APPENDIX.

NOTE I.

Extract from the Preface to Bibb's Reports of Cases in the Court of Appeals of Kentucky.

"THE rules of landed property in Kentucky are, in an eminent degree, the creatures of the court—a species of judicial legislation. The disputes between claimants under the laws of Virginia have grown, principally, out of two requisitions in the statute of 1779. The one requiring of those claiming rights of settlement, or of pre-emption, to obtain certificates from the commissioners appointed for that purpose, mentioning the cause of the claim, the number of acres, and 'describing, as near as may be, the particular location;'(*a*) the other, requiring the holders of land-warrants to lodge them with the surveyor, and in a book to be kept for that purpose, to 'direct the location thereof so specially and precisely, as that others may be enabled, with certainty, to locate warrants on the adjacent *residuum*.'(*b*) The text was short and novel: the commentary was left to the direction of the judges. The ancient depositories of the law gave but little light to guide the exercise of this discretion. The rules for construction of deeds gave some aid; but this was far short of what was wanted. For a time, unfettered by precedent, undirected by rule, each decision was but fact—multiplication of facts gave precedents, and precedents have grown into doctrine. The statute requires first, a description *of the particular tract, specially and precisely; that is to say, [*490
that the description shall apply, certainly, to one identical tract, and not uncertainly, or equally to two, or divers. Next, that this description shall enable others to find and know the identical tract intended. The statute intends the entry in the surveyor's book, to be notice to all persons of the appropriation. The question arising out of the entry is, does it contain that description which was sufficient to operate as notice of an appropriation of a particular tract? This question is analyzed into the identity and notoriety of the objects referred to in the location. That is to say, the entry must contain proper allusion and reference to known and certain objects, which shall serve as *indices* to the particular tract of land intended to be appropriated.

"Identity is absolutely necessary in the investigation of every question of *meum et tuum*. The propriety of making identity one subject of inquiry in testing entries, needs no explanation. But in deciding upon what description is sufficient to give identity or individuality to the location, various rules have been established, whereby entries, apparently admitting of diversity of figures, have been helped, and rendered identical by construction. A location, "to include his cabin," in matter of facts, admits

(*a*) LL. V Chan. Rev. 93; 1 Litt. E. L. K. 402-3. (*b*) Chan. Rev. 95; 1 Litt. 410.

of divers surveys, each of which may inclose the cabin, and yet not have an acre in common. If the locator could take any one of these circumjacent tracts, as whim or fancy may direct, it is evident, that, until this choice was made known, by some act posterior to his entry, others could not know the adjacent *residuum*, nor appropriate it with certainty. But, as matter of law, the courts have established as a rule, in such cases, that the survey shall be in a square, with lines due north or south, east and west, the cabin at the intersection of the diagonals. Thus (the quantity being expressed), when the particular cabin is ascertained, the location is reduced to mathematical certainty, appropriate to one precise identical tract. This is one example, among many, of which you will read in these reports.

"The identity of the tract being ascertained, the inquiry is, whether the description was, at the date of the location, with the surveyor, sufficient to enable others to find and know it? *This branch of the subject has called forth many decisions, and
*491] embraces the doctrine of notoriety, so frequently recurring in questions upon conflicting claims.

"This rule is, that the location must contain such expressions and allusions to objects, natural or artificial, as would enable others, using reasonable diligence of inquiry, to ascertain the particular tract intended to be appropriated. A reference to obscure objects, known to the locator only, without proper directions for finding them, could not satisfy the requisitions of the statute, although the figure of the land could be precisely described, if the beginning could be ascertained. For such reference to obscure objects, although it might enable the locator himself to appropriate the adjacent *residuum*, would not enable others to do it. This required reference to known objects by their known appellations, or other distinguishing characteristics, is essential to every geographical description, and is founded in the very constitution of language, as the medium of communicating the ideas of one man to another. The geographer must draw his equator, and establish and make known his first meridian, before he can describe, intelligibly, the relative positions of the different parts of the earth, and of the countries he describes. The surveyor must have his first positions, from whence to take his bearings and distances, his latitude and departure. In language, the sign and the thing signified by articulate sounds, must be agreed upon, and mutually made known, before men can converse intelligibly one with another. The substances must be pointed out, and the names repeated, before the child, or the foreigner, understands what we mean by land, water and cabin. There is no natural connection between words and the ideas they are intended to stand for; otherwise, there would be but one language among all men. But sounds, as the representatives of ideas, are of mere arbitrary imposition; therefore, language is properly defined 'a system of articulate sounds, significant by compact.' This compact is established by common consent, use and custom, in every country. It is this established use, custom and common consent which makes names, words and terms, mark and signify particular ideas. All men, therefore, who speak intelligibly *to others, must use words which stand for
*492] ideas, and employ those words according to their common use and acceptation in the language of the country. A man who would use three to signify eight would deceive his hearers. He who would speak to others of substances and objects, by sounds never before used to signify those things, without any explanation to make known his meaning, would be guilty of an abuse of language, by uttering empty sounds and nothing else. From known ideas, the mind may be conducted to the knowledge of things new, and before unknown. But from things unknown, to attempt to describe things more unknown, so far from helping us to knowledge, serves only the more to perplex and bewilder the mind. A locator using words which stand for ideas in his own mind, but which do not convey the same ideas, or no certain ideas, to the mind of others, has not complied with the requisitions of the statute. Should he allude to a water-course only, by a name unheard of by others, and arbitrarily imposed by himself, he does not write intelligibly to others. So, 'to include a tree in a forest, whereon he has marked the initials of his name,' may identify the land in his own mind, but does not communicate to others a competent idea of the intended appropria-

tion. Locators must have reference to objects known to others by their usual names, or by terms in common use and acceptation, describe and make known the objects intended.

"Notoriety is either absolute or relative. Absolute, as where the object is known so generally that, according to the usual courtesies and intercourse among men, the presumption is irresistible, that any one using ordinary inquiry might have been conducted to the place, as Lexington, Bryant's Station, the Lower Blue Licks, &c. Relative, as where the particular object is not actually known, but is ascertainable by reasonable diligence—as one mile east of the Lower Blue Licks &c.

"As the record in the books of entries is to have the effect of general notice to all holders of warrants, the entry must contain apt reference to objects known to the generality of persons acquainted in the neighborhood of the intended appropriation. Neither will the proof, that the particular conflicting claimant had knowledge of the appropriation intended, suffice to *help out an entry in a controversy with him, as is adjudged in several cases, and, I think, very properly. 1st. That [*493 would be to make the entry valid as to some, and invalid as to others, as is more fully explained in Craig *v.* Pelham, *Sneed* 286–7. 2d. That would be to test the entry, not by the record, but by matters out of the scope of the record. 3d. It would put men's estates upon a tenure too slender and uncertain, without any sufficient safeguard against the perjury or mistakes of a solitary witness; whereas, evidence of notoriety, being an appeal to general understanding and knowledge of the people of the neighborhood, is capable of being rebutted and disproved, if untrue, by calling upon other men who had equal opportunities of information on the subject. 4th. To admit proof that a particular person understood the entry, would be to test the signification and propriety of the language of the entry, not by the standard of general use and common acceptation, but by the particular ideas of two individuals.

"Notoriety must have been co-existent with the entry. The location, when made, if valid, is to stand for notice of appropriation from that time. Words conveying to others no precise idea of appropriation, at the time used, because they were not conformable to objects then in existence; or, because the names and terms employed had not then been annexed, in common use and understanding of the neighborhood, to any individual object, being signs without anything signified, cannot, without abuse of language and of truth, be made to apply to after-made objects, or after-acquired names. 'A. enters for 400 acres, to include his cabin;' at the time, he had no cabin, and therefore, his entry was null, appropriating no land: one year afterwards, A. builds a cabin. Ought he to be permitted to hold land around it, by virtue of his entry before the fact? If so, A. has had one year to make his choice of the country. To suffer him to hold by relation to the time of his entry, would be a fraud upon intermediate purchasers. To suffer him to hold against after purchasers, would be, 1st. To make the same entry valid and invalid; good against some persons, and null as to others, of which enough has been said before. 2d. To refer his claim, not to the the truth of the recorded entry, but to mere occupancy. 3d. To make an act not valid in the *beginning, grow valid and legal in the lapse, which is contrary to a maxim in law. '*Quod* [*494 *ab initio non valet, in tractu temporis non convalescit.*'(*a*) Noy's Max. 9. In illustration of the maxim, Noy putteth the case of A. 'remainder limited to A., the son of A. B. Having no such son, and afterwards a son is born to him, whose name is A., during the particular estate,' the remainder is void, whether the entry alluded to objects not then existing, or employed names or terms, not then standing for signs of the existing objects, or signs of ideas among the generality of those acquainted in the neighborhood, the reason is the same for denying validity to the entry by means of after notoriety. To test the entry by any other standard than the significancy or insignificancy, of the words at its date, would produce an inconstancy and shifting of locations. Objects lose their old names and acquire new ones. Names of streams are transposed

(*a*) 4 Co. 61; 10 Ibid. 62; Plowd. 344.

in the progress of time, and of the settlement of the country. Upon the doctrine that after notoriety should apply to a previous entry, the identity and validity of entries would be referred, not to one uniform standard expressed in the face of each entry, but to perplexed and different standards, according to the dates of the entries happening to conflict. Thus, the date of a subsequent conflicting entry, would make a part of a prior entry, and affect its validity or invalidity."

NOTE II.

On the Practice in Prize Causes.

In some of the district courts of the United States (to which courts the exclusive jurisdiction in the first instance belongs) *great irregularities have crept into the practice in prize causes. These irregularities have been censured at the bar, and occasionally noticed, with expressions of regret, by the supreme court. It is hoped, therefore, that an attempt to sketch an outline of the regular practice of prize courts, in some of the more important particulars, may not be without use to the profession. This outline will be principally copied from the rules of the British courts, which, so far as cases have arisen to which they could apply, have been recognised and enforced by the supreme court of the United States; and for the most part, are conformable with the prize practice of France, and other European countries, as will appear by a reference to the laws and treaties quoted in the margin. The letter of Sir William Scott, and Sir John Nicholl, to Mr. Jay, written in September 1794, which is printed in the appendix to Chitty's Law of Nations (American edition), and Wheaton on Captures, affords, so far as it goes, a very satisfactory and luminous view of the subject. Something more in detail, however, may be desirable to those who are not familiar with the admiralty practce.

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As soon as a vessel or other thing captured as prize, arrives in our ports, notice should be given thereof by the captors to the district judge, or to the commissioners appointed by him, that the examinations of the captured crew, who are brought in, may be regularly taken in writing, upon oath, in answer to the standing interrogatories. These are usually prepared under the direction of the district judge, and should contain sifting inquiries upon all points which can affect the question of prize. The standing interrogatories used in the English high court of admiralty (1 Rob. 381), have been drawn up with great care, precision and accuracy, and are an excellent model for other courts. They were generally adopted during the late war, by the district judges in the principal states, with a few additions, and scarcely any variations. The examinations upon these interrogatories are rarely taken by the district judge in person, for in almost all the principal ports within his district, he appoints standing commissioners for prize proceedings, upon which this duty devolves.

It is also the duty of the prize-master, to deliver up to the district judge all the papers and documents found on board and, *at the same time, to make an affidavit that they are delivered up as taken without fraud, addition, seduction or embezzlement. (a)

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In general, the master and principal officers, and some of the crew of the captured

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(a) Aussi tôt que la prise aura été amenée en quelques rades ou ports de notre royaume, le capitaine qui l'aura faite, s'il y est en personne, sinon celui qu'il en aura chargé, sera tenu de faire son rapport aux officiers de l'amirauté; de leur représénter et mettre entre les mains les papiers et prisioniers; et de leur déclarer le jour et l'heure que le vaisseau aura été pris; en quel lieu ou à quelle hauteur; si le capitaine a fait refus d'amener les voiles, ou de faire voir sa commission ou son congé, s'il attaque ou s'il s'est défendu; quel pavillon il portait, et les autres circonstances de la prise et de son voyage. Ordonnance de la Marine 1681, tit. 9, art. 21; Declaration du 24 Juin 1778, art. 42. See also the Swedish Ordinance of 1715, Coll. Mar. 168.

vessel, should be brought in for examination. This is a settled rule of the prize courts,(a) and was, during the late war, enforced by the express instructions of the president. The examination must be confined to persons on board at the time of the capture, unless the special permission of the court is obtained for the examination of others. (The Eliza and Katy, 6 Rob. 185 ; The Henrick and Maria, 4 Ibid. 43, 57.) In order to guard as much as possible against frauds * and mis-statements from after contrivances, the examinations should take place as soon as possible after the [*497 arrival of the vessel, and the witnesses are not allowed to have communication with, or to be instructed by counsel. The captors should also introduce all their witnesses in succession; for if the commissioners have taken the despositions of some of the crew, and transmitted them to the judge, they will not be at liberty, without a special order, to examine others who are afterwards brought by the captors before them. (The Speculation, 2 Rob. 243.) On the other hand, an equal strictness is held over the conduct of the claimants. If they keep back any one of the captured crew, for two or three days after the vessel comes into port, and then offer him, together with papers in his possession, the commissioners will be justified in not examining him. (1 Rob. 331: and see The William and Mary, 4 Ibid. 381.) The ship's papers, and other documents found on board, which are *not delivered up to the district judge, or the commissioners, before, or at the time of, the examinations, will not be admitted as [*498 evidence. (Ibid.)

Although the examinations are to be on standing interrogatories, without the instructions of counsel, yet the witnesses are produced in the presence of the agents of the parties, before the comissioners, whose duty it is to superintend the regularity of the proceedings, and protect the witnesses from surprise or misrepresentation. When the deposition is taken, each sheet is afterwards read over to the witness, and separately signed by him. (The Apollo, 5 Rob. 286.) And the commissioner should be careful, that the various answers are taken fully and perfectly, so as to meet the stress of every question, and should not suffer the witness to evade a sifting inquiry, by vague and obscure statements. If the witness refuse to answer at all, or to

(a) Thus, in a treaty of amity and commerce between Charles VIII., king of France, and Henry VII., of England, concluded at Boulogne, the 24th of May 1497, and which may be considered as evidence of the prize practice of Europe at that period, is contained the following article: "Simili quoque juramento solemniter præstando promittent, quod de qualibet præda, captura, manubiis, sive spoliis, adducent duos aut tres viros in capto navi præcipuum locum obtinentes, ut magistrum, submagistrum, patronum, aut hujusmodi conditionis, quos admiraldo, vice-admiraldo, aut eorum officiariis exhibebunt, ut per eosdem, aut eorum alterum, debite examinetur ubi, super quibus, et qualiter, navis sive bona capta sint; nec facient aut fieri permittent aliquas prædarum, spoliorum, mercium, aut bonorum, per eos capiendorum divisiones, patitiones, traditiones, permutationes, alienationesve, priusquam se viros captos, bona et merces, integre dominis, admiraldo, vice-admiraldo, aut eorum vices gerentibus repræsentaverint; qui de illis disponi, si æquum putabunt, permittent, alias nihil hujusmodi permissuri. Coll. Mar. 95.

De toutes les prises qui se feront en mer, soit par nos subjects, ou autres tenans nostre party, et tant soubs ombre et couleur de la geurre q'autrement, les prisonniers ou pour les moins deux ou trois des plus apparentes d'iceux seront amenez à terre, devers nostre dit admiral, ou son vis-admiral, ou lieutenant, pour, au plustost que faire se pourra, estre par lui examinez et ouys, avant qu'aucune chose des dits prises soit descendue; a fin de savoir le pays delà où ils seront, à qui appartiennent les navires et biens d'iceux, pour si la prise se trouve avoir esté bien faite, telle la declarer, si non, et ou il se trouveroit mal faite, la restituer a qui elle appartiendra, &c. Ordonnance de 1584, art. 33; Ord. de 1400, art 4; de 1543, art. 20; Declaration du premier Févoier, 1650, art. 9; Les officiers de l'amirauté entendront sur le faite de la prise, le maître ou commandant du vaisseau pris, même quelques officiers et matelots du vaisseau preneur, s'il est besoin. Ordonnance de la Marine 1681, tit. 9, art. 24. Si le vaisseau est amené sans prisonniers, charte-parties ni connaisemens, les officiers, soldats et équipages de celui qui l'aura pris, seront separement examinés sur les circonstances de la prise, et pourquoi le navire a été amene sans prisonniers, et seront, le vaisseau et les marchandises visités par experts, pour connoître, s'il se peut, sur qui la prise aura été faite. Ibid. art. 25.

answer fully, the commissioners are to certify the fact to the court, and, in addition to the other penal consequences to the owners of the ship and cargo, from a suppression of evidence, he will be liable to close imprisonment for the contempt. The witnesses should be examined separately, and not in presence of each other, so as to prevent any fraudulent concert between them.

As soon as the examinations are completed, they are to be sealed up and directed to the proper district court, together with all the ship's papers, which have not been already lodged by the captors in the registry of the court.

It is upon the ship's papers, and depositions thus taken and transmitted, that the cause is, in the first instance, to be heard and tried. The Vigilantia, 1 Rob. 1.(*a*) *499] This is not a mere *matter of practice or form: it is of the very essence of the administration of prize law; and it is a great mistake, to admit the common-law notions, in respect to evidence, to prevail in proceedings which have no analogy to those at common law. In some few of the district courts, it was not unusual, during the late war, to allow the witnesses to be examined, orally, at the bar of the court, long after their preparatory examinations had been taken, and full opportunities had been given to enable the parties to shape any new defence, or explain away any asserted facts. This was, unquestionably, a great irregularity, and, in many instances, must have been attended with great public mischiefs. By the law of prize, the evidence to acquit or condemn, must, in the first instance, come from the papers and crew of the captured vessel. The captors are not, unless under peculiar circumstances, entitled to adduce any extrinsic testimony. It is, therefore, of the last importance, to preserve the most rigid exactness as to the admission of evidence, since temptations would otherwise be held out to the captured crew, to defeat the just rights of the captors, by subsequent contrivances, explanations and frauds. There can be no honest reason why the whole truth should not be told by the captured persons, at the first examination; and if they then prevaricate, or suppress important facts, it must be from motives which would materially impair the credibility of their subsequent statements. Where the justice of the case requires the admission of new evidence, that may always be obtained, except where, by the rules of law, or the misconduct of the parties, the right to further proof has been forfeited. But whether such further proof be necessary or admissible, can never be ascertained, until the cause has been fully heard upon the facts, and the law arising out of the facts, already in evidence. And in the supreme court, during the whole of the late war, no further proof was ever admitted, until the cause had been first heard upon the original evidence, although varions applications were made to procure a relaxation of the rule. We shall have occasion hereafter to state some of the cases in which further proof is allowed or denied.

*500] *If a person wishes to procure the restitution of any property captured as prize, it is necessary that he should, after the prize libel is filed, and at or before the return of the monition thereon, or time assigned for the trial, enter his claim for such property before the proper court. And if the captors omit, or unreasonably delay to institute prize proceedings, any person claiming an interest in the captured property may obtain a monition against them, citing them to proceed to adjudication; which if they omit to do, or show cause why the property should be condemned, it will be restored to the claimants, proving an interest therein. And the same process is often resorted to, where the property is lost or destroyed, through the fault or negligence of the captors, in order to obtain a compensation in damages for the unjust

(*a*) Il est ordonné, &c. que pleine et entière foi sera ajoutée aux dépositions des capitaines, matelots et officiers des vaisseaux pris, s'il n'y a contre eux aucun reproche valable proposé par les réclamateurs, ou quelque preuve de subornation et de seduction. Réglement du 26 Octobre 1692. Veut que dans aucun cas, les piéces qui pourraient être rapportées, après la prise des bâtimens, puissent faire aucune foi, ni être d'aucune utilité, tant aux propriétaires desdits bâtimens q'uá ceux des marchandises qui pourraient avoir été chargées: Voulant qu'en tout occasions l'on n'ait égard qu'aux seules piéces trouvées abord. Réglement du 26 Juillet 1778. See also the Swedish Ordinance of 1715, art. 7. Coll. Mar. 169.

seizure and detention. (The Betsey, 1 Rob. 93; The Mentor, Ibid 181; The Huldah, 3 Ibid. 239; The Der Mohr, Ibid. 129; The George, Ibid. 212; The William, 4 Ibid. 215; The Susanna, 6 Ibid. 48.) The claim should be made by the parties interested, if present, or, in their absence, by the master of the ship, or some agent of the owners. A mere stranger will not be permitted to interpose a claim merely to speculate on the chances of an acquittal.(*a*) The claim must be accompanied by an affidavit, stating briefly the facts respecting the claim and its verity. This affidavit should be sworn to by the parties themselves, if they are within the jurisdiction. But if they are absent from the country, or at a very great distance from the place where the court is held, the affidavit may be sworn to by an agent. Before a claim is made, and affidavit put in (which should always be special, if the case stands on peculiar grounds), it is not permitted to the parties to examine the ship's papers, and the preparatory examinations, in order to shape their claims; for this might lead to great abuses. *But if it be necessary to ascertain the particulars of a claim, the court will, upon a special application, suffer so many of the papers to be examined as directly relate to such claim; but a sufficient reason is always expected to be shown, on affidavit, to sustain such an application. (The Port Mary, 3 Rob. 233.) It is a general rule, that no claim is to be admitted, which stands in entire opposition to the ship's papers and to the preparatory examinations. (The Vrow Anna Catharina, 5 Rob. 15, 19; La Flora, 6 Ibid. 1.) But this only applies to cases arising during the war, and not to cases arising before the war. (The Anna Catharina, 5 Rob. 15.) And it is not so inflexible as to exclude the interest of a citizen or subject, where there is an absolute necessity to simulate papers, as in the case of a trade with the enemy licensed by the state. (La Flora, 6 Rob. 1.) It is also a general principle, that no citizen or subject can be admitted to claim in a prize court, where the transaction, in which he is engaged, is in violation of the municipal laws of his own country. (The Walsingham Packet, 2 Rob. 77; The Etrusco, 4 Ibid. 262, note; The Cornelis and Maria, 5 Ibid. 23; The Abby, Ibid. 251; The Recovery, 6 Ibid. 341.) Nor can a person be admitted to claim, where the trade in which he is taken is forbidden by the law of nations, and by the municipal law of his own country, and that where the court is sitting. (The Amedie, Edinb. Review, vol. 16, No. 21, p. 426.) Nor can an enemy interpose a claim, unless under the protection of a flag of truce, a cartel, license, pass, treaty, or some other act of the public authority suspending his hostile character. (The Hoop, 1 Rob. 196.) And, even in the case where the capture has been made in violation of the territorial jurisdiction of a neutral country, the claim for restitution must be made, not by the enemy proprietor, but the neutral government. (The Vrow Anna Catharina, 5 Rob. 15; 3 Ibid. 162, note.)

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Where no claim is interposed, it is not now usual to condemn the goods for want of a claim, until a year and a day has elapsed from the time of the return of the monition, except in cases where there is a strong presumption, and reasonable proof, that the property actually belongs to an enemy. (The Staadt Embden, 1 Rob. 26, 29. And see The Henrick and Maria, 4 Ibid. 43; Coll. Mar. 88, note.) But after a year *and a day has elapsed, condemnation goes, of course, if there be no claim interposed.(*b*)

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After a claim is once put in, it is not amendable, of course; but if an amendment

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(*a*) Il est fait très expresses inhibitions et défenses à toutes sortes de personnes de réclamer aucunes des prises faites par ses vaisseaux de guerre ou ceux des armateurs particuliers, ni faire aucune procédure, en l'amirauté, sans être au préalable, parteurs de procurations en bonne forme de ceux pour qui ils feront les reclamations, et les avoir présentées aux officiers de l'amirauté des ports ou les prises auront été conduites, à peine de six cents livres d'amende. Ordonnance du 30 Janvier 1692. Réglement du 19 Juillet 1778.

(*b*) Si par la déposition de l'equipage et la vente du vaisseau et des marchandises, on ne peut eécouvrir sur qui la prise aura été faite, le tout sera inventorié et apprécié, et mis sous bonne et sûre garde, pour être restitué à qu'il appartiendra, s'il est réclamé dans l'an et jour; sinon, partagé comme épave de la mer, également entre nous, l'amiral et les armateurs. Ordonnance de la Marine de 1681, tit. 9, art. 26.

is wanted, to correct the generality of the original claim, it will not be allowed, unless a proper case is made out, and sufficient reasons given for the admission in the first instance. (The Graaf Bernstoff, 3 Rob. 109; and see The Sally, Ibid. 179.)

It often happens, that persons whose property has been captured apply to the court for a delivery upon bail, and under a mistaken notion, that such a delivery, after an appraisement, was a matter of course, or was to be governed by the same rules as are prescribed in the case of municipal forfeitures under the act of the 2d of March 1799, c. 128. Some of the district courts have allowed such applications, before any hearing of the cause; and parties have thereby, sometimes, fraudulently obtained possession of goods at an under-valuation, where their title was totally defective, or grossly illegal. It is a settled rule of the prize court, not to deliver a cargo on bail, before the cause has been fully heard, unless by the consent of all parties; and if any inconvenience should result from this rule, as if the property be perishable, it may easily be avoided by an interlocutory sale. (The Copenhagen, 3 Rob. 178.) After the hearing, if the claimant obtain a decree in his favor, or an order for further proof, the court will listen to an application for a delivery on bail; but if his claim be rejected, or be affected with the imputation of fraudulent or unlawful conduct, *the application will not be allowed, notwithstanding an appeal is interposed. Where there is a decree of condemnation, the captors are, in general, entitled to a delivery of the property, or the proceeds thereof, upon bail.

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On an appeal to the circuit court, the property follows the appeal into that court, and is no longer subject to the interlocutory orders of the district court. It is otherwise with regard to the supreme court, whose decrees are always remanded to the circuit court for execution; and therefore, the property always remains in the custody of the latter. In cases of delivery on bail, a stipulation, according to the course of the admiralty, and not a bond, should be taken. (*a*)

*Where further proof is admissible, it may, in the discretion of the court, be by affidavits and other papers introduced without any formal allegations, or by way of plea and proof, where formal allegations are made by each party, in the nature of special pleadings; and it may be opened to the claimants only, or to the captors as well as claimants. Upon a simple order for further proof, the captors are not entitled to adduce any new evidence, unless by the special direction of the court; but upon plea and proof, both parties are at liberty to introduce new evidence to support their respective allegations, and the points put in issue. (The Adriana, 1 Rob. 313.)

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The court is, in no case, concluded by the original evidence, but may order further proof on a doubt arising from any cause or quarter (The Romeo, 6 Rob. 351); and it will sometimes direct it, where suspicion is produced by extrinsic evidence. (Ibid.) But

(*a*) Et si ab interlocutoriis dictorum judicum partes appellare contigerit, nihilominus super principale usque ad sententiam definitivam inclusive, appellationibus illis non obstantibus, procedere poterunt. Sed si sententia super bonorum restitutione seu principali feratur, illa executioni demandibitur, tractatum pacis insequendo, appellationibus etiam quibuscumque non obstantibus. Poterit tamen supplicari ad consilia principum, modo supradicta, scilicet cautione præstita ab ea parte, contra quam supplicabitur, de bonis captis restituendis, in eventum contrariæ sententiæ, et a parte supplicante, de expensis damnis et interesse, si in causa succumbunt. Traité de Paix et de Commerce, entre Charles VIII., Roi de France et de Navarre, et Henry VII., Roi d'Angleterre, 1497. Coll. Mar. 101.

Les marchandises qui no pourront être conservées, seront vendues sur la requisition des parties intéressées, et adjudgées au plus offrant, &c. Ordonnance de la Marine de 1681, tit. 9, art. 28. Le prix de la vente sera mis entre les mains d'un bourgeois solvable, pour être délivrée après le jugement de la prise, à qui il appartiendra. Ibid. art. 29. Lorsque la vente ne se fait qu'après que la prise a été declarée bonne, c'est toujours entre les mains de l'armateur que les deniers en provenans son remis, à la charge d'en compter; & afin qu'il en fût autrement, il faudroit que sa solvabilité fût bien suspecte. Valin, sur l'Ordonnance, Ibid. And according to the French practice, where restitution is decreed by the council of prizes on the original hearing, the claimants are entitled to a delivery of the property on bail, notwithstanding an appeal to the council of state, on the part of the captors. 2 Valin 335.

this is rarely done, unless there be something in the original evidence which lays a suggestion for prosecuting the inquiry further. (The Sarah, 3 Rob. 330.) And where the case is perfectly clear, and not liable to any just suspicion, the disposition of the court leans strongly against the introduction of extraneous matter, and against permitting the captors to enter upon further inquiry. (The Romeo, 6 Rob. 351.)

The most ordinary cases of further proof are, where the cause appears doubtful upon the original papers, and the answers to the standing interrogatories; and in such cases, if the parties have conducted themselves with good faith, and the error or deficiency may be referred to honest ignorance or mistake, the court will indulge them with time to supply the defects, by the introduction of new evidence. But further proof is, in no case, a matter of right, and rests to the sound discretion of the court. Further proof is, in all cases, necessary, where the master does not swear to, or give any account of he property. (The Eenroom, 2 Rob. 1; The Juno, Ibid. 1241; The Convenientia, 4 Ibid, 201.) Where the shipment, though stated to be on neutral account, is not stated to be on account of any particular person. (The Jonge Pieter, 4 Rob. 79.) Where the ship has been purchased in the enemy's country. (The Welvaart, 1 Ibid. 122.) Where there has been any loss or suppression of material papers. (The Polly, 2 Ibid. 361.) *And indeed, in all cases where the defects of the papers, the conduct of the parties, the nature of the voyage, or the original evidence, in general, induces any doubt of the proprietary interest, the legality of the trade, or the integrity of the transactions. [*505 But it is not in every case where further proof is necessary, that the parties will be permitted to introduce it; for the privilege may be forfeited by fraud or gross misconduct. And in cases where further proof is necessary, if it is not allowed, the penal consequences are as fatal, as if the property were originally hostile, since a condemnation certainly follows the denial. (The Welvaart, 1 Rob. 122; The Juffrow Anna, Ibid. 124; The Graaf Bernstorf, 3 Ibid. 109; The Eenroom, 2 Ibid. 1.) Further proof is never allowed to the claimants, where fraudulent papers have been used. (The Welvaart, 1 Rob. 122; The Juffrow Anna, Ibid. 124; The Juffrow Elbrecht, Ibid. 126.) Where there has been a spoliation of papers. (The Rising Sun, 2 Ibid. 104.) Where there has been a fraudulent covering or suppression of an enemy's interest. (The Graaf Bernstorf, 3 Ibid. 109.)(*a*) Where there is a false destination, and false papers. (The Nancy, 3 Ibid. 122; The Mars, 6 Ibid. 79.) Nor, in general, where the case appears incapable of fair explanation. (The Vrow Hermina, 1 Ibid. 163.) Or where *there has been gross prevarication, or an attempt to impose spurious claims upon the court, or such a want of good faith as shows [*506 that the parties cannot safely be trusted with an order for further proof.

If, upon further proof ordered, no proof is adduced, or the proof be defective, or the parties refuse to swear, or swear evasively, it is deemed conclusive evidence of hostile interests, or of such misconduct as authorizes condemnation. And it is a general rule of the prize court, that the *onus probandi* that the property is neutral rests upon the claimant; and if he fails to show it, condemnation ensues. (The Walsingham Packet, 2 Rob. 77; The Rosalie & Betty, Ibid. 343; The Countess of Lauderdale, 4 Ibid. 283.)

In cases where further proof is admitted on behalf of the captors, they may introduce papers taken on board of another ship, if they are properly verified by affidavit.

(*a*) Et pour ce qu'il pourroit advenir, qu'aucuns de nosdits alliez et confederez, voudroyent porter plus grande faveur à nosdits ennemis, et adversaires, que à nous, et a nosdits subjets, et à ceste cause, voudroyent dire et soustenir contre verité, que les navires pris en mer par nosdits subjets leur appartiendroyent, ensemble la marchandise, pour en fraude nosdits subjets; voulons et ordonnons, qu'incontinent âprês la prise et abordement de navire, nosdits subjets facent diligence de recouvrer la charte-partie, et autres lettres concernant la charge du navire; et incontinent a leur arrivement à terre, les mettre par devers le lieutenant de nostredit admiral, afin de cognoistre à qui le navire et marchandises appartiennent; et où ne seroit trouvée charte dedans lesdits navires, ou que le maistre et compagnons l'eussent jettée en la mer, pour en celer le verité, voulons que les dits navires ainsi pris, avec les dits bien et marchandises estans dedans soyent declarez de bonne prise. Ordonnance de 1584, art. 70, du 5 Septembre 1708, du 21 Octobre 1744, art. 6.

The Romeo, 6 Rob. 351; The Maria, 1 Ibid. 340.) And they may also invoke papers from another prize cause. (The Romeo, 6 Rob. 350; The Sarah, 3 Ibid. 330; The Vriendschap, 4 Ibid. 166.) It has even been permitted to the captors, to invoke the depositions of the claimant, given in another cause, to prove his domicil, at the first hearing, and without an order for further proof. (The Vriendschap, 4 Rob. 166.) And upon an order for further proof, the affidavits of the captors, as to facts within their own knowledge, are admissible evidence. (The Maria, 1 Rob. 340; The Resolution, 6 Ibid. 13.)

It is time to draw this note to a close, and in so doing, it is proper to inform the reader, that, although authorities are cited to support some of the positions, they will not always be found to support them in their full extent. Much of what is stated, as the general practice of prize courts, is to be gathered from lights scattered here and there in the books, and more frequently and accurately, by attendance on the arguments of prize causes, where the points are discussed by counsel, or ruled incidentally by the court.

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*507] *NOTE III.

On the Rule of the War of 1756.

The rule, commonly called the rule of 1756, has acquired this denomination, from its having been first judicially applied by the courts of prize, in the war of that period. The French (then at war with Great Britain), finding the trade with their colonies almost entirely shut off by the maritime superiority of the British, relaxed their monopoly of that trade, and allowed the Dutch (then neutral) to carry on the trade between the mother country and her colonies, under special licenses or passes, granted to Dutch ships for this special purpose, excluding at the same time, all other neutrals from the same trade. Many Dutch vessels so employed, were captured by the British cruisers, and, together with their cargoes, were condemned by the prize courts, upon the just and true principle that, by such employment, they were, in effect, incorporated into the French navigation, having adopted the character and trade of the enemy and identified themselves with his interests and purposes. They were, in the opinion of these courts, to be considered like transports in the enemy's service, and hence liable to capture and condemnation, upon the same principle as property condemned by way of penalty for resistance to search, for breach of blockade, for carrying military persons or dispatches, or as contraband of war. In all these cases, the property is considered, *pro hâc vice*, as enemy's property, as so completely identified with his interests, as to acquire a hostile character. So, where a neutral is engaged in a trade which is exclusively confined to the subjects of a country, in peace and in war, and is interdicted to all others, and cannot be avowedly carried on in the name of a foreigner, such a trade is considered so entirely national, that it must follow the hostile situation of the country.(*a*) There is all *the difference between this principle and the modern British doctrine, which interdicts to neutrals, during war, all trade not open to them in time of peace, that there is between the granting by the enemy of special licenses to the subjects of the belligerent state, protecting their property from capture in a particular trade, which the policy of the enemy induces him to tolerate, and a general exemption of such trade from capture. The former is clearly cause of confiscation, whilst the latter has no such effect.(*b*) The rule of the war of 1756 was

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(*a*) The Princessa, 2 Rob. 52; The Anna Catharina, 4 Ibid. 118; The Rendsborg, Ibid. 121; The Vrow Anna Catharina, 5 Ibid. 150. In this last case, Sir William Scott distinguishes from the ordinary colonial trade, "the strict exclusive colonial trade from the colony to the mother country, where the trade is limited to native subjects, by the fundamental regulations of the state; and the national character is required to be established by oath, as in the case of the Spanish register ships.

(*b*) See the opinion of Mr. J. Story, in the case of The Liverpool Packet, 1 Gallis. 513, 524.

founded upon the former principle, and likewise upon a construction of the treaties between Great Britain and Holland, in which, the former power contended, was conceded to the latter a freedom of commerce only as to her accustomed trade in time of peace. The rule lay dormant through the war of the American revolution; but was afterwards revived, during the war of the French revolution, and extended to the prohibition of all neutral traffic whatsoever with the colonies, and upon the coasts of an enemy.

That this is a correct representation of the nature, origin and subsequent application, of this celebrated rule of the British prize courts, will appear from its history. It cannot be pretended, that its origin can be traced, in judicial records, to an earlier source than that war from which it derives its name. It has, indeed, been attempted to seek, by the aid of historical lights, for earlier instances of the application of the rule. But it is evident, that the property of the pretended neutrals, who according to M. Arnould, were employed by the French administration to carry on the colonial trade, during the war which ended with the peace of Utrecht, and that of 1744,(*a*) must have been condemned as enemy's property; *because, with all the advantages possessed by the advocates for the British doctrine, of access to the records of the proceedings of the prize courts, during those wars, no trace can be found in them, of condemnations under the rule as applicable to the colonial trade, and because that trade was expressly adjudged to be lawful, by the Lords of Appeal, during the war of 1744.(*b*) It has also been asserted, that the treaty of 1668, renewed in 1674, between Great Britain and Holland, relaxed the primitive rigor of the law of nations in this particular, and that this relaxation was gradually extended by similar treaties to other nations.(*c*) But this treaty was contended by Great Britain to be a declaration of the original and pre-existing law of nations on this subject; and the explanatory article, signed on the 30th of December 1675, was itself declaratory of the meaning of the treaty, and was drawn up at the request of the British minister, Sir William Temple.(*d*) It is true, it contains a proviso, "that this declaration shall not be alleged by either party for matters which happened before the late peace, February 1673-4." But before that peace, the two parties were at war with one another, and could not claim the rights of neutrality against each other, and previous to that war, they were at peace with all the world; so that this reservation could not imply that vessels had been recently drawn into judgment on a different understanding of the principle. Nor does the letter of Sir Leoline Jenkins, of the 6th of February 1667, imply, that at that time, a vessel carrying enemy's goods, between ports of an enemy, was held liable to condemnation. It is admitted, that the preceding letter of the Swedish resident adverted only to the circumstance of the vessel's having carried enemy's goods, on her outward voyage, as the ground on which she was seized on her return-voyage; and it will be seen, by quoting the whole of Sir Leoline Jenkins's letter, that he does not lay any stress whatever on the circumstance of the former voyage being a coasting voyage: "The question which I am, in obedience to his majesty's most gracious *pleasure, to answer unto, being a matter of fact, I thought it my duty not to rely wholly on my own memory or observation, but further to inquire of Sir Robert Wiseman, his majesty's advocate-general; Sir William Turner, his royal highness, the lord high admiral's, advocate; Mr. Alexander Check, his majesty's proctor; Mr. Roger How, principal actuary and register in the high court of admiralty in England—whether they, or any of them, had observed, or could call to mind, that, in the late war against the Dutch, any one ship, otherwise free, as belonging to some of his majesty's allies, having carried goods belonging to his majesty's enemies, from one enemy's port to another, and being seized, after it had discharged the said goods, laden with the proceeds of that freight which it had carried, and received of the enemy upon the account of the ship's owners, had been adjudged prize to his majesty; they all unani-

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(*a*) 6 Rob. 474, Appendix, note I. (a)

(*b*) See the argument of Drs. Arnold and Laurence, in the case of The Providentia, 2 Rob. 146.

(*c*) 6 Rob. 74, n. (a.)

(*d*) 2 Sir W. Temple's Works, 313.

mously resolved, that they had not observed, nor could call to mind, that any such judgment or condemnation ever passed in the said court; and to this, their testimony, I must, as far as my experience reaches, concur; and if my opinion be, as it seems to be, required, I do not, with submission to better judgment, know anything, either in the statutes of this realm, or in his majesty's declarations upon occassion of the late war, nor yet in the laws and customs of the seas, that can (supposing the property of the said proceeds to be *bonâ fide* vested in the ship-owners of his majesty's allies) give sufficient ground for a condemnation in this case. And the said advocates, upon the debate I had with them, did declare themselves positively of the same opinion. Written with my hand, this 6th day of February 1667."(*a*) So that there does not appear to be any doubt respecting the legality of the former voyage, but only whether the vessel, with a return-cargo, being the proceeds of the freight received from the enemy on the former voyage, could be condemned on the return voyage; which question was answered in the negative, provided the property had *bonâ fide* vested in the neutral ship-owners. Before the treaty of 1674 was concluded, foreign vessels were freely admitted into the coasting trade of France; and when Louis XIV. was making efforts
*511] to *establish a nursery of seamen for his navy, and Colbert, under the influence of the commercial system of political economy, was endeavoring to appropriate to his own country some portion of the benefits of the carrying trade, which had been before almost entirely conducted, even from one French port to another, by the Dutch, they did not exclude foreign vessels from the coasting trade, but only imposed a tonnage of fifty sous upon the Dutch, and a crown upon Spanish and Flemish vessels.(*b*) A like discriminating duty was imposed upon foreign vessels entering French ports, in whatever commerce they might be engaged; so that there was as much reason to conclude, that the whole trade of France was exclusively appropriated to her own shipping, in time of peace, as that the coasting trade was thus appropriated. This renders it more improbable, that the trade from one enemy's port to another should have been considered unlawful by the British prize courts, until the principle of adoption, or naturalization, was applied, in the war of 1756, to the trade between the mother country and her colonies, from which neutrals, were in fact, excluded in time of peace. Neither that principle, nor the more modern doctrine, which confines the neutral to his accustomed peace trade, could be applied to a commerce which the neutral might carry on in peace or war, upon payment of alien tonnage duties. According to Lord Liverpool, this discriminating duty of fifty sous was suspended during the war of 1756, in order to ward off the effects of the British superiority at sea;(*c*) and this might afford a pretext for applying the rule, during that war, to the coasting trade of France, as it would raise a presumption of enemy's interests in the foreign shipping, thus adopted into his navigation, with all the privileges of French-built ships. But such a presumption could never arise from neutral vessels entering the coasting trade, under the disadvantage of the discriminating duty; nor could the doctrine which confines the neutral to his accustomed peace trade
*512] be applied, *since it is admitted by Sir William Scott, in the case of The Immanuel, that the neutral has a right to push his accustomed trade to the utmost extent of which it is capable, but not to enter a new trade from which he was before wholly excluded.(*d*)

(*a*) Sir Leoline Jenkins's Works, vol. 2, p. 741.

(*b*) Valin, sur l'Ordonnance, tom. 1, p. 14.

(*c*) Discourse on the Conduct of the Government of Great Britain, &c., p. 9.

(*d*) "I do not mean to say, that in the accidents of a war, the property of neutrals may not be variously entangled and endangered; in the nature of human connections, it is hardly possible, that inconveniences of this kind should be altogether avoided. Some neutrals will be unjustly engaged in covering the goods of the enemy, and others will be unjustly suspected of doing it; these inconveniences are more than balanced by the enlargement of their commerce; the trade of the belligerents is usually interrupted in a great degree, and falls, in the same degree, into the lap of neutrals. But without reference to accidents of the one kind or the other, the general rule is, that the neutral has

It is incredible, that the freight only should have been forfeited, in the wars of 1744, 1756 and 1778, as a mitigation of the primitive strictness of the rule, when we know that vessels engaged in the colonial trade, in the war of 1756, were confiscated, together with their cargoes; and the Veranderen, taken *on a voyage from Bordeaux to Dunkirk, 1778, and the Prosperité, from Nantz to Dunkirk, 1779, [*513 could not have been restored by Sir James Marriott, upon the ground of a relaxation, but restitution must have been decreed, upon the principle of a total abandonment of the rule, since the one was a vessel belonging to Prussia, and the other to Lubeck, with neither of which states Great Britain had, at that time, any treaty regarding this matter.

It is true, that, before the war of 1756, attempts were made to prohibit, by mere proclamation, all trade with an enemy. Thus, beside the earlier attempts of this nature,(*a*) by the convention concluded at London, on the 22d of August 1689, between England and Holland, wherein the contracting parties say, "that, having declared war against the Most Christian King, it behoves them to do as much damage as possible to the common enemy, in order to bring him to agree to such conditions as may restore the repose of Christendom; and that, for this end, it was necessary to interrupt all trade and commerce with the subjects of the said king," it was agreed between them, "that they would take any vessel, whatever king or state it may belong to, that shall be found sailing into, or out of, the ports of France, and condemn both vessel and merchandise as legal prize; and that this resolution should be notified to all neutral states." Lord Liverpool and Mr. Ward, among the strongest advocates for the maritime claims of Great Britian, condemn in the most unequivocal manner, this pretension, on her part.(*b*) The French regulation of the 23d July 1704 seems to have been intended to counteract these measures of the English and Dutch, during the war which followed the English revolution in 1688, and we may suppose, were revived during the subsequent war concerning the Spanish succession. Although Louis XIV., in the preamble to this ordinance, studiously negatives the idea of its being *intended as a [*514 measure of retaliation, yet this profession is powerfully contrasted with the provisions actually contained in the body of the edict, prohibiting all neutral trade in articles the growth or manufacture of the enemy's country, except in the direct voyage from the enemy's ports to a port of the neutral country to which the vessel belongs.(*b*)

During the long period of tranquillity which followed the peace of Utrecht, interrupted only by the very short war of 1719, no occasion could be afforded to administer the principles of prize law; and, as we have seen, no traces of the existence of the rule in question can be found, previous to that epoch, although the colonial system

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a right to carry on, in time of war, his accustomed trade, to the utmost extent of which that accustomed trade is capable. Very different is the case of a trade which the neutral has never possessed; which he holds by no title of use and habit, in times or peace, and which, in fact, can obtain, in war, by no other title, than by the success of the one belligerent against the other, and at the expense of that very belligerent under whose success he sets up his title; and such I take to be the colonial trade, generally speaking." (2 Rob. 198.) The truth is, France never had a navigation act, similar to the English, and absolutely excluding foreign shipping from her coasting and carrying trade, until the revolution, when the decree of the 21st of September 1793, entitled *Acte de Navigation*, was passed, which is alluded to by Sir W. Scott in the case of The Emanuel (1 Rob. 297), as if it had been a re-enactment of the ancient laws of France. This was, besides, limited to the coasting trade; as it only extended to the transportation of goods of French production or manufacture, and not to the trade from port to port, in commodities of foreign growth or fabric; which last has been confounded by the British prize courts in the same indiscriminate rule of condemnation with the coasting trade, properly so called.

(*a*) Coll. Mar. 158, note *h*.

(*b*) Discourse on the conduct of the Government of Great Britain, &c., p. 36; Ward on the Rights and Duties of Belligerents and Neutrals, &c., pp. 3, 4.

(*c*) Valin, sur l'Ordonnance, 2 tom. p. 248.

of Europe had, long before, been established, and its maritime nations all participated in the commerce of the East and West Indies.

The judicial history of the rule, during the subsequent wars, is so admirably traced in a memorial to congress from the merchants of Baltimore, &c., a paper drawn up, in 1806, by Mr. Pinkney, that the subject cannot be better illustrated than by the following extract:

"In the war of 1744, in which Great Britain had the power, if she had thought fit to exert it, to exclude the neutral states from the colony trade of France and Spain, her high court of appeals decided, that the trade was lawful, and released such vessels as had been found engaged in it.

"In the war which soon followed the peace of Aix-la-Chapelle, Great Britain is supposed to have first acted upon the pretension, that such a trade was unlawful, as being shut against neutrals in peace. And it is certain, that, during the whole of that war, her courts of prize did condemn all neutral vessels, taken in the prosecution of that trade, together with their cargoes, whether French or neutral. These condemnations, however, proceeded upon peculiar grounds. In the seven years' war, France did not throw open to neutrals the traffic of her colonies. She established no free ports in the east, or in the west, with which foreign vessels could be permitted to trade, either generally, or occasionally, as such. Her first practice was simply to grant special licenses to particular neutral vessels, principally Dutch, and commonly chartered by Frenchmen, to make, under the usual restrictions, particular trading voyages to the colonies. These licenses *furnished the British courts with a peculiar reason for condemning vessels sailing under them, viz., 'that they become in virtue of them, the adopted or naturalized vessels of France.'

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"As soon as it was known, that this effect was imputed to these licenses, they were discontinued, or pretended to be so; but the discontinuance, whether real or supposed, produced no change in the conduct of Great Britain; for neutral vessels, employed in this trade, were captured and condemned as before. The grounds upon which they continued to be so captured and condemned, may best be collected from reasons subjoined to the printed cases in the prize causes, decided by the high court of admiralty (in which Sir Thomas Salisbury, at that time, presided), and by the Lords Commissioners of Appeal between 1757 and 1760.

"In the case of The America (which was a Dutch ship, bound from St. Domingo to Holland, with the produce of that island, belonging to French subjects, by whom the vessel had been chartered), the reason stated in the printed case is, 'that the ship must be looked upon as a French ship (coming from St. Domingo), for by the laws of France, no foreign ship can trade in the French West Indies.'

"In the case of The Snip, the reason (assigned by Sir George Hays and Mr. Pratt, afterwards Lord Camden) is, 'for that the Snip (though once the property of Dutchmen), being employed in carrying provisions to, and goods from, a French colony, thereby became a French ship, and as such was justly condemned.'

"It is obvious, that the reason, in the case of The America, proceeds upon a presumption, that as that trade was, by the standing laws of France, even up to that moment, confined to French ships, any ship found employed in it must be a French ship. The reason in the other case does not rest upon this idle presumption, but takes another ground; for it states, that by the reason of the trade in which the vessel was employed, she became a French vessel.

"It is manifest, that this is no other than the first idea of adoption or naturalization, accommodated to the change attempted to be introduced into the state of things, by the actual or pretended discontinuance of the special licenses. What, then, is the amount of the doctrine of the seven years' war, in the utmost extent which it is possible to ascribe to it? It is, in substance, no more than this, that as France did not, at any period of that war, abandon, or in any degree suspend, the principle of colonial monopoly, or the system arising out of it, a neutral vessel, found in the prosecution of the trade, which, according to that principle and that system, still continuing in force, could only be a French trade, and open to French vessels, either became, or was legally

to be presumed to be, a French vessel. It *cannot be necessary to show, that this doctrine differs essentially from the principle of the present day; but even if it were otherwise, the practice of that war, whatever it might be, was undoubtedly contrary to that of the war of 1744, and as contrasted with it, will not be considered, by those who have at all attended to the history of these two periods, as entitled to any peculiar veneration. The effects of that practice were almost wholly confined to the Dutch, who had had rendered themselves extremely obnoxious to Great Britain, by the selfish and pusillanimous policy, as it was falsely called, which enabled them, during the seven years' war, to profit of the troubles of the rest of Europe.

"In the war of 1744, the neutrality of the Dutch, while it continued, had in it nothing of complaisance to France; they furnished, from the commencement of hostilities, on account of the pragmatic sanction, succors to the confederates; declared openly, after a time, in favor of the Queen of Hungary; and finally, determined upon, and prepared for, war by sea and land. Great Britain, of course, had no inducement, in that war, to hunt after any hostile principle, by the operation of which, the trade of the Dutch might be harassed, or the advantage of their neutral position, while it lasted, defeated. In the war of 1756, she had this inducement in its utmost strength. Independent of the commercial rivalry existing between the two nations, the Dutch had excited the undisguised resentment of Great Britain, by declining to furnish against France the succors stipulated by treaty; by constantly supplying France with naval and warlike stores, through the medium of a trade, systematically pursued by the people, and countenanced by the government; by granting to France, early in 1757, a free passage through Namur and Maestricht, for the provisions, ammunition and artillery belonging to the army, destined to act against the territories of Prussia, in the neighborhood of the Low Countries; and by the indifference with which they saw Nieuport and Ostend surrendered into the hands of France, by the court of Vienna, which Great Britain represented to be contrary to the Barrier treaty and the treaty of Utrecht. Without entering into the sufficiency of these grounds of dissatisfaction, which undoubtedly had a great influence on the conduct of Great Britain towards the Dutch, from 1757 until the peace of 1763, it is manifest, that this very dissatisfaction, little short of a disposition to open war, and frequently on the eve of producing it, takes away, in a considerable degree, from the authority of any practice to which it may be supposed to have led, as tending to establish a rule of the public law of Europe. It may not be improper to observe, too, that the station occupied by Great Britain in the seven years' war (as proud a one as any country ever did occupy), compared with that of the other European *powers, was not exactly calculated to make the measures which her resentments against Holland, or her views [*517 against France, might dictate, peculiarly respectful to the general rights of neutrals. In the north, Russia and Sweden were engaged in the confederacy against Prussia, and were, of course, entitled to no consideration in this respect. The government of Sweden was, besides, weak and impotent. Denmark, it is true, took no part in the war; but she did not suffer by the practice in question. Besides, all these powers combined, would have been as nothing against the naval strength of Great Britain, in 1758. As to Spain, she could have no concern in the question, and at length, became involved in the war, on the side of France. Upon the whole, in the war of 1756, Great Britain had the power to be unjust, and irresistible temptations to abuse it. In that of 1744, her power was, perhaps, equally great, but everything was favorable to equity and moderation. The example afforded on this subject, therefore, by the first war, has far better title to respect than that furnished by the last.

"In the American war, the practice and decisions on this point followed those of the war of 1744. The question first came before the Lords of Appeal, in January 1782, in the Danish cases of the Tiger, Copenhagen, and others, captured in October 1780, and condemned at St. Kitts, in December following. The grounds on which the captors relied for condemnation, in The Tiger, as set forth at the end of the respondent's printed case, were, 'for that the ship having been trading to Cape François, where none but French ships are alllowed to carry on any traffic, and having been laden, at the

time of the capture, with the produce of the French part of the island of St. Domingo, put on board at Cape François, and both ship and cargo taken, confessedly, coming from thence, must (pursuant to precedents in the like cases in the last war), to all intents and purposes, be deemed a ship and goods belonging to the French, or at least adopted and naturalized as such.'

"In The Copenhagen, the captor's reasons are thus given: '1st. Because it is allowed, that the ship was destined, with her cargo, to the island of Guadaloupe, and no other place. 2d. Because it is contrary to the established rule of general law, to admit any neutral ship to go to, and trade at, a port belonging to a colony of the enemy, to which such neutral ship could not have freely traded in time of peace. On the 22d of January 1782, these causes came on for hearing before the Lords of Appeal, who decreed restitution in all of them; thus, in the most solemn and explicit manner, disavowing and rejecting the pretended rules of the law of nations, upon which the captors *relied; the first of which is literally borrowed from the doctrine of the war of 1756, and the last of which is that very rule on which Great Britain now relies. *518]

"It is true, that, in these cases, the judgment of the Lords was pronounced upon one shape only of the colony trade of France, as carried on by neutrals; that is to say, a trade between the colony of France and that of the country of the neutral shipper. But as no distinction was supposed to exist, in point of principle, between the different modifications of the trade, and as the judgment went upon general grounds, applicable to the entire subject, we shall not be thought to overrate its effect and extent, when we represent it as a complete rejection, both of the doctrine of the seven years' war, and of that modern principle, by which it has been attempted to replace it. But at any rate, the subsequent decrees of the same high tribunal did go that length. Without enumerating the cases, of various descriptions, involving the legality of the trade in all its modes, which were favorably adjudged by the Lords of Appeal, after the American peace, it will be sufficient to mention the case of The Vervagting, decided by them in 1785 and 1786. This was the case of a Danish ship, laden with a cargo of dry goods and provisions, with which she was bound on a voyage from Marseilles to Martinique and Cape François, where she was to take in, for Europe, a return-cargo of West India produce. The ship was not proceeded against; but the cargo, which was claimed for merchants of Ostend, was condemned as enemy's property (as in truth it was), by the vice-admiralty of Antigua, subject to the payment of freight *pro rata itineris*, or, rather, for the whole of the outward voyage. On appeal, as to the cargo, the Lords of Appeal, on the 8th of March 1785, reversed the condemnation, and ordered further proof of the property to be produced, within three months. On the 28th March 1786, no further proof having been exhibited, and the proctor for the claimants declaring, that he should exhibit none, the Lords condemned the cargo, and on the same day, reversed the decree below, giving freight *pro rata itineris* (from which the neutral master had appealed), and decreed freight, generally, and the costs of the appeal.

"It is impossible, that a judicial opinion could go more conclusively to the whole question on the colony trade than this; for it not only disavows the pretended illegality of neutral interpositions in that trade, even directly between France and her colonies (the most exceptionable form, it is said, in which that interposition could present itself); it not only denies, that property engaged in such a trade, is, on that account, liable to confiscation (inasmuch as, after having *reversed the condemnation of the cargo pronounced below, it proceeds afterwards to condemn it, merely for want of further proof as to the property), but it holds, that the trade is so unquestionably lawful to neutrals, as not even to put in jeopardy the claim to freight for that part of the voyage which had not yet begun, and which the party had not yet put himself in a situation to begin. The force of this, and the other British decisions produced by the American war, will not be avoided, by suggesting, that there was anything peculiarly favorable in the time when, or the manner in which, France opened her colony trade to neutrals on that occasion. Something of that sort, however, has been said! We *519]

find the following language in a very learned opinion on this point: 'It is certainly true, that in the last war (the American war), many decisions took place, which then pronounced that such a trade between France and her colonies was not considered as an unneutral commerce; but under what circumstances? It was understood, that France, in opening her colonies, during the war, declared, that this was not done with a temporary view, relative to the war, but on a general permanent purpose of altering her colonial system, and of admitting foreign vessels, universally, and at all times, to a participation of that commerce; taking that to be the fact (however suspicious its commencement might be, during the actual existence of a war), there was no ground to say, that neutrals were not carrying on a commerce as ordinary as any other in which they could be engaged; and therefore, in the case of The Vervagting, and in many other succeeding cases, the Lords decreed payment of freight to the neutral ship-owner. It is fit to be remembered, on this occasion, that the conduct of France evinced how little dependence can be placed upon explanations of measures adopted during the pressure of war; for, hardly was the ratification of the peace signed, when she returned to her ancient system of colonial monopoly.'

"We answer to all this, that, to refer the decision of the Lords, in The Vervagting, and other succeeding cases, to the reason here assigned, is to accuse that high tribunal of acting upon a confidence which has no example, in a singularly incredible declaration (if, indeed, such a declaration was ever made), after the utter falsehood of it had been, as this learned opinion does itself inform us, unequivocally and notoriously ascertained.

"We have seen, that The Vervagting was decided by the Lords in 1785 and 1786, at least two years after France had, as we are told, 'returned to her ancient system of colonial monopoly,' and when, of course, the supposed assertion of an intended permanent abandonment *of that system, could not be permitted to produce any legal consequence. We answer, further, that if this alleged declaration was in [*520 fact made (and we must be allowed to say, that we have found no trace of it out of the opinion above recited), it never was put into such a formal and authentic shape, as to be the fair subject of judicial notice. It is not contained in the French *arrêts* of that day, where only it would be proper to look for it, and we are not referred to any other document proceeding from the government of France, in which it is said to appear. There does not, in a word, seem to have been anything which an enlightened tribunal could be supposed capable of considering as a pledge on the part of France, that she had resolved upon, or even meditated, the extravagant change in her colonial system, which she is said, in this opinion, to have been understood to announce to the world. But even if the declaration in question was actually made, and that, too, with all possible solemnity, still, it would be difficult to persuade any thinking man, that the sincerity of such a declaration was, in any degree, confided in; or that any person in any country, could regard it in any other light than as a mere artifice that could give no right which would not equally well exist without it. Upon the whole, it is manifestly impracticable to rest the decisions of the Lords of Appeal, in and after the American war, upon any dependence placed on this declaration, of which there is no evidence that it ever was made—which, it is certain, was not authentically or formally made—which, however made, was not, and could not be, believed, at any time, far less in 1785 and 1786, when its falsehood had been unquestionably proved by the public and undisguised conduct of its supposed authors, in direct opposition to it. That Sir James Marriot, who sat in the high court of admiralty of Great Britain, during the greater part of the late war, did not consider these decisions as standing upon this ground, is evident; for notwithstanding that, in the year 1756, he was the most zealous, and perhaps, able advocate for the condemnation of the Dutch ships engaged in the colony trade of France, yet, upon the breaking out of the late war, he relied upon the decisions in the American war as authoritatively settling the legality of that trade, and decreed accordingly.

"If, as a more plausible answer to these decisions (considered in the light of authorities), than that which we have just examined, it should be said, that they ought rather to be viewed as reluctant sacrifices to policy, or even to necessity, under circum-

stances of particular difficulty and peril, than as an expression of the deliberate opinion of the Lords of Appeal, or the government of Great Britain, on the *matter of right, it might, perhaps, be sufficient to reply, that if the armed neutrality, coupled with the situation of Great Britain as a party to the war, did in any degree compel these decisions, we might also expect to find, at the same era, some relaxation on the part of of that country, relative to the doctrine of contraband, upon which the convention of the armed neutrality contained the most direct stipulations which the northern powers were particularly interested to enforce. Yet such was not the fact. But in addition to this, and other considerations of a similar description, it is natural to inquire, why it happened, that if the Lords of Appeal were satisfied that Great Britain possessed the the right in question, they recorded, and gave to the world a series of decisions against it, founded, not upon British orders of council, gratuitously relaxing what was still asserted to be the strict right, as in the late war, but upon general principles of public law. However prudence might have required (although there is no reason to believe it did require) an abstinence, on the part of Great Britain, from the extreme exercise of the right she had been supposed to claim, still it could not be necessary to give, to the mere forbearance of a claim, the stamp and character of a formal admission, that the claim itself was illegal and unjust. In the late war, as often as the British government wished to concede and relax, from whatever motive, on the subject of the colony trade of her opponents, an order of council was resorted to, setting forth the nature of the concession or relaxation, upon which the courts of prize were afterwards to found their sentences; and, undoubtedly, sentences so passed cannot, in any fair reasoning, be considered as deciding more than that the order of council is obligatory on the courts whose sentences they are. But the decrees of the Lords of Appeal, in and after the American war, are not of this description; since there existed no order of council on the subject of them; and of course, they are, and ought to be, of the highest weight and authority against Great Britain, on the questions involved in, and adjudged by, them."

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In confirmation of the preceding authorities, adduced from the decisions of the British prize courts, during the wars of 1744, 1756 and 1778, the following cases may be added from the adjudications of the common-law tribunals.

The first is that of Berens *v.* Rucker, ruled by Lord MANSFIELD, at the sittings after Trinity term 1761. (1 W. Black. 313.) This was an action on a policy of insurance on a Dutch ship, called the Tyd, *and its cargo, at and from St. Eustatius to Amsterdam, warranted a Dutch ship, and the goods Dutch property, and not laden in any French port in the West Indies. The cargo was worth 12,000*l.*, and insured at a premium of 15 guineas per cent., which was inflamed to this high rate, on account of the number of captures made by the British, of neutral vessels, on suspicion of illicit trade, and the detention of those vessels by the proceedings in the courts of admiralty. In May 1758, the ship was at St. Eustatius, taking in her cargo, which consisted of sugar and indigo, and other French commodities, which were put on board her, partly out of barks from sea, and partly from the shore of the island. On the 18th of June 1758, she sailed on her voyage to Amsterdam; on the 27th, she was taken by a British privateer, and carried into Portsmouth, in England. On the 1st of August, the seamen were examined on the standing interrogatories, and the master entered his claim in the high court of admiralty. In October, the claimants were cited to specify what part of the goods were taken from the shore of St. Eustatius, and what from the barks. Citation was continued, from court to court, until February 1759, when an interlocutory decree was pronounced, for the contumacy of the claimants, in not specifying, and that, therefore, the goods should be presumed French property. There was an appeal to the Lords, but as many cases stood before it, as the market was very high, and as the cargo was, in part, perishable, the agent of the owners agreed with the captors to give them 800*l.* and costs, in order to obtain a reversal of the sentence. The reversal was had by consent, and in order to give costs to the captors, it was decreed, by consent, that there was probable cause for seizure, and thereupon, costs were

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decreed to the captors, and the cargo was restored to the claimants. The ship, when restored, proceeded to Amsterdam; and after her arrival there, the chamber of insurances, in that city, settled the average of the plaintiff towards the loss and expenses occasioned by the capture, detention and litigation, and for this sum the action was brought.

"Lord Mansfield.—The first question is, whether this was a just capture? Both sentences are out of the case, being done, and undone, by consent. The capture was certainly unjust. *The pretence was, that part of this cargo was put on board, off St. Eustatius, out of barks supposed to come from the French islands, and not loaded immediately from the shore. This is now a settled point by the Lords of Appeal, to be the same thing as if they had been landed on the Dutch shore, and then put on board afterwards; in which case, there is no color for seizure. The rule is, that if a neutral ship trade to a French colony, with all the privileges of a French ship, and is thus adopted and naturalized, it must be looked upon as a French ship, and is liable to be taken. Not so, if she have only French produce on board, without taking it in at a French port, for it may be purchased of neutrals. [*523

"The second question is, whether the owners have acted *bonâ fide* and uprightly, as men acting for themselves, and upon a reasonable footing, so as to make the expenses of this compromise a loss to be borne by the insurers. The order of the judge of the admiralty to specify, was illegal, contrary to the marine law and the act of parliament, which is only declaratory of the marine law; because, if they had specified, it could be of no consequence, according to the rule I before mentioned. The captors were, however, in possession of a sentence, though an unjust one; and a court of appeal cannot, or seldom does, upon a reversal, give costs or damages which have accrued subsequent to the original sentence; for these damages arise from the fault of the judge, not of the parties. Under all these circumstances, the owners did wisely to offer a compromise. The cargo was worth 12,000*l.*, the appeal was hazardous, the delay certain. The Dutch deputy in England negotiated the compromise; the chamber of commerce, at Amsterdam, ratified it, and thought it reasonable. Had the whole sentence been totally reversed, the costs must have sat heavy on the owners. I, therefore, think the insurers liable to answer this average loss, which was submitted to, in order to avoid a total one." (*a*)

Such was the definition of the rule, as given by a judge who, according to Blackstone, attended the commission of appeals, *and conducted its decisions during the war of 1756, and "whose masterly acquaintance with the law of nations was known and revered by every state in Europe." (*b*) [*524

The next case is that of Brymer *v.* Atkyns, determined in the court of common pleas, Hilary Term 1789, in which Lord Loughborough uses the following words: "But during the prosecution of the war which ensued in the year 1758, great complaints were made by neutral powers of the misconduct of English privateers in the channel, in seizing their merchantmen, and a question had also arisen between the subjects of Holland and the officers of the British navy, upon the extent of the treaties of commerce between this country and the Dutch republic; the Dutch claiming a right to carry to the French all such goods as were not specifically enumerated under the title of contraband; while, on the part of the British navy, it was contended, that free ships only made free goods as to such course of trade as was carried on in time of peace; that the Dutch being excluded from the French islands in the West Indies, in time of peace, and only admitted in time of war, to cover their trade, their ships ought to be considered as adopted French, and were, therefore, lawful prize." (*c*)

The next adjudication which may be advantageously cited, to illustrate the history of the rule, is the case of The Katharina, determined in the House of Lords, on the 2d of May 1783. (*d*) This was a Dutch ship, which sailed from the Texel, on the 31st of August 1779, bound to Curaçoa, where she arrived on the 18th of November following,

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(*a*) Park on Ins. 90, ed. 1809.
(*b*) 3 Bl. Com. 70.
(*c*) 1 H. Bl. 191.
(*d*) 5 Bro. Parl. Cas. 328, ed. 1803.

with a cargo of linen goods, and some articles of provisions, and thence sailed for Cape François, in the island of St. Domingo, where the cargo was sold, a return-cargo of colonial produce taken on board, and the ship sailed for Amsterdam, on the 17th of April 1780. On the 22d of May, she was captured by a British privateer, and carried into Scotland, where the ship and cargo were, on the 22d of September 1780, condemned, as lawful prize, by the judge-admiral. An appeal was entered to the court of session, where *the sentence was affirmed, and the claimants appealed to the House of Lords, who reversed the decrees of the courts below, and ordered the value of the ship and cargo to be paid to the claimants.

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It has been alleged, that this case was determined by the House of Lords, as it is said the parallel case of The Tiger must have been by the Lords of Appeal, upon the ground of the existence of a French edict, dated the 31st of July 1779, opening the colonial trade to neutrals.(*a*) But, as we have seen, this could not possibly have been the foundation for the decree of restitution in the case of The Tiger. 1st. Because no such edict can be found in any collection of French *arretés*, and it is acknowledged that the search for it had been fruitless.(*b*) 2d. Because the edict has been supposed to have been issued *flagrante bello;* and a trade opened in time of war to neutrals, could not be considered as an accustomed trade, in the view of the prize courts. 3d. Because it is admitted, that France returned to her ancient colonial system, after the peace of 1783, and yet the Lords of Appeal persisted in decreeing restitution of neutral property taken during the war. 4th. Because the supposed edict of the 31st July 1779, is not recited in the printed case of The Tiger; but on the contrary, a special ordinance, of a preceding date, is relied upon by the claimants in that case, as opening to foreigners the ports of St. Domingo. The objection also applies to this ordinance, that, beside its being issued immediately upon the commencement of hostilities, it was the mere local act of a colonial governor, and still less likely to be regarded by the Lords of Appeal as indicative of a permanent change in the colonial system of France, than the supposed more general edict of the 31st July 1779.

If, then, the opening of the French colonies to neutrals could not have formed the basis on which restitution was decreed by the Lords of Appeal, in the case of The Tiger, was it the real ground of the reversal, by the House of Lords, of the decree of condemnation in the case of The Katharina?

*When the grounds of a judicial decision are stated by a court, it is not only superfluous, but manifestly tends to lead the inquirer astray, who is seeking for the real grounds of such decision, to look for it in the arguments of the parties. It was, indeed, argued by the counsel for the claimants, in The Katharina, that the French edict of the 31st July 1779, excepted that case from the general rule which had been enforced in the preceding war; whilst, on the other hand, the captor's counsel denied that any reliance could be placed on the sincerity and permanence of the supposed change in the colonial system of France. It was also contended by the claimants' counsel, that the ship was exempted from capture, under the general immunity of the Dutch treaty of 1674; whilst, on the contrary, the counsel for the captors maintained, that she was liable to condemnation for carrying provisions on her outward voyage, contrary to the same treaty. But the only points even glanced at by the learned Lord who moved for the reversal in the House of Lords were, 1st. The want of jurisdiction in the court below. 2d. The discontinuance, during the war of the American revolution, of the principle of the war of 1756.

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As to the first point, there seems to be no doubt, that by the articles of union between England and Scotland, the court of admiralty, in Scotland, was preserved in its ancient jurisdiction, which, unquestionably, extended to prize causes, and no subsequent act of the British parliament has made any change in this respect. The appeal is to the court of session, and thence to the House of Lords.(*c*)

The second point, on which the decree of the House of Lords was founded is, "because the principle on which the courts below had proceeded, although adhered to

(*a*) 6 Rob. Appendix, Note I., 476. (*b*) Ibid. 476. (*c*) 2 Browne's Civ. & Adm. Law 30.

in the war which ended in 1763, had been departed from in that which terminated in 1782."

Hence, it is manifest, that the decree of the House of Lords, in this case, can only be referred to an actual abandonment of the rule of the war of 1756. And such is the effect of this adjudication, as understood by the reporter himself, who, in his marginal note to the case, says, in the very words of the claimants' *counsel, "It is now established, by repeated determinations, that neither ships nor cargoes, the property of subjects of neutral powers, either going to trade at, or coming from, the French West India islands, with cargoes purchased there, are liable to capture." There is, then, no occasion to advert to the printed reasons of the parties, in order to rest this decree upon a supposed exception to the rule which is not stated by the tribunal itself. [*527

Yet they may be quoted, as a confirmation of what has been before asserted respecting the origin and nature of the rule. Thus, it was stated by the claimant's counsel (of whom Sir William Scott, then at the bar, was one), "That it was now established, that neither ships nor cargoes, the property of subjects of neutral powers, either going to trade at, or coming from, the French West India islands, with cargoes purchased there, are liable to capture; for in many recent instances, particularly The Tiger, a Danish ship, with a cargo purchased at Cape François, proceeding to St. Thomas; The Copenhagen, a Danish ship, from St. Thomas to Guadaloupe; The Jonge Jan, a Dutch ship, with a cargo taken at Port-au-Prince, and bound to Curaçoa; and likewise, in the case of The Sloop Nancy, and six other Danish vessels, with cargoes taken in at Guadaloupe, in the year 1780, and bound therewith to the island of St. Thomas, under convoy of a Danish frigate; all which were captured by British cruisers, and condemned in the vice-admiralty courts, in the British West Indies, the Lords Commissioners of Appeal reversed the sentences of condemnation, and restored the ships and cargoes."(*a*)

To which it was answered by the captor's counsel, "That the subjects of all other nations being absolutely prohibited to trade to or from the French West India islands, by the fundamental laws of France, the ship in question, coming directly from St. Domingo, with a cargo taken in there (be the property whose it might), must be considered as French, and, as such, both ship and cargo were lawful prize, agreeable to many decisions in the courts of admiralty, and by the Lords of Appeal, **last war*, founded upon the clearest principles. But it is objected, that, by an edict of the French king, dated in July 1779, the trade to his colonies was laid open to all neutral states. To this it is answered, that during the last war, Dutch ships, engaged in this fraudulent trade, obtained special licenses from the French government; but these were constantly disregarded, when urged as obviating the allegation of their being engaged in a trade open only to French subjects, and even were taken as conclusive evidence of their being adopted French ships. During the present war, it is said, a general license has been given, which cannot vary the case, when the views and consequences are precisely the same. The opening a trade to the colonies of France, *flagrante bello*, is a transaction to the prejudice of Great Britain, and a mere device and cover for fraud. A Dutchman, who trades under a privilege of this kind, is not in the ordinary situation of a neutral subject, continuing his own commerce with the warring nations, as in time of peace; he is, to all intents and purposes, carrying on the trade of France, being admitted to a participation, *ad hunc effectum*, in the exclusive rights of a French subject; and as the government of France considers such persons as temporary subjects, to the effect of being allowed to trade with the French West Indies, the subjects of Great Britain, on the other hand, must, according to every principle of justice and sound reasoning, be entitled to consider them in the same light and to seize, as lawful prize, both ships and cargoes employed in this extraordinary commerce. No person can possibly believe, that the license will be continued by France, after the peace. It has been shown, in a variety of instances, that the Dutch do not [*528

(*a*) 5 Bro. Parl. Cas. 339.

understand that it will; and till such a license has been granted, or continued, in time of profound peace, no regard can be paid to it, when issued in time of war."(*a*)

Bui this doctrine of the captor's counsel was rejected by the House of Lords in the case of The Katharina, as it had before been in the cases of The Tiger and The Copenhagen, by the Lords of Appeal; and thus we have the conjoint authority of the two highest *tribunals in the British empire, to confirm the abandonment of this rule, during the war of the American revolution.

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We come now to the first war of the French revolution, and here we have the testimony of Sir WILLIAM SCOTT, to show that his predecessor, in the high court of admiralty (Sir JAMES MARRIOT) adhered, at the commencement of that war, to the practice which had been settled in the war of 1778, and accordingly, decreed freight to neutral vessels employed in the coasting trade of the enemy. In the case of The Emanuel (April 9th, 1799),(*b*) Sir WILLIAM SCOTT says, "with respect to authorities, it has been much argued, that in three cases, this war, the court of admiralty has decreed payment of freight to vessels so employed; and I believe that such cases did pass under an intimation of the opinion of the very learned person who preceded me, in which the parties acquiesced without resorting to the authority of a higher tribunal. But a case before the Lords seems to convey a different opinion upon this subject of the coasting trade of the enemy—the case of The Mercurius, in which freight was refused."

Here, it is to be remembered, that this case of The Mercurius was determined by the Lords of Appeal, on the 7th of March 1795, and therefore, can be no authority as to the practice at an earlier period of the war, or as to the law at the same period, which was understood by Sir JAMES MARRIOTT, and the learned counsel who acquiesced in his decisions, without an appeal, still to subsist as settled by the Lords during the preceding war, and adhered to by them, down to the year 1786. Even Sir WILLIAM SCOTT himself, long after the case of The Mercurius was decided by the Lords, seems to have regarded the rule, in respect to the coasting trade, as merely creating a presumption of enemy interests, and not as affording a substantive ground of condemnation. Thus, in the case of The Welvaart (January 8th, 1799),(*c*) he says, "Besides, this vessel appears to have been engaged in the coasting trade of France. The court has never gone so far as to say, that pursuing one voyage of that kind would be sufficient to fix a hostile character; but in *my opinion, a habit of such trading would. Such a voyage must, however, raise a strong degree of suspicion against a neutral claim, and the plunging at once, into a trade so highly dangerous, creates a presumption, that there is an enemy proprietor lurking behind the cover of a neutral name." So also, in the case of The Speculation (December 16th, 1799),(*d*) the king's advocate (Sir John Nicholl) stated, "That the ship appeared to have been carrying on the coasting trade of France; a trade not only generally forbidden, but expressly prohibited to neutral ships, by the ordinances of France, which have issued during this war, that she would, therefore, come under the character of an adopted French ship." Whilst on the other hand, the claimant's counsel (Dr. Laurence) answered, that "it has not been held in the present war, that the mere circumstances of being engaged in the coasting trade of the enemy, does amount to that adoption, which will subject the property to condemnation." Sir WILLIAM SCOTT, in his judgment says, "This is a case of a ship taken on a voyage from one French port to another, which is certainly a sufficient justification of the capture; because the very circumstance of being engaged in conducting the trade of the enemy, from one port to another, will justly subject the vessel to inquiry; and perhaps, in some future case, the court may have occasion to consider, how far the regulations that have been alluded to, and the acting upon them (which it may be proper to consider at the same time), may not make such a trade liable to be considered as a case of adoption."

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We may therefore, considered it as proved, that the rule was suffered to slumber, from the beginning of the war of the American revolution, until it was awakened, with

(*a*) 5 Bro. Parl. Cas. 341. (*b*) 1 Rob. 301. (*c*) 1 Rob. 124. (*d*) 2 Rob. 293.

increased activity, by the orders in council of the 6th November 1793, instructing the public and private ships of war of Great Britain, to "stop and detain all vessels laden with goods, the produce of any colony belonging to France, or carrying provisions, or other supplies, for the use of any such colony, and to bring the same, with their cargoes, to legal adjudication in our courts of admiralty."

*Although some confusion and contradiction exists in the language of the British prize courts, whether instructions of this nature are binding on the tribunals of the nation by whom they are issued, as a positive law, or merely as declaratory of the pre-existing law of nations, Sir WILLIAM SCOTT appearing, at one time, to regard the text of the king's instructions, as binding on his judicial conscience, and at another, holding it indecorous to anticipate the possibility of their conflicting with the law of nations, whilst Sir JAMES MACKINTOSH declared, that, if he saw in such instructions, any attempt to extend the law, to the prejudice of neutrals, he should not obey them, but regulate his decisions by the known and recognised law of nations;(a) yet, the instructions of 1793 might properly be considered as evidence of what the British government deemed to be law, if this inference were not somewhat weakened by the circumstances that they were secretly issued, precipitately repealed, and full indemnification was made, for the captures under them. On the 8th January 1794, the following instruction was substituted: "That they shall bring in for lawful adjudication, all vessels, with their cargoes, that are loaded with goods, the produce of the French West India islands, and coming directly from any port of the said islands, to any port in Europe. And on the 25th of Jannary 1798, this order was also revoked, and the following was issued: "That they should bring in, for lawful adjudication, all vessels, with their cargoes, that are laden with goods, the produce of any island or settlement, belonging to France, Spain, or the United Provinces, and coming directly from any port of the said islands or settlements, to any port in Europe not being a port of this kingdom, nor a port of that country to which such ships, being neutral ships, shall belong." [*531

We have seen, that, up to the time when this last order was issued, the prize courts had never, of their own authority, revived the rule which they had invented in the war of 1756, and laid aside in that of the American revolution. But when it was once more called into life, by the instructions of the executive government, they gradually enlarged the sphere of its activity *beyond the text of those instructions, either upon the principle of affecting the return-voyage, with the penalty of contraband, contrary to Sir WILLIAM SCOTT's own previous opinions,(b) or, upon the principle of a continuity of the voyage, which had been repudiated by the Lords of Appeal, in the war of 1756, even where the colonial produce was transshipped in a neutral port, from barks, in which it was brought from enemy's ports, and not from the shore. Upon one or the other of these assumptions, the rule was applied to cut off the exportation of the produce of the enemy's colonies from neutral countries, where it had been imported, unless it had become incorporated into the general stock of national commodities (c) according to the fluctuating rules prescribed to break the continuity of voyage. On the renewal of the war, after the peace of Amiens, the following order was issued, dated on the 24th of June 1803: "In consideration of the present state of commerce, we are pleased hereby to direct the commanders of our ships of war and privateers, not to seize any neutral vessel which shall be carrying on trade, directly between the colonies of the enemy, and the neutral country to which the vessel belongs, and laden with the property of the inhabitants of such neutral country; provided, that such neutral vessel shall not be supplying, nor shall, on the outward voyage, have supplied the enemy with any articles contraband of war, and shall not be trading with any blockaded port." This instruction is substantially the same with that of 1798, except that it adopts the innovation of the prize courts, affecting the return-voyage with the penalty of contraband [*532

(a) The Minerva, 1 Hall's L. Journ. 217.

(b) The Frederick Molke, 1 Rob. 87; The Margaretha Magdalena, 2 Ibid. 140.

(c) See The William, 5 Rob. 349; and The Maria, Ibid. 325, where all the cases on the subject of continuity of voyage, are cited.

carried outward. Under it, the same course of decisions took place, by which the noxious qualities of the rule were much enlarged, and its wide-spreading desolation threatened to interrupt the amicable relations between the United States and Great Britain: when the order in council, of the 16th of May 1806, was issued, blockading
*533] the coasts from the river Elbe to Brest, inclusive, except that neutral *vessels, coming directly from the ports of their own country, were allowed to enter and depart from the blockaded ports, with cargoes, not enemy's property, nor contraband, but were not permitted to trade from port to port. This order was supposed to have been drawn up with a view to the colonial trade; but it does not appear to have been considered by the prize courts, as containing any relaxation of the principles they had established respecting that trade, and the whole question was at length merged in the orders in council of the 7th of January, and the 11th of November 1807; by the first of which, all neutral trade, from one enemy's port, or from a port where the British flag was excluded, to another such port, and by the latter (among other provisions) the exportation of the produce of the enemy's colonies, from a neutral country, to any other country than Great Britain, was prohibited. These orders were issued in retaliation of the Berlin decree of the French emperor, and on the 26th of April 1809, they were relaxed, as to the European blockade, but extended to the total prohibition of all neutral trade with the colonies of France and Holland.

It would unreasonably swell this note, to enlarge upon this part of the subject. These edicts were condemned by the universal voice of the impartial world; they were condemned by the past example of the powers who issued them; they were condemned by the authority of the jurists whom Europe revered in better times, as the oracles of public law.(*a*) It is pretended, by a superficial writer on the law of nations, that Sir William Scott decided the case of The Nayade, 4 Rob. 251, upon the principle of retaliating the injustice of an enemy on a neutral power, who passively submits to that
*534] injustice.(*b*) *Sir William Scott did no such thing; all that he determined, in that case, was, that Portugal and Great Britain, being allied by ancient treaties, the *casus fœderis* between them had arisen, by the passive submission of Portugal to the hostile attacks of France, which involved Portugal, *nolens volens*, as an ally, in the war against France, and consequently, rendered the property of a Portuguese merchant, taken in trade with the common enemy, liable to condemnation in the British prize courts. It cannot be pretended, that the neutral states, whose commerce was affected by the Berlin decree, had participated in the injustice of France, by passively submitting to that measure; since the orders in council were issued, before sufficient time had elapsed to ascertain what would be the conduct either of France, or of those states, in respect to the decree. Nor can the order of the 7th of January 1807, be justified as an original and abstract measure; (*c*) because the trade from the port of one enemy, to the port of another, was always held lawful by the British tribunals. "This sort of traffic, from one of his (the enemy's) ports to the ports of another country, has always been open, and is, in its own nature, subject to the uses of all mankind, who are not in a state of hostility with him. The Dane has a perfect right, in time of profound peace, to trade between Holland and France, to the utmost advantage he can make of such a navigation; and there is no ground upon which any of its advantages can be withheld from him in time of war."(*d*) It is needless, however, to enlarge upon the topics which

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(*a*) Bynkershoek, speaking of the edicts of the States General of Holland, retaliating upon neutrals, certain illegal orders of France and of England, denies that these edicts could be founded upon the law of retortion, which is only applicable to him who has inflicted the injury. *Retorsio non est nisi adversus eum, qui ipse damni quid dedit, ac deindè patitur, non vero adversus communem amicum.* (Q. J. Pub. c. 4.) See also Sir William Scott's remarks, in the case of The Flad Oyen, 1 Rob. 142.

(*b*) Chitty's Law of Nations 152.

(*c*) See Lord Erskine's speech in Parliament, on the Orders in Council. Cobbett's Parl. Debates, vol. 10, p. 945.

(*d*) The Wilhelmina, in note to The Rebecca, 2 Rob. 101.

might be urged against this train of innovations, by which first the trade from neutral countries to the colonies, and from port to port, of the enemy, and then, all neutral traffic whatever with him, was prohibited. It deserves notice, however, that Great Britain and France appropriated to themselves, by means of free ports or licenses, the very commerce they were prohibiting to neutrals, and to their allies, under the pretext of its aiding their enemy in the war.

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