*The Ship Octavia: Nicholls *et al.*, Claimants.

Burden of proof.

A question of fact under the non-intercourse act of the 28th June 1809. On an information for a forfeiture, where the claimants assume the *onus probandi*, the rule is, not to acquit, unless the defence be proved beyond a reasonable doubt.

Appeal from the decree of the Circuit Court for the Massachusetts district, affirming the decree of the district court, condemning said vessel.

This ship was seized in the port of Boston, in October 1810; and the information alleged, that the ship, in March 1810, departed from Charleston, South Carolina, bound for a foreign port, to wit, Liverpool, in Great Britain, with a cargo of merchandise on board, without a clearance, and without having given the bond required by the non-intercourse act of the 28th of June 1809, ch. 9, § 3. The claimants admitted, that the ship proceeded with her cargo (which consisted of cotton and rice) to Liverpool; but they alleged, that the ship originally sailed from Charleston, bound to Wiscasset, in the district of Maine, with an intention there to remain, until the non-intercourse act should be repealed, and then to proceed to Liverpool. That by reason of bad winds and weather, the ship was retarded in her voyage, and on the 10th of May 1810, while still bound to Wiscasset, she spoke with a ship from New York, and was informed of the expiration of the non-
*21] intercourse act, and thereupon, changed her course, and *proceeded to Liverpool. The manifest stated the cargo to have been shipped by sundries, consigned to Mr. P. Grant, Boston.

The *Attorney-General* and *Law* argued the case for the appellees, on the facts, and cited the case of *The Wasp*, 1 Gallis. 140, which was an information under the same section of the same act. They contended, that the burden of proof was thrown upon the claimant, inasmuch as the law requires a bond to be given, if the ship was bound to a port then permitted, conditioned that she should not go to a prohibited port.

Dexter, for the appellants and claimants, stated, that the suit was not founded on the same act with that in the case of *The Samuel* (*ante*, p. 9); but that the same objection existed as to the form of the process. It is true, the judiciary act of the 24th of September 1789, c. 20, § 9, has declared, that certain causes shall be causes of admiralty and maritime jurisdiction, but it does not, therefore, follow, that a forfeiture created by a new statute shall be enforced by the same process. The arguments urged against it in the cases subsequent to that of *The Vengeance*, 3 Dall. 297, have always been answered by the mere authority of that case. But the decision in that case ought to be re-examined, because it affects the right of trial by jury, and because the argument was very imperfect. The word "including," in the judiciary act, ought to be construed cumulatively. It
*22] provides, that the district *courts shall "have exclusive original cognisance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United

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on a reference to them from the privy council. The proceeding in this case is called "a libel of information;" showing, that libel and information in the admiralty are synonomous terms. The Fabius, 2 Rob. 245.

States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas," &c. The presumption arising from the collective use of debt, information and indictment, in the non-intercourse act, is, that they relate to a common-law jurisdiction. The word *information* cannot be synonymous with *libel*, because the first is a common-law, the second a civil-law proceeding. A common-law proceeding may be applied by statute to admiralty suits. The statute, 28 Hen. VIII., c. 15, prescribes a common-law process (indictment) for offences triable in the admiralty.

STORY, J.—That was the high commission court.

Dexter answered, that he was aware of it; but that a suit may be a cause of admiralty and maritime jurisdiction, and yet triable by common-law process. (*a*)

*STORY, J., delivered the opinion of the court.—This case depends on a mere question of fact. After a careful examination of the evi- [*23
dence, the majority of the court are of opinion, that the decree of the circuit court ought to be affirmed. It is deemed unnecessary to enter into a formal statement of the grounds of this opinion, as it is principally founded upon the same reasoning which was adopted by the circuit court, in the decree which is spread before us in the transcript of the record.

Decree affirmed, with costs. (*b*)

(*a*) Before the statute 28 Hen. VIII,, c. 15, the admiralty had a very extensive criminal jurisdiction, which seems to have been coeval with the very existence of the tribunal, in which it proceeded, not according to the civil law, and other its own peculiar codes, but by the process of indictment, found by a grand jury, and a *capias* thereupon delivered by the admiral or his lieutenant, to the marshal of the court or the sheriff. See Clerke's Praxis, Roughton's Articles, cited therein, 122, note c. 16, 17; Exton 32; Selden *de Dominio Maris*, lib. 2, c. 24, p. 209; The Rucker, 4 Rob. 73, note a. This criminal jurisdiction, independent of statutes, still exists; and all offences within it, which are not otherwise provided for by positive law, are punishable by fine and imprisonment. See 4 Black. Com. 263; Browne's Civ. & Adm. Law, App'x, No. 111. The statute 28 Hen. VIII., c. 15, provides, that all treasons, felonies, &c., on the seas, or where the admiral hath jurisdiction, &c., shall be tried, &c., in the realm, as if done on land; and commissions under the great seal shall be directed to the admiral, or his lieutenant, and three or four others, &c., to hear and determine such offences, after the course of the laws of this land for like offences done in the realm. And the jury shall be of the shire within the commission. Stat. 33 Geo. III., c. 66. Under this provision, the sessions at the Old Bailey are now held, at which the judge of the High Court of Admiralty presides, and common-law judges are included in the commission. But it is held, that this statute does not alter the nature of the offence, which shall still be determined by the civil law, but the manner of trial only. (Hale's P. C.; 3 Inst. 112.)

(*b*) As the opinion of the court below is referred to, for the grounds upon which its decree was affirmed, it may seem fit here to insert so much of that opinion as developes the principles and rules of evidence applied by the court in cases of this nature. After stating the facts of this case, the learned judge proceeds:

"Since I have had the honor to sit in this court I have prescribed to myself certain rules, by the application of which, my judgment, in cases of this nature, has been *uniformly governed. 1st. Where the claimants assume the *onus probandi* (as [*24
they do in this case), not to acquit the property, unless the defence be proved

*The Mary and Susan: G. & H. Van Wagenen, Claimants.

Capture as prize of war.

Goods, the property of merchants actually domiciled in the enemy's country at the breaking out of a war, are subject to capture and confiscation as prize.

The fact, that the commander of a private armed vessel was an alien enemy, at the time of the capture made by him, does not invalidate such capture.

The President's instructions of the 26th August 1812, prohibiting the interruption of vessels coming from Great Britain, in consequence of the supposed repeal of the British orders in council, must have been actually known to the commanders of vessels of war, at or before the seizure, in order to invalidate captures made contrary to the letter and spirit of the instructions.

Appeal from the Circuit Court for the district of New York. The goods in question were part of the cargo of the ship Mary and Susan, a merchant vessel of the United States, which was captured, on the 3d of September 1812, by the Tickler, a private armed vessel of the United States. The cargo was libelled as prize of war; this portion was claimed by Messrs G. & H. Van Wagenen, and condemned in the district court. In the circuit court, this sentence was reversed, and restitution to the claimants was ordered; from which decree, the captors appealed to this court.

The cause having been heard in both the courts below, on the documentary evidence found on board, the original order for the goods did
*26] not appear. That they were shipped in consequence of *orders, was however, sufficiently proved, by the letters addressed to the claimants, and the other papers which accompanied them. These were, 1. An invoice headed in the words following:

"Birmingham, 8th July 1812: say, 15th March 1811.

"Invoice of fourteen casks and four baskets of hardware, bought by

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beyond a reasonable doubt. 2d. If the evidence of the claimants be clear and precisely in point, not to indulge in vague and indeterminate suspicions, but to pronounce an acquittal, unless that evidence be clouded with incredibility, or encountered by strong presumptions of *mala fides*, from the other circumstances of the case." He also alludes to the absence of documentary evidence to support the defence set up by the clamants, as affording an example of the application of these rules, as well as of another rule equally important. "What strikes me as decisive against the defence, is the entire absence of all documents respecting the cargo. Bills of lading, letters of advice, or general orders must have existed. If the cargo had been destined for Boston only, there would not have been so much difficulty. But the defence shows its destination ultimately for Liverpool. Where, then, is the contract of affreightment, the bills of lading, the letters of advice, and the correspondence of the shippers, or of Mr. P. Grant? Can it be credible, that without any authority, the master, or part-owner of the ship, should, on their own responsibility, have gone to Liverpool, without orders or consignment? That from a mere vague knowledge of the wishes of the shippers, they should place at imminent risk the whole property, without written authority to color their proceedings? There must have been papers: they are not produced. The affidavits of the shippers, of Mr. Grant, of the consignees in England, are not produced. What must be the conclusion from this general silence? It must be, that if produced, they would not support the asserted defence. At least, such is the judgment that both the common law and the admiralty law pronounces, in cases of suppression of evidence."[1]

[1] For a further decision in this case, see 1 Mason 149.