

*The GROTIUS, SHEAFE, Master. (a)

Capture.

In order to constitute a capture, some act should be done, indicative of an intention to seize and to retain as prize; it is sufficient, if such intention is fairly to be inferred from the conduct of the captor.¹

THIS case was continued from last term, for further proof (see 8 Cr. 456), and was now submitted, upon the further proof produced, without argument.

WASHINGTON, J., delivered the opinion of the court, as follows:—This case comes before the court upon an order for further proof, made at the last session, in relation to the validity of the alleged capture of this vessel. The master, the mate and two of the seamen of the Grotius, in answer to some of the standing interrogatories, swore, that they did not consider the ship to have been seized as prize, and that the young man who was put on board by Odiorne, the captain of the privateer, was received and considered as a passenger, during the residue of the voyage. The deposition of Very, the alleged prize-master, was taken and read in the court below, in which he swore, that he was present at the capture; that Sheafe, the master of the Grotius, was ordered to go on board the privateer, with his papers, and that he, Very, was directed by Captain Odiorne, in the presence of Sheafe, to go with the prize, as prize-master, and to permit the master of the Grotius to keep possession of the ship's papers and to navigate her into port. That he accordingly went on board as prize-master, taking with him a copy of the privateer's commission, and also written instructions from Captain Odiorne for his own conduct.

The deposition of Very, though irregularly taken in that stage of the cause, was nevertheless calculated to weaken the preparatory evidence in relation to this contested fact, and to point out the propriety of a further investigation. The evidence of this witness lost much of its weight, from the circumstance that his letter of instructions was not annexed to his deposition, or made an exhibit in the cause. It was proper, that this omission should be supplied by the captors, if it could be done, and that they should have an opportunity to fortify the *evidence of Very, if in their power to do so. For these reasons, the order for further proof [^{*369}] was extended as well to the captors as to the claimants. Under this order, the captors have exhibited an attested copy of the written instructions to Very, bearing date the 29th of July 1813. They inform him, that he is put on board the Grotius, and direct him to proceed to the ship, and on his arrival, to report himself to the agent of the privateer, who would take such measures as he might deem necessary; that he is not to take charge of the vessel, but is to allow the master to take her into any port in the United States he might see fit. The authenticity of this paper is ascertained by the affidavit of the prize-agent of the privateer, in which he swears that the original was delivered to him, by Very, on his arrival, as containing his orders, and that it has remained ever since in his possession. The deposition

(a) March 10th, 1815. Absent, TODD, Justice.

¹ See The Alexander, 1 Gallis. 532.

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of Very has not been taken, under the order for further proof, but the omission is accounted for by the prize-agent, who, in his affidavit, swears that Very was captured on a subsequent voyage, and had not since returned to the United States. Under these circumstances, the court feels no difficulty in receiving his deposition, originally taken in the court below. In addition to the letter of instructions to Very, the collector of the port of Portsmouth has furnished an extract from the journal of the privateer, kept on that cruize, which states "that on the 30th of July 1813, the Grotius was boarded, and after an examination of her papers, a prize-master was put on board of her, and she was ordered to the first port in the United States."

This documentary evidence is further supported by the deposition of Mr. Wardwell, the surgeon of the privateer, who swears that Captain Odiorne informed the master of the Grotius, after he had come on board, that he should make out a copy of his commission, and should put a prize-master on board, to whom he should give orders to suffer Captain Sheafe to conduct his ship into any port of the United States he should think fit; that he would be further instructed to report to the custom-house on his arrival, and to inform the agent of the privateer of his arrival. That a prize-master, named Very, was accordingly placed on board, with instructions and a copy of the commission. This witness being examined ^{*as touching his interest} _{*370]} in this cause, swears that he has none, having for a valuable consideration assigned all his interest in the prize, to the owners of the privateer. The only evidence given by the claimants, under the order for further proof, is the deposition of John de Forest, and the affidavit of Captain Sheafe, which corresponds with his answers to the standing interrogatories; and in addition thereto, he contradicts the material parts of Wardwell's testimony. De Forest was a passenger on board of the Grotius, and he swears that Very exercised no authority whatsoever on board that ship, but was considered and treated as a passenger.

Upon this evidence, and the answers to the standing interrogatories, the cause is now to be decided; and the only question is, whether the Grotius was, in fact, seized as prize of war. When the facts are ascertained, there can be very little doubt, what constitutes in law a valid seizure as prize. It is clear, that some act should be done, indicative of an intention to seize and to retain as prize; and it is always sufficient, if such intention is fairly to be inferred from the conduct of the captor. Now, in this case, the evidence of Very and of Wardwell, proving that Captain Sheafe was distinctly informed that his ship would be sent in as prize, is corroborated by the written instructions to the former, which he delivered, on his arrival, to the prize-agent, and by the journal of the privateer, both of which documents correspond with the evidence of those witnesses. The former of these documents, written at the time when Very was appointed the prize-master, as he states, imports a clear declaration of the intention of Captain Odiorne, and having been deposited, with the prize-agent, immediately on the arrival of the Grotius, it cannot be presumed to have been fabricated, to serve the purpose for which it is now used.

Although the instructions do not call Very prize-master, by name, yet they contain other equivalent expressions; for if he was put on board merely as a passenger, what had he to do with reporting the vessel, on her arrival, to the collector, and particularly, to the prize-agent?

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*The evidence, then, on the part of the captor, would be quite sufficient to establish the fact of a valid capture, if it stood uncontradicted. The only positive evidence against it, is the deposition of Sheafe, which is in direct opposition to that of Wardwell and Very. He swears, that Odiorne represented himself, in the first instance, as the commander of a British privateer, and as such, threatened to put a prize-master on board, and send him into Halifax. That he afterwards avowed his real character, after which, he never spoke of putting a prize-master on board, but merely requested him to receive Very as a passenger. He says, that the first conversation when Odiorne spoke of putting a prize-master on board, took place in the cabin, when Wardwell was present; that the latter conversation was on deck, when he was not present.

Wardwell is equally positive. He swears, that after Captain Odiorne had disclosed his real character, he told Sheafe that he should put a prize-master on board, and send him into any port in the United States he might choose, adding, that he might as well be prize to the privateer, as be seized by the government of the United States on his arrival; to which Captain Sheafe assented. He further swears, that Captain Odiorne informed the master of the Grotius, that he should direct the prize-master to report himself to the custom-house, and to the prize-agent. In point of credit, these witnesses appear to be equal, neither of them having any personal interest in the dispute. But Wardwell is fully supported by Very, and their united testimony receives considerable aid from the instructions, and from the journal of the privateer. They are also supported, in some degree, by the answer of Chambers, one of the crew of Grotius, to one of the standing interrogatories, in which he states that Very, the day after his coming on board of that ship, declared that he was put on board as prize-master.

The evidence of the mate, of de Forest, and of Prince, is entitled to very little weight, because the two former did not go on board of the privateer, and the latter, although he did accompany Captaid Sheafe to the privateer, does not pretend that he heard any conversation between him and Captain Odiorne; and being a common seaman, it is unlikely that he should have been admitted into their company. The evidence of these persons as *to the unassuming conduct of Very, whilst on board the Grotius, from which they inferred that he was there merely as a passenger, is entirely consistent with the arrangement proved to have been made on board of the privateer, that he was not to interfere in the navigation of the vessel. [*372]

Upon the whole, it is the opinion of a majority of the court, that the validity of the capture of the Grotius, as prize of war, is sufficiently established by the evidence, and the master having acquiesced in the subsequent arrangement as to the mode of sending in the vessel, she ought to have been condemned to the use of the captors.

The decree of the circuit court condemning the ship Grotius, &c., to the the United States is reversed; and the court proceeding to give such decree as the said circuit court ought to have given, it is further decreed and ordered, that the said ship be condemned as lawful prize to the captors.