

*The VENUS: JADEMEROWSKY, Claimant.

Prize.

A case of further proof.

APPEAL from the decree of the Circuit Court for the district of Georgia. This ship having taken in a cargo, at London, proceeded to Portsmouth, and from thence, on the 12th of April, 1814, sailed for St. Bartholomews, under convoy of a British ship of war. From St. Bartholomews, she sailed for the Havana, but on her passage thither, was captured and sent into the island of St. Thomas, for adjudication, by a British cruiser. Upon being released from this detention, she abandoned her destination for the Havana, and was proceeding to Amelia Island, when she was captured by the flotilla under the command of Commodore Campbell, and sent into the port of Savannah, where the vessel and cargo were libelled as prize. The ship was restored by consent, in the court below, as Russian property; the cargo was condemned as prize of war, and an appeal entered from that sentence by the claimant.

The proofs of property consisted: 1. Of a recital in a power of attorney, from one Jones, the alleged agent, in London, of the claimant (who was stated to be a Russian merchant, domiciled at St. Petersburg) to Mr. Diamond, the supercargo. 2. A certificate of property from the Russian consul-general, in *London. 3. The testimony of Mr. Diamond, and [*113] other witnesses, taken *in preparatorio*, expressing their belief that the property was as claimed.

Charlton, for the appellant and claimant, offered to read affidavits in the nature of further proof.

STORY, J.—Until the cause is heard, further proof cannot be admitted.

MARSHALL, Ch. J.—If, upon the opening, it appears to be a case for further proof, then it may be admitted *instanter*, unless, indeed, the court should be of the opinion, that the captors ought to be allowed to produce further proof also. The cause is before us, as if in the inferior court.

Charlton.—We contend, that it is a case entitled to further proof, and that there is no circumstance of fraud or *mala fides* to preclude it.

The *Attorney-General*, contrà.—It is incumbent upon the claimant, to make out his title by competent testimony, according to the rules of the prize court; and if the court should be of opinion, that the property does not belong as claimed, the captors will be entitled to condemnation, without specifically proving to whom it does belong. *The Odin*, 1 Rob. 227; *The Neptunus*, 3 Ibid. 68. The recital in the power from Jones to Diamond, cannot be sufficient to show the interest of Mr. Jademerowsky. *The [*114] recital in a deed binds only the parties, and those claiming under it: we are entitled to the production of the original power, duly authenticated. *The Argo*, 1 Rob. 133. The certificate of the Russian consul-general is no proof of the real property. *The Endraught*, 1 Rob. 19. The failure on the part of the supercargo to testify, positively, as to the property, is, in the prize court, always held strongly against the title of the claimant. *The Neptunus*, 3 Rob. 68. The cargo was purchased and loaded in a British

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port, and the ship had an alternative destination to a British colony. The voyage is different from that authorized in the original power from Mr. Jademerowsky to Jones; and therefore, such power either never existed, or it is falsified by the evidence, and must be repudiated by the court.

Pinkney, in reply, agreed, that in a suspicious case, restitution could not be demanded upon the original evidence; but this is a case of further proof, and there is no evidence of fraud, or unneutral conduct, to preclude it. The documentary evidence expresses neutral account and risk. By the law of nations, the papers must be supported by the examinations *in praeparatorio*; but there is no determination which warrants the position, that the supercargo must swear to anything more than *belief*. He is, in this respect, in the same predicament with the master. In both cases, it is matter, not of positive knowledge, but of inference from the circumstances which *come to his knowledge. The consular certificate is a part of the ^{*115]} ship's papers, and, as such, is necessarily a part of the documentary evidence in the cause. The recital of the procuration is said not to be admissible at common law; but this court is now sitting as a court of prize.

March 2d, 1816.—The cause was this day ordered to further proof, on the part of the captors and claimants.

Further proof ordered.

PRESTON v. BROWDER.

Land law of North Carolina.

The act of assembly of North Carolina, of November 1777, establishing offices for receiving entries of claims for lands in the several counties of the state, did not authorize entries for lands within the Indian boundary, as defined by the treaty of the Long Island of Holston, of the 20th of July 1777. The act of April 1778, is a legislative declaration explaining and amending the former act, and no title is acquired by an entry contrary to these laws.

ERROR to the Circuit Court for the district of East Tennessee. This was an action of ejectment, commenced by the plaintiff in error, in that court.

On the trial of the cause, the plaintiff produced and read in evidence an ^{*116]} entry made on the 25th of February ^{*1778}, in the name of Ephraim Dunlap, for 400 acres of land in the point between Tennessee and Holston rivers. Also a grant to said Dunlap, issued in virtue of, and founded upon, said entry, under the great seal of the state of North Carolina, dated the 29th of July 1793; which grant was duly registered. The plaintiff also produced and read in evidence, a deed of conveyance, with the certificates of probate and registration indorsed, from Dunlap, the grantee, to John Rhea. Also a deed of conveyance from said Rhea to the lessor of the plaintiff.

It was also proved, that the land lies within the boundaries of what was the state of North Carolina, at the time of making said entry, and within the county of Washington; likewise, within the territory ceded by the state of North Carolina to the United States, in 1789, and within the now county of Blount, in the district of East Tennessee; that it lies on the south side of Holston river, and between Big Pigeon and Tennessee river, and west of a line described in the 5th section of the act of the general assembly of North Carolina, passed in April 1778, ch. 3. Also, within the tract of country