

## The Struggle.

that the sale is void, and that the judge of the circuit court committed no error, in giving this instruction to the jury. The judgment is affirmed, with costs.

Judgment affirmed.

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THE STRUGGLE. (a)

The Brig STRUGGLE, THOMAS LEIGH, claimant, v. UNITED STATES.

*Penal statute.—Circumstantial evidence.*

A party who offers an excuse for violating a penal statute, must make out the *vis major* under which he shelters himself, so as to leave no reasonable doubt of his innocence. Circumstances will sometimes outweigh positive testimony.

APPEAL from the sentence of the Circuit Court for the district of Massachusetts, which condemned the brig Struggle, for violation of the non-intercourse act of 28th of June 1809 (2 U. S. Stat. 550), by going, with a cargo, to a prohibited port.<sup>1</sup>

February 18th, 1815. (Absent, Johnson, J., and Todd, J.) LIVINGSTON, J., delivered the opinion of the court, as follows :—

This was an information, in the district court of Massachusetts, against the brigantine Struggle, for the violation of the act of congress of the 28th of June 1809, in departing from Portsmouth, in the United States, with a cargo of domestic growth and manufacture, bound to a foreign port with which commercial intercourse was not then permitted. The libel further states that the vessel arrived at said prohibited port, with her cargo, and that no bond had at any time been given to the United States, in the manner required by law, that she should not proceed to any interdicted \*port, nor be engaged directly or indirectly, during such voyage, in [\*72 any trade with such port or place.

The claim denies the departure of the brigantine from Portsmouth, on a foreign voyage, to a port with which commercial intercourse was interdicted, or to any other foreign port or place ; but insists, that she was duly cleared, at the custom-house at Portsmouth, for Charleston, and that she departed and was sailing towards her place of destination, when by the violence of the winds and waves, she was driven out of her course, and became so much damaged, that she could not proceed on to Charleston ; but that it was necessary for the preservation of the vessel and cargo, and of the lives of those on board, to sail for the West Indies ; that she accordingly went to Martinico, and thence proceeded to St. Bartholomews.

The cause being at issue on this allegation of the claimant, and a number of witnesses having been examined, the district court condemned the vessel as forfeited to the United States. This decree was affirmed by the circuit court, from whose sentence this appeal is taken.

The master of the Struggle, who was produced as a witness, swears that after being regularly cleared, she sailed from Portsmouth to Charleston, the cargo being consigned to Joseph Waldron & Co., on whom he had

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(a) February 15th, 1815.

<sup>1</sup> See 1 Gallis. 476.

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orders to call for advice ; but it being rumored, at the time of his sailing, that the non-intercourse would shortly be removed, he was informed by the owner, that orders were given to Waldron & Co., in that case, to send the vessel to the West Indies, provided the prospects at Charleston should not be equal to his expectation. That five or six days after sailing, they had a very heavy gale from the south-west which made such a tremendous sea that it became impossible to keep the vessel to. That they had not less than 65,000 feet of seasoned sawed lumber on the deck, besides loose lumber, all of which, in his opinion, must inevitably have been lost, if the vessel had been kept head to. At one time, an attempt was made to heave her to, and after laying a few hours, the gale increased and knocked the vessel down, her yards being nearly in the water, and the top of the deck load so \*73] shifted that they were obliged to put her before the wind, to \*right the deck load and clear the companion way. During several gales, they were obliged to scud, and at one time for twenty-three hours together. They shipped several seas which washed overboard a part of the loose lumber. About the 16th of February, the wind being less violent, the deck load was found so much soaked, that it was like green lumber, which made the vessel so crank that they could not keep on the wind with a six-knot breeze. One of the water-casks was entirely leaked out ; another partly out ; and the sails and rigging much injured. On a consultation with the people on board, they were all of opinion, that it would be extremely dangerous to attempt coming on the coast, in the state in which the vessel then was, she being so top-heavy as to be almost water-logged. It being also the worst season in the year, they unanimously thought, that the only way they could save the deck load, and probably their lives, would be to make the first port they could. They accordingly bore away for the West Indies, and arrived at Martinico, which was the first port they made. The cargo was there sold, at a low price, it not being thought safe to venture to sea again, in the then condition of the vessel. After making some repairs, they sailed from Martinico for St. Bartholomews, where they took freight for Boston, at which place they arrived in June 1810.

This is the history of the voyage given by the master, and is substantially confirmed by the mate and two of the seamen, who also swear that they shipped for wages usual on a voyage to Charleston, which were lower than those which were given for a voyage to the West Indies. It also appears by the documentary evidence in the case, that the Struggle had a regular clearance on board for Charleston ; that she was chartered by the claimant, of certain merchants of Portsmouth, "to go to some southern port, or to the West Indies ;" that the cargo taken on board at Portsmouth was lumber, butter and crackers ; and that she returned from St. Bartholomews, to the United States, with a cargo on freight consisting of 180 casks and nine barrels of molasses.

On these proofs, the court is now to decide, whether the claimant has made out his allegation, that the vessel was driven out of her course by the violence of the winds and waves, and that her condition was such as to \*74] make \*it necessary, for her preservation and the safety of the crew, to sail for a port in the West Indies.

Were the court bound to decide according to positive testimony, without regard to other circumstances, or to the situation and character of the wit-

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nesses, it might be difficult to say, that the plea of necessity had not been satisfactorily made out. The master, mate and two of the mariners establish everything which the claimant had undertaken to prove, so far as their positive declarations are entitled to credit. But when it is recollected, how many cases of fictitious distress have been offered to the courts of the United States, as excuses for violations of the restrictive system, as it has been called, and that these cases, whether real or imaginary, have generally been supported by the same species of testimony, it cannot be wondered at, if this court shall receive, with considerable jealousy and caution, evidence which is so perpetually recurring, and which, if compared, will be found to present the same uniform statement of facts, with very few shades of difference, all calculated to impress a belief that some overwhelming calamity, of which, in ordinary voyages, so little is heard, has produced a departure from the original legitimate destination of the vessel. When it is considered too, that the testimony on these occasions comes from men, who, whatever their characters may be in other respects, must be viewed as accomplices in the offence, if any has been intentionally committed, and are, to say the least, very much under the influence of those who have projected the voyage, and are to be gainers by a violation of the law, it cannot be supposed, that such testimony can be examined, without very considerable reserve and distrust.

Although mere suspicion, not resting upon strong circumstances, unexplained, should not be permitted to outweigh positive testimony, in giving effect to a penal statute; yet it cannot be regarded as an oppressive rule, to require of a party who has violated it, to make out the *vis major* under which he shelters himself, so as to leave no reasonable doubt of his innocence; and if, in the course of such vindication, he shall pass in silence, or leave unexplained, circumstances which militate strongly against the integrity of the transaction, he cannot complain, if the court shall lay hold of those circumstances as reasons \*for adjudging him *in delicto*. What [75 then are the circumstances in this case, which it is difficult to reconcile with the concurrent testimony of the witnesses who have been examined?

1. If the Struggle really encountered so much bad weather, and was obliged, to avoid shipwreck, and to preserve the lives of the crew, to abandon a coasting for a foreign voyage, it might be expected, that, on her arrival at Martinico, the ordinary process of survey would have been called for. Her situation would then have been ascertained by professional and skilful men. The not taking a precaution so common in cases of distress, and so necessary for the master's exculpation, if he acted without an understanding with his owner, while it leaves us in great doubt as to the magnitude of the injuries sustained, and the imminence of the danger to which the vessel and crew were thereby exposed, is but little calculated to excite a belief of the great extent of either. It is taken for granted, that no such survey was had, from the silence of all the witnesses upon the subject, and from the manifest interest which the claimant had in producing it, if it any degree supported the testimony or the defence which he had set up.

2. A still more common document, and of which, notwithstanding, we hear not a word, is a protest. Perhaps, a case never occurs, that a vessel is forced to abandon a voyage, without stating the reasons of such deviation, in the form of a protest, at the first port at which she arrives. Although, of itself, it would be no evidence, the master might have stated in

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his testimony, that he had made one at Martinico. His not having done so, subjects him to the just presumption of having neglected it altogether, and that his going thither was brought about by a necessity of his own contrivance, and not by the act of God, or adverse winds.

Again, although it is said, that orders were sent by the claimant to the house of Waldron & Co., in Charleston, yet neither these orders, nor those to the master, both of which must be presumed to be in writing, are produced. Their suppression (to say the least) is a circumstance of some suspicion. It may also be asked, why, \*if the danger was so pressing, \*76] and the vessel nearly on her beam ends, was not relief sought by throwing over the deck-load, or a part of it? The court does not mean to say, that it was the master's duty to sacrifice the cargo, rather than go to a foreign port; but from his not disembarassing himself of an incumbrance, which must have been so much in his way, it may well be doubted, whether the situation of the brig were as perilous as is now represented, or the lives of the crew exposed to the dangers we now hear of.

From the declarations of the claimant, as to his intentions, previous to the voyage, an argument was drawn in his favor. It is sufficient to say, that such declarations are not evidence, and if they were, might, in a case otherwise mysterious, rather increase than lull suspicion. As little dependence is to be placed on the fact, that for a foreign voyage, higher wages would have been demanded than for one to Charleston. Although the original agreement with the mariners may have been, and probably was, for Charleston, there can be no doubt, that the owner would have an interest, in a case of this kind, to raise them full as high as seamen would have a right to expect, if the vessel were carried, and especially, without a palpable necessity, to an interdicted foreign port.

Considering then, the suspicious source from which the testimony is derived, and the unfavorable and unexplained circumstances which have been stated, the court is unanimously of opinion, that the sentence of the circuit court must be affirmed.

Sentence affirmed.

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RANDOLPH v. DONALDSON. (a)

*Escape.*

If a debtor, committed to the state jail, under process from a court of the United States, escape, the marshal is not liable.

ERROR to the Circuit Court for the district of Virginia, in an action of debt, brought by Donaldson against Randolph, late marshal of that district, \*77] for the \*escape of one Baine, who, being taken in execution by the deputy marshal, had been delivered over to the jailer of the state prison of Botetourt county, from whose custody he escaped.

The action was in the common form, and the defendant pleaded *nil debet*, upon which issue was joined. Upon the trial, the defendant below took two bills of exception.

The first bill of exception set forth the judgment and execution of Don-

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(a) February 16th, 1815. Absent, MARSHALL, Ch. J., and TODD, Justice.