

## The Short Staple.

equitable title to the said land, and ought to be perpetually enjoined from claiming the same ; and that a sale of the said land ought, for the reasons stated in the bill, to be decreed, upon the assent of the minister of said church (if any there be) being given thereto ; and that the present church-wardens and the said James Wren ought to be decreed to convey the same to the purchaser ; and the proceeds to be applied in the manner prayed for in the bill. The decree of the circuit court is to be reformed, so as to conform to this opinion.

Decreed accordingly.

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The Brig SHORT STAPLE and Cargo, HOLLOWAY and others, Claimants, v. UNITED STATES.

*Embargo.—Rescue.*

*Quære?* Whether, under the 1st and 2d embargo laws of 1807 and 1808, a registered vessel, which had a clearance from one port to another of the United States, was liable to condemnation for going to a foreign port?

If a vessel be captured by a superior force, and a prize-master and a small force be put on board, it is not the duty of the master and crew of the captured vessel to attempt to rescue her ; for they may thereby expose the vessel to condemnation, although otherwise innocent.

The Short Staple, 1 Gallis. 104, reversed.

THIS was an appeal from the sentence of the Circuit Court for the district of Massachusetts, which affirmed that of the district court, condemning the brig Short Staple and cargo. The facts of the case are thus stated by the Chief Justice in delivering the opinion of the court :

This vessel was libelled in the district court of Massachusetts, in March 1809, for having violated the embargo \*laws of the United States, [\*56 by sailing to a foreign port. The fact is admitted by the claimants, who allege, in justification of it, that the vessel was captured, while on her voyage to Boston, by a British armed vessel, and carried into St. Nicholas Mole, where the government of the place seized the cargo.

It appeared in evidence, that the Short Staple sailed from Boston, about the 10th of October 1808, with instructions to procure a cargo of flour, and return therewith to Boston, unless the embargo should be removed before the commencement of her return-voyage, in which case she was directed to proceed to the island of Guadaloupe. At Baltimore, she took on board a cargo of flour, and sailed thence to Boston, about the 28th of October. She was detained, several days, in Hampton Roads, by contrary winds. During this detention, the British armed vessel Ino put into Hampton Roads, for the purpose of repairing some damage sustained in a storm on the coast. The Ino had been in the port of Boston, while the Short Staple lay there, and had cleared out for the Cape of Good Hope, though her real destination was Jamaica. The reason her captain has since assigned for this imposition, was, that by clearing out for the Cape of Good Hope, he was allowed to take on board a larger supply of provisions than would have been allowed, had he cleared out for any port in the West Indies.

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As soon as the wind was favorable, the Short Staple, together with another vessel, likewise bound from Baltimore to Boston, called the William King, put to sea, and was followed by the Ino, who soon overtook them, and took possession of them both as prize, alleging that they were bound to a French island. The captor put a prize-master and two hands on board the Short Staple, and sailed in company with them, until they fell in with a British ship of war. The captain of the Ino directed the prize-master to meet the ship of war, and submit to her orders; while the Ino, dreading that her hands might be impressed, made sail to the windward and escaped. After their papers had been examined, the Short Staple and the William King were permitted to proceed on their voyage, and were carried into St. \*57] Nichola Mole, the place appointed by the captain of the Ino for \*meeting them, when he was separated from them by the ship of war. They arrived at the Mole, about two days after parting from the Ino, who followed them, and entered the port soon after them. The government of the place insisted on detaining one of the vessels, as provisions were scarce at the Mole, and the Short Staple was given up to them. Her cargo was landed, under the direction of the government, and purchased at about \$32 per barrel. Having received about \$1200 in part pay for the cargo, the master of the Short Staple sailed to Turk's Island, and loaded her with a cargo of salt, with which he returned to a port in Massachusetts, where his vessel was seized as having violated the embargo laws. The William King appeared to have been carried to Jamaica, and there liberated, without having been libelled. The Short Staple was condemned in both the district and circuit courts, and the case was brought before this court by a writ of error.

*P. B. Key* and *R. G. Amory*, for the appellants, contended, 1. That no law prohibited the Short Staple from going to the West Indies; and 2. That she was carried there by the superior force of a British vessel of war.

1. There was no law then in force, by which the brig could be condemned for going to a foreign port. The only embargo laws then in force, which could affect this vessel, were the original embargo act of 22d December 1807 (2 U. S. Stat. 451), and the supplementary act of 9th of January 1808 (*Ibid.* 453).

The first act laid "an embargo on all ships and vessels bound to any foreign port or place," and directed that no clearance should be granted for any foreign voyage; and that no registered or sea-letter vessel, having on board a cargo, should be allowed to depart from one port of the United States to another port of the United States, unless the master, &c., should give bond, in double the value of vessel and cargo, that the cargo should \*58] be relanded in the United States. The act did not \*give any forfeiture. The first section of the 2d embargo law (the supplementary act of January 9th, 1808) relates only to vessels "licensed for the coasting trade." The 2d section relates only to vessels licensed for the fisheries or whaling voyages. The 3d section enacts, that "if any vessel" "shall, contrary to the provisions of this act, or of the act to which this is a supplement," "proceed to a foreign port or place," "such vessel shall be wholly forfeited."



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If any forfeiture is given, it must be by this section ; and this section applies only to such vessels as shall violate the provisions of this or the former act. The "provisions of this act" do not apply to a registered vessel, but only to licensed coasters and fishing vessels. The first embargo law did not forbid a vessel to sail to a foreign port, if she should have a clearance, but relied upon the bond and security that the cargo should be relanded. It was the violation of a contract, not an offence against law. It was a breach of the condition of the bond, but no crime. Every man has a right to refuse to comply with the condition of his bond, if he will pay the penalty. The United States, in the present instance, did resort to the bond. It is true, they did not recover, because the jury found a verdict against them upon the issue of fact. But they have had their remedy.

A registered vessel could only violate the provisions of the first or second embargo law, by going to a foreign port, without a clearance ; or by going to a port of the United States, without giving bond. A vessel which had a clearance, and had given the bond, was not forbidden to go to a foreign port. The Short Staple had a clearance and had given the bond. The provisions of the supplementary act could only be violated by licensed coasters and fishing vessels, and are not applicable to the present case. The vessel did not go to a foreign port, contrary to the provisions of the act, but contrary to the condition of the bond.

*Jones, contra.*—The only questions are, whether the 3d section of the 2d embargo law superadds the forfeiture of the vessel \*to the penalty of the bond, for violation of the previous law? or whether it provides a [\*59] forfeiture for the violation of a new prohibition?

The expression "contrary to the provisions of this act or of the act to which this is a supplement," mean contrary to the spirit and intention of those acts. The spirit of the former act was, unquestionably, a prohibition of all foreign trade. To go with a cargo to a foreign port, was clearly against the spirit of the embargo. A vessel violates the provisions of the act, when she violates the bond which the act provides. The act declares, that an embargo shall be laid on all vessels bound to a foreign port. The word embargo is equivalent to a prohibition. And the words "bound to a foreign port" mean a vessel intending to go to a foreign port ; not merely a vessel ostensibly bound to such port.

But if the vessel, by violating the bond, does not violate the law which requires the bond, yet the third section of the second embargo act creates a new offence, viz., that of going to a foreign port. It is coupled, in the same sentence, with the prohibition to put foreign goods on board of another vessel, which is, unquestionably, an entirely new offence, and yet, according to the words of the act, must be done contrary to the provisions of this or the former act. This shows that the legislature did not mean to confine the forfeiture to violations of the first act, or of the first two sections of the second act.

*Amory*, in reply, observed, that the word embargo meant a restraint or confinement of vessels already in port, and could not affect the conduct of a vessel after she had left the port. If she has a license to leave the port, the embargo, as such, cannot make her subsequent conduct unlawful.

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February 17th, 1815. (Absent Johnson, J., and Todd, J.) MARSHALL, Ch. J., after stating the facts of the case, delivered the opinion of the court, as follows :—It has been contended by the plaintiffs in error, \*1. That \*60] the Short Staple, being a registered vessel, and having given bond as required by law for relanding her cargo in the United States, is not liable to forfeiture, if she has violated the condition of that bond. 2. That her sailing to a foreign port, being under the coercion of a force she was unable to resist, is justifiable, under the laws of the United States.

The first error has been pressed with great earnestness by the counsel for the plaintiffs; but the court is not convinced that his exposition of the embargo acts is a sound one. On this point, however, it will be unnecessary to give an opinion; because we think the necessity under which the claimants justify their going into St. Nichola Mole, is sustained by the proofs in the cause. It is not denied, that a real capture and carrying into port, by a force not to be resisted, will justify an act which, if voluntary, would be a breach of the laws imposing an embargo. Nor is it denied, that if such capture be pretended, if it be made with the consent and connivance of the parties interested, such fraudulent capture can be no mitigation of the offence. The whole question, then, to be decided by the court is a question of fact. Was this capture real? Was the force such as the Short Staple could not resist? Or was it made in consequence of some secret arrangements between the captor and captured?

It is contended, on the part of the United States, that the circumstances of this case are such as to outweigh all the positive testimony in the cause, and to prove, in opposition to it, that the Short Staple was carried into St. Nichola Mole, not by force, but with her consent, and by previous concert between her owners and the captain of the Ino. Those circumstances are, 1. The arrival and continuance of the Ino in the port of Boston, while the Short Staple lay in that port, previous to her departure for Baltimore. \*2. Her clearing out for the Cape of Good Hope, while her real destination was Jamaica. \*61] 3. The continuance of the Short Staple in Hampton Roads, until the arrival of the Ino. 4. Her capture on a coasting voyage which would not justify suspicion. 5. Her being carried to a port where there was a good market, and there given up: and 6. That the William King, when carried to Jamaica, was also given up, without being libelled.

That these circumstances are, some of them, such as to justify strong suspicion, and such as to require clear explanatory evidence to do away their influence, is unquestionable. But the court cannot admit, that any or all of them together amount to such conclusive evidence as to render it impossible to sustain the defence.

That the Ino should arrive in the port of Boston, while the Short Staple lay in that port, is nothing remarkable. It furnished an opportunity of concerting any future plan of operations with the owners of the Short Staple, or of any other vessel; but is certainly no proof of such concert. There is no evidence, that the respective owners were acquainted, or had any communication with each other; and the whole testimony is positive, that no such communication took place.

That the Ino should have cleared out for the Cape of Good Hope, when her real destination was Jamaica, is sufficiently accounted for. It enabled



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her to take on board a considerable quantity of provisions, an article in demand in Jamaica, which she would not have been permitted to do, had her real destination been known. This may be a fraud in the Ino, but cannot affect the Short Staple.

That the Ino should have arrived in Hampton Roads, while the Short Staple remained there, and should have followed her to sea, and have captured her, are, unquestionably, circumstances which justify strong suspicion, \*and which would be sufficient for the condemnation of the vessel, if not satisfactorily explained: but it is not conceded by the [\*62 court, that they admit of no explanation. These circumstances are not absolutely incompatible with innocence.

It is proved by testimony to which there is no exception, and which no attempt has been made to discredit, that the Short Staple was absolutely wind-bound the whole time she remained in Hampton Roads; and that she attempted to put to sea, before the arrival of the Ino, but could not. Had this capture ever been pre-concerted in Boston, the Ino and Short Staple would more probably have contrived to meet on the return-voyage of the latter, than to have adopted the course of the one waiting in port for the arrival of the other, and then sailing out almost together.

The arrival of the Ino in Hampton Roads is completely accounted for. She had suffered by the perils of the sea, and put in for necessary repairs. This fact is proved positively, and no opposing testimony is produced.

That the Ino should have pursued the Short Staple on a coasting voyage, and have captured her, was a wrong not to be justified. It is said to have been so atrocious a *tort*, that its reality is incredible. The fact, however, is completely proved. The master of the Short Staple swears that he was on his voyage to Boston; that his intention was to proceed to that port; that he had had no previous communication with the Ino, and had no expectation of being captured by her, or of being turned out of his course. The other persons on board the Short Staple testify to the same facts, as far as their knowledge extends. The owner of the Ino, who was on board, and her officers, swear that they had no previous communication with the Short Staple, or her owner; that there was no concert of any sort between them; that they were informed by some person on shore, while the Ino lay in Hampton Roads for repairs, that the Short Staple and the William King were on a voyage to a French island; that expecting to find something which would justify condemnation as prize, they determined to examine those vessels, and, \*although, on examination, they found nothing to [\*63 justify capture, they still hoped that something would appear in future; and that, at the worst, they should incur no risk of damages, because they should carry the vessels and cargoes to a good market. In this confidence, they determined to take them to Jamaica. This disposition in the captors, however indefensible, is very probable. It grew out of the state of the two countries; and no individual who was captured in consequence of it, ought, if his own conduct contributed in no degree to that capture, to be made the victim of it.

That she was carried into St. Nicholas Mole, and there given up to the government of the place, is, in itself, a circumstance throwing some suspicion on the transaction, and requiring explanation. The testimony explains it. The Ino was separated from her two prizes, by a fact which is fully

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proved, and which sufficiently accounts for that separation. That her captain should, when about to leave them, appoint some near port as the place of meeting again, was almost of course; and that he should have relinquished one of the vessels to the government of the place, ceases to be matter of much surprise, when it is recollected, that he could not have much expectation of making her a prize; that, in fact, the capture was made with scarcely any hope of condemnation, but with a certainty that it would produce some additional supply of provisions, and could injure no person. The criminality of this mode of thinking, whatever it might be, was not imputable to the owners of the Short Staple.

It has been contended, that, during the separation of the Ino from the captured vessels, a rescue ought to have been attempted. There having been, during that period, but three persons belonging to the Ino on board the Short Staple, they might have been overpowered by the American crew; but the attempt to take the vessel from them was no part of the duty of the Americans, and might, in the event of re-capture, have exposed the vessel and cargo to the danger of condemnation, of which, without such rescue, they incurred no hazard.

\*64] The abandonment of the William King, without libelling \*her, is the natural consequence of having been able to find no circumstances of suspicion which might tempt the captors to proceed against her. It undoubtedly proves, what the captain of the Ino avows, that he acted under a full conviction of being exposed to no risk by the capture, though he should reap no advantage from it.

The interest which coasting vessels had in fictitious or concerted captures, undoubtedly, subjects all captures to a rigid scrutiny, and exposes them to much suspicion. The case of the claimant ought to be completely made out. No exculpatory testimony, the existence of which is to be supposed from the nature of the transaction, ought to be omitted. The absence of such testimony, if not fully accounted for, would make an impression extremely unfavorable to the claim. But where the testimony is full, complete and concurrent; where every circumstance is explained and accounted for, in a reasonable manner; where the testimony to the innocence of the owners and crew of the vessel is positive, proceeding from every person who can be supposed to have any knowledge of the facts, and contradicted by none; the court cannot pronounce against it. This would be to allow to suspicious circumstances a controlling influence to which they are not entitled.

The sentence of the circuit court, condemning the Short Staple, is reversed and annulled, and the cause remanded to that court, with directions to decree a restoration of the vessel to the claimants, and to dismiss the libel.

STORY, J., stated, that he dissented from the opinion of the court, and adhered to the opinion which he gave in the court below, in which he had the concurrence of one of his brethren.<sup>1</sup>

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<sup>1</sup> See *The William King*, 2 Wheat. 148.