

*UNITED STATES *v.* SHELDON.*Contraband.*

Under the act of the 6th July 1812, "to prohibit American vessels from proceeding to or trading with the enemies of the United States, and for other purposes," held, that living fat oxen, &c., are articles of provision and munitions of war, within the true intent and meaning of the act. Also held, that driving living fat oxen, &c., on foot, is not a transportation thereof, within the true intent and meaning of the same act.

February 12th, 1817. THIS cause was argued by the *Attorney-General*, for the United States, and by *Hopkinson*, for the defendant.

February 26th. WASHINGTON, Justice, delivered the opinion of the court.—The defendant, George Sheldon, was indicted in the Circuit Court for the district of Vermont, for transporting, overland, in November 1813, a certain number of fat oxen, cows, steers and heifers, from a place in the United States to the province of Lower Canada. A special verdict was found, which submitted to the court the questions, whether, living fat oxen, cows, steers and heifers, are articles of provision and munitions of war? and whether driving living fat oxen, cows, steers and heifers, on foot, is a transportation thereof, within the true intent and meaning of the act of congress then in force? The judges being opposed in opinion upon both these questions, the cause comes before this court upon a certificate of such disagreement.

*This indictment was founded on the act of the 6th of July 1812; [*120 the 2d section of which declares, "that if any citizen of the United States, or person inhabiting the same, shall transport, or attempt to transport, overland or otherwise, in any wagon, cart, sleigh, boat or otherwise, naval or military stores, arms or munitions of war, or any articles of provision, from the United States to Canada, &c., the wagon, cart, sleigh, boat, or the thing by which the said articles are transported, or attempted to be transported, together with the articles themselves, shall be forfeited; and the person aiding, or privy to the same, shall forfeit to the United States a sum equal in value to the wagon, &c., or thing by which the said articles were transported, and shall moreover be considered as guilty of a misdemeanor, and liable to fine and imprisonment."

In answer to the first question submitted to this court, we are unanimously of opinion, that living fat oxen, &c., are articles of provision and munitions of war, within the true intent and meaning of the above-recited act.

The second question is attended with much more difficulty: Is the driving of living fat oxen, &c., a transportation of them, within the true intent and meaning of the law? There is no doubt, but that the word transport, correctly interpreted, as well as in its ordinary acceptation, means to carry, to convey; and in this sense, it seems to a majority of the court, the legislature intended to use it. The offence is made to consist in transporting in any wagon, cart, sleigh, boat, or *otherwise, the prohibited articles. [*121 Had the words "or otherwise" been omitted, it would scarcely admit of a doubt, that unless the prohibited articles had been conveyed on some one of the enumerated vehicles, no offence would have been committed, within the words or the meaning of the law. What then is the correct interpretation of these expressions, taken in connection with the other parts of the section?

The Mary.

To transport an article in a wagon, or otherwise, would seem necessarily to mean to carry or convey it in that or in some other vehicle, by whatever name it might be distinguished. If these words are construed to mean, a removal of the article from one place to another, otherwise than in a vehicle, it might well admit of a doubt, whether a removal in a vehicle, other than one of those which are enumerated, would be a case within the law. But so far from this matter being left a doubt by the law, we find, that when the punishment by way of forfeiture is prescribed, the words "or otherwise" are very plainly construed to mean the thing by which the articles are transported; thus distinguishing between the thing which transports, and the thing which is transported.

It may be admitted, that the mischief is the same, whether the enemy be supplied with provisions in the one way or the other; but this affords no good reason for construing a penal law by equity, so as to extend it to cases not within the correct and ordinary meaning of the expressions of the law, particularly, when it is confirmed by the interpretation which the legislature *122] has given to the same expressions in the *same law. If it were impossible, to satisfy the words "or otherwise," except in the way contended for on the part of the United States, there would be some reason for giving that interpretation to them. But it has been shown, that this is not the case.

It was contended by the attorney-general, that these questions were in effect settled in the case of the *United States v. Barber*, 9 Cr. 243. But this is clearly a mistake. The only question in that case which was referred to this court, was, "whether fat cattle are provisions or munitions of war?" The decision of this court was in the affirmative. But whether the fat cattle were dead or alive, and if the latter was to be intended, whether they were driven or transported in some vehicle, did not appear, and of course, the law arising out of that state of facts was not, and could not be decided.

Upon the whole, it is the opinion of a majority of this court, that driving living fat oxen, &c., on foot, is not a transportation thereof, within the true intent and meaning of the above-recited act of congress.

Judgment for the defendant.

*123]

*THE MARY.

Prize.—Rights of captors.

Where an enemy's vessel was captured by a private armed vessel of the United States, and subsequently dispossessed by the force or terror of another; the prize was, under the circumstances of the case, adjudged to the first captor, with costs and damages.

APPEAL from the Circuit Court for the district of Massachusetts. The British schooner *Mary*, whereof Charles Thomas, jr., a British subject, domiciled at St. Johns, New Brunswick, was late owner and master, sailed under convoy from St. Johns, New Brunswick, bound to Castine, then in the military occupation of the British, laden with a cargo, the growth, produce and manufacture of British possessions, shipped by British merchants domiciled in St. Johns, New Brunswick, to merchants resident in Castine.

The schooner *Mary* was captured by the private armed schooner *Cadet*,