*The Elsineur: Jones, Claimant.

Documents in prize causes.

Where an inspection and comparison of original documents is material to the decision of a prize cause, this court will order the original papers to be sent up from the court below.

Appeal from the Circuit Court for the district of Georgia. In this case, which was principally a question of fact, *Pinkney* and *Charlton*, for the claimant, stated, that the condemnation in the court below was partly grounded on a comparison of certain documents in this case, with a paper invoked from *The Stackelburg*, another prize cause brought from the same court; that comparison of hands can never be evidence in a court that has not the two writings before it; and that the original papers might be brought up from the court below, in the same manner as the record is removed upon a writ of error, in England.

March 21st, 1816. The following order was made by the court:—In this case, it is ordered, that the claimant make further proof respecting the letter, dated at St. Barts, September 1st, 1813, and signed Jasper D. Blagge, which is now offered to the court; that he show where he received it, and why it has been so long suppressed. It is further ordered, that the clerk of the *440] circuit court for the district of Georgia, do, under *the direction of the judges of that court, transmit, by some safe conveyance, to this court, the original papers following, to wit, the Swedish registers of the Elsineur, of the Allemon, and the Stackelburg; the burgher's brief to Peter Hofstrom, and to Runnels, and the bill of sale to Blagge. The claimant is also required to state the persons to whom the vessel and cargo were consigned at Bath, in the voyages to that place, together with the detailed account of those voyages.

The Hiram: Cornthwait *et al.*, Claimants.

Enemy's license.

An agreement in a court of common law, chancery or prize, made under a clear mistake, will be set aside.[1]

Navigating under a license from the enemy, is cause of confiscation, and is closely connected in principle with the offence of trading with the enemy; in both cases, the knowledge of the agent will affect the principal, although he may, in reality, be ignorant of the fact.

Appeal from the Circuit Court for the district of Massachusetts. This was a vessel laden with flour, and bound from Baltimore to Lisbon, captured, and finally condemned by this court, at February term 1814, for sailing under a license from the enemy. (8 Cr. 444.) The present case was that of the claimants of a greater part of the cargo.

*441] The ship was owned, *and the license procured, by Samuel G. Griffith, a citizen of the United States. Separate bills of lading were at first signed by the master, one for each shipper, and separate letters of instruction were given to Patterson Hartshorne, the supercargo. But, in the expectation, as was alleged, that in case of detention, the delay and

[1] Daniel *v.* Mitchell, 1 Story 172. But the mistake must be established by testimony free from all suspicion. Willett *v.* Fister, 18 Wall. 91.

expense would be less considerable, if the cargo appeared to be the property of one individual, than if there should be several small claims, one general bill of lading was signed to the owner of the ship, and one general letter of instruction was given, in his name, to the supercargo, so as to make the whole cargo appear to be owned by Mr. Griffith, the owner of the ship, and of a small part of the cargo.

At the May term 1814, of the circuit court, the property of the claimants was condemned by that court, upon the ground, that their counsel had, at the preceding term, entered into an agreement with the captors, that the decision of the supreme court, as to Griffith's claim, should conclude the rest. Of this agreement, the circuit judge had made a memorandum in his minute-book, but it was not entered on the records of the court, until the May term, at which condemnation was pronounced, when it was admitted by the claimants' counsel to have been made, and was recorded. From this last sentence of condemnation, an appeal was taken to this court.

Pinkney, for the appellants and claimants.—1. The claimants of the cargo cannot be concluded by the verbal agreement in the court below, so as to exclude them from further proof. The agreement was, *that the decision of this court, as to the ship, should bind the fate of the cargo, and was entered into, upon a mistaken supposition that the question was the same in both cases. The court of chancery will grant a rehearing, though the parties have entered into an order by consent to abide the decree, and not to appeal. *Buck* v. *Turcott*, 2 P. Wms. 242; 1 Vern. 274; and see 2 Ves. 458. If a court of equity will do it, why will not a court of prize, which is still more liberal in its practice, do the same thing? [*442

2. Although further proof was ordered by the court below, it did not apply to the claimants' case, as distinguishable from that of the ship-owner, and they may, and ought to, be let in to further proof again. *The Harmony*, 2 Rob. 322; *The Franklin*, 6 Ibid. 132.

3. The principle on which a court of prize proceeds in confiscating the property of a citizen, for the offence of sailing with a license from the enemy, has its root in the municipal code. It is but enforcing the rule of municipal law, as to allegiance, in a court of the law of nations. Therefore, the party cannot be liable to a penalty *civiliter*, unless he would have been liable *criminaliter:* the presumption of law is, indeed, against the party, but it is a presumption which will bend to fact; and there must be an actual participation, by knowing the fact, or a virtual participation, in neglecting to make the proper inquiries. If the fact of trading with the enemy be a misdemeanor, the *scienter* must be laid in the indictment; and it must be a misdemeanor, or a court of prize cannot *furnish it. Resistance to the right of search by a neutral, ignorant of the existence of war, does not import confiscation. *The St. Juan Baptista*, 5 Rob. 33. Why? Because there was no intention to commit an offence. Ignorance of one part-owner of a ship, where the owners are not general partners, will exempt his share from the penalty of confiscation, for carrying contraband. *The Jonge Tobias*, 1 Rob. 330. Spoliation of papers, by the master, does not preclude the owners from further proof, though it does preclude him. 2 Rob. 108. The owner of the cargo is not held responsible for the master's breach of blockade, unless the blockade was known to exist, before the voyage commenced. [*443

The Adonis, 5 Rob. 262; *The Shepherdess*, Ibid. 267. There must be the intention as well as the act of trading with the enemy, to constitute guilt. The *continentiam delicta* is here wanting; the ship-owner was not the agent of the claimants for this purpose; and supposing the supercargo to have been their agent, where will be found the application of the maxim *respondeat superior?* In the prize court, when acting in the sphere of its proper jurisdiction of cases arising under the *jus gentium?* but this is the case of the property of a citizen taken in violation of his local allegiance. The court must, therefore, adopt the maxim of domestic jurisprudence, that guilt is never to be presumed, but always to be proved.

Dexter, for the respondents and captors, in reply.—The agreement in the court below, that the case of *the present claimants should abide that
*444] of the ship-owner in this court, was acknowledged by both parties, and recorded *nunc pro tunc*. It is impossible, under the circumstances of this case, that it should be a fact, that the owners of the cargo did not know the existence of the license; and therefore, it is impossible for them to prove their ignorance of it. The claimants are affected with knowledge, by the knowledge of their agents—the ship-owner and the supercargo; but it is superfluous to discuss the question of law, the facts are so clear.

Marshall, Ch. J., delivered the opinion of the court.—When the claimants in this case applied to the circuit court to be let in to further proof, for the purpose of showing their ignorance of the fact, that the Hiram sailed under the protection of a British license, the judge of that court considered the agreement of the parties, that these causes should depend on the fate of Griffith's claim, under which agreement, the sentence, that would otherwise have been pronounced against them, was suspended, until the decision of the supreme court on that claim should be made, as having the same validity as if that agreement had been entered, at the time, on the records of the court. In that opinion, there having been no doubt respecting the fact, this court concurs.

But this court is also of opinion, that if the agreement was made, under a clear mistake, the claimants ought to be relieved from it, where it could be done without injury to the opposite party. If a judgment be confessed
*445] *under a clear mistake, a court of law will set that judgment aside, if application be made, and the mistake shown, while the judgment is in its power. An agreement, made a rule of court, to confess a judgment, cannot be stronger than a confession itself; and, of course, a party will not be compelled to execute such an agreement, but will be allowed to show cause against the rule, in a case where it was plainly entered into under a mistake. If the judgment be no longer in the power of a court of law, relief may be obtained in chancery. Still more certainly will an agreement, entered into in a suit originally pending in a court of chancery, be relaxed, or set aside, if it be proved to the court, to have been entered into under a mistake. The case cited from Peere Williams is directly in point.

These principles are of universal justice, and of universal obligation. They cannot apply with less force to causes depending in prize courts, than to causes depending in other courts. The propriety, then, of rejecting further proof in this case, and of condemning the property claimed by the appellants, will depend on the clearness with which they show the mistake

under which the agreement was made, and on their ability to support their case, if that agreement be set aside. If a real and substantial difference exists between the case of the present claimants, and that formerly decided by this court, there will not be much difficulty in yielding to the suggestion, supported, as it is, by the proof now offered, that this agreement was made without knowledge of that difference, and consequently, by mistake. *But the question then occurs, whether restitution ought to be decreed to them, if the obligation of the agreement be removed. [*446

The claimants allege, that, in point of fact, they did not know that the Hiram sailed under a British license, and the proof they offer goes far in supporting this allegation. It is admitted, that ignorance of this fact will save from the forfeiture incurred by it, unless the claimants have such constructive notice as will preclude them from showing the want of actual notice. It has been argued, that the transaction rendered Griffith the agent of the other shippers, so as to infect their claims with his knowledge; that by consenting that their property should be shipped in his name, it becomes liable to all the risks to which it would have been exposed, had it been actually his. It has been also argued, that the supercargo is clearly the agent of the shippers, and that his knowledge of the license being on board is, constructively, their knowledge. The counsel for the claimants endeavors to rescue his clients from the effect of this constructive notice, by contending, that the principle of *respondeat superior* can never apply to a case of a criminal nature; that a license works a forfeiture, because it is a breach of allegiance—an offence which cannot be imputed to a person having no knowledge of the criminal act which constitutes the breach of allegiance: and that this principle has, in prize courts, been applied to cases punishable under the law of nations; not to offences against the government of the captor and captured.

*The court considers the sailing, under an enemy's license, as closely connected, in principle, with the offence of trading with the enemy; in which case, it is believed to be incontrovertible, that the knowledge of the agent would affect the principal, although he might, in reality, be ignorant of the fact.(a) Upon this ground, the sentence of the circuit court is affirmed, with costs. [*447

Sentence affirmed.

(a) Thus, where a shipment was made to the enemy, by the partners of a house of trade, resident in a neutral country, without the knowledge or consent of a copartner, resident in the belligerent state, his share was held liable to confiscation. The Franklin, 6 Rob. 129. And it appears, from that case, that even an inactive or sleeping partner (as it is termed) has been held, by the Lords of Appeal, incapable of receiving restitution in a transaction in which he could not lawfully be engaged, as a sole trader. Ibid. 131.