store the cargo, it might have been better and easier done at Provincetown than at Barnstable.

It is confidently believed, this court, will not, by construction, extend the authority of collectors under the embargo laws, to distant removals. No removal will be permitted, unless absolutely necessary to preserve or secure the property. Otis has not produced a tittle of evidence to show that any such necessity existed. On the other hand, it has been abundantly proved to have been unnecessary and ruinous.

*March 10th, 1815. (Absent, Todd, J.) LIVINGSTON, J., delivered the opinion of the court, as follows :—This is an action of trespass, [*353 brought in the supreme judicial court of the commonwealth of Massachusetts, for taking, carrying away and destroying a certain schooner called the Friendship, with her cargo, belonging to the plaintiff below.

The declaration is in common form. The defendant pleaded, that as deputy-collector for the district of Barnstable, he detained and removed from the port and harbor of Provincetown, to the port and harbor of Barnstable, the said vessel and cargo, that they might be securely kept ; the said schooner and cargo, at the time of such detention, lying in the said harbor of Provincetown, within the district aforesaid, ostensibly bound to some other port of the United States, with an intent, in the opinion of the defendant, to violate or evade the provisions of the embargo laws. He further pleaded, that he caused the said vessel to be detained, so that the decision of the president of the United States might be had thereon, who, afterwards, upon his report and representation, did approve and confirm the said detention. The plaintiff replies, that the defendant committed the trespass of his own wrong, and without any such cause, &c. Issue being joined thereon.

On a bill of exceptions taken to the charge of the court, the following facts appear to have been given in evidence : That the schooner in question, in the month of December 1808, was lying at Provincetown, wholly loaded with cod-fish. She had also a barrel of beef, a number of small stores and groceries, with three or four barrels of water, and a number of kegs of pickled lobsters. That an inspector of the customs, seeing the Friendship in this situation, and judging that the groceries were sufficient for the crew of such a vessel for thirty days, and having no doubt of her being bound to sea, gave information of such his suspicions, to the collector, who gave a written order to one Ganett, to detain *and to bring her into the port [*354 of Barnstable, and there secure her in the best manner possible. That Ganett proceeded to Provincetown, with about thirty men, and removed the said vessel to Barnstable, about ten leagues, by water ; but when attempting to come up to a wharf, she accidentally ran on to a point of land which projected into the water, and there stuck fast. That she could not be gotten off, during that tide, which soon left her ; and the weather was very cold, and the harbor was frozen up for a long time, so that the schooner could not be removed. That the defendant gave notice, by letter, to the secretary of the treasury of the United States, of the detention of said vessel, stating, at the same time, his reasons for believing that " she was evidently intended

for a foreign port;" which detention was approved of and confirmed by the president. That, as soon as the weather would permit, which was in the month of March following, the defendant caused the said schooner to be brought to a wharf and unloaded, and secured the cargo. That about 60 or 70 quintals of fish were damaged, and the rest in good order. There was, also, evidence, on the part of the plaintiff, to prove that the Friendship was actually bound to Boston, and the extent of the injury which his property had sustained.

The court charged the jury that the several matters and things so given in evidence by the defendant, "did not, in law, maintain the issue aforesaid on his part; and also, that it was the duty of the collector, as collector, to have used reasonable care in ascertaining the facts on which to form an opinion, and to transmit to the president a statement of those facts, for his decision." On an exception to the charge, the cause now comes before us, it having been removed into this court under the 25th section of the judiciary act; and whether it were correct or not, is the question which is now to be decided.

This seizure was made under the 11th section of the act of the 25th of April 1808 (2 U. S. Stat. 501), which provides, "that the collectors of the customs be and they are hereby respectively authorized to detain any vessel, ostensibly bound, with a cargo, to some other port of the United States, *355] whenever, in their opinions, the *intention is to violate or evade any of the provisions of the acts laying an embargo, until the decision of the president of the United States be had thereupon."

The issue tendered by the defendant, and on which the parties went to trial, was, whether the vessel and cargo were detained, because, in the opinion of the defendant, she intended, although ostensibly bound to a port in the United States, to violate or evade the provisions of the embargo laws? and whether the vessel was removed to Barnstable, that she might be securely kept until the decision of the president was known?

If there were any evidence to prove this issue, it should have been left to the jury to draw their own conclusions. If the defendant had taken upon himself to say, that the vessel did intend to violate the embargo laws, and that such removal was absolutely necessary for her secure detention, such charge would have been less exceptionable; but that it was the opinion of the collector, that such violation was in contemplation, and that such removal was for the purpose of securing the vessel, which were the facts in issue, might very well have been inferred by the jury, from the evidence before them. Indeed, it would have been difficult for them to have come to a different conclusion; for the collector, from the information which he received, could scarcely fail to form the opinion he did; and there was no evidence whatever, to induce them to believe, that she could have been removed to Barnstable, considering the care which was taken of her, during her removal, and after her arrival there, for any other purpose but for that alleged in the plea. In this particular, then, it is the opinion of a majority of the court, that the charge was erroneous.

The charge is deemed incorrect in another respect. The jury are told, that it was the collector's duty to have used reasonable care in ascertaining the facts on which to form an opinion. This instruction implies that the collector is liable, if he form an incorrect opinion, or if, in the opinion of

the jury, it shall have been made unadvisedly, or without reasonable care and diligence. But the law exposes *his conduct to no such scrutiny. If it did, no public officer would be hardy enough to act under it. [*356 If the jury believed, that he honestly entertained the opinion under which he acted, although they might think it incorrect, and formed hastily or without sufficient grounds, he would be entitled to their protection. Such was the opinion of this court in the case of *Crowell and Hawes* v. *McFadon*, decided at the last term. This does not preclude proof, on the part of the plaintiffs, showing malice or other circumstances which may impeach the integrity of the transaction. The jury, then, were misled, when their attention was drawn from the fact, whether the defendant really entertained such opinion, and were directed to inquire into the reasonable care with which it was formed, which left them at liberty to find a verdict against the defendant, however honestly and fairly he may have acted.

It is the opinion of the court, that the judgment of the supreme judicial court of Massachusetts must, for the reasons assigned, be reversed, and the cause be remanded for further proceedings.

Marshall, Ch. J., after stating the facts of the case, delivered his separate opinion, as follows :—As this court can notice no other error than such as may be founded on a misconstruction of the act of congress under which the defendant justified the taking and carrying away, charged in the declaration, the charge of the judge can be considered so far only as it respects that act.

The section to which the plea refers is in these words : "Be it enacted," &c. In construing this law, it has already been decided in this court, that the collector is not liable for the detention of a vessel "ostensibly bound, with a cargo, to some other port of the United States, whenever, in his opinion, the intention is to violate or evade any of the provisions of the acts laying an embargo, until the decision of the president of the United States be had thereon." For the correctness of this opinion, he is not responsible. If, in truth, he has formed it, his duty *obliges him to act upon it ; and when the law affords him no other guide than his [*357 own judgment, and declares that judgment to be conclusive in the case, it must constitute his protection, although it be erroneous. The legislature did not intend to expose the collector to the hazard of being obliged to show that he had probable cause for the opinion he had formed. If, in reality, he had formed it, the law justifies him for acting upon it. If it can be proved, either from the gross oppression of the case, or from other proper testimony, that the collector did not, in fact, entertain the opinion under which he professed to act, some doubt may be entertained of his being justified by the law ; but if the opinion avowed was real, though mistaken, a detention, under that opinion, is lawful.

But the act of congress authorizes only a detention of the vessel, not its removal. The collector did remove the vessel from one harbor into another, a distance of about thirty miles by water, and in this removal, the injury was sustained. As an independent act, this proceeding is not justified by the law. It was the duty of the collector, to detain the vessel ; and all acts which were necessary, as means to the end, were lawful ; but unless this

removal was necessary for the purpose of detention, it is not protected by the law.

The charge of the judge will now be examined. He instructed the jury, "that the several matters and things so given in evidence by the said William Otis, did not in law maintain the issue on his part." If this instruction could be understood as conveying to the jury an opinion, that Otis had not justified the detention of the vessel, the court would feel no hesitation in pronouncing it erroneous. But it was necessary for Otis to justify the removal, as well as the detention, and he could only justify the removal, by showing that it was necessary to a secure detention. Had he offered any testimony whatever to this point, it might have been incumbent on the judge to submit that testimony to the jury; but he has offered no testimony whatever to it. This court, therefore, cannot say, that the judge of the state court has erred, in saying that the matters and things *given in *358] evidence by the said William Otis, did not, in law, support his plea. Certainly, they did not make out a justification, under the act of congress.

The judge further instructed the jury, "that it was the duty of the collector, as collector, to have used reasonable care in ascertaining the facts on which to form an opinion, and to transmit to the president a statement of those facts, for his decision." The act authorizes the collector to detain a vessel, on his own mere suspicion, "until the decision of the president of the United States be had thereupon."

On what is the decision of the president to be had? Clearly, on the further detention of the vessel, and on the future proceedings of the collector respecting her. Whenever the president acts, he is expected to act upon information; and from whom, in this instance, is his information to be derived? Unquestionably, from the collector. The law does not, indeed, say, in terms, that the collector "shall take reasonable care in ascertaining the facts," or that he shall afterwards communicate those facts correctly to the president; and if this be not a fair and necessary construction of the act, the judge has misconstrued the law, and his judgment ought to be reversed. But it seems to be an inference which must be drawn from the words of the law. It follows, necessarily, from the duties of forming an opinion and of communicating that opinion to the president for his decision in the case, that reasonable care ought to be used in collecting the facts to be stated to the president, and that the statement ought to be made.

I cannot say that the court of Massachusetts has erred, in its construction of the act of congress under which the defendant justifies the trespass alleged in the declaration.

Judgment reversed.