

APPENDIX.

NOTE I.

Additional Note on the Principles and Practice in Prize Causes.

In the Appendix to the first volume of these reports (Note II.), a summary sketch was attempted of the practice in prize causes, in some of its most important particulars. It has been suggested, that a more enlarged view of the principles and practice of prize courts might be useful, and in case of a future war, save much embarrassment to captors and claimants. With this view, the following additional sketch is submitted to the learned reader.

As preliminary to the subject, it may be observed, that the ordinary prize jurisdiction of the admiralty extends to all captures made on the sea, *jure belli* (The Two Friends, 1 Rob. 271, 284); (a) to captures in foreign ports and harbors (Lindo v. Rodney, 2 Doug. 613 note); to captures made on land by naval forcés, and upon surrenders to naval forces either solely or by joint operations with land forces (Lindo v. Rodney, *ut supra*; Chinsurah, 1 Acton 179); and this, whether the property so captured be goods, ships or mere *choses in action* (Ibid.); to captures made in rivers, ports *2] and harbors of the *captor's own country (W. B. v. Latimer, 4 Dall. App'x, 1; Le Caux v. Eden, 2 Doug. 606; Lindo v. Rodney, Ibid. 613, note); to money received as a ransom or commutation on a capitulation to naval forces alone, or jointly with land-forces (Ships taken at Genoa, 4 Rob. 388); and to ransoms upon captures at sea, generally. Anthon v. Fisher, 2 Doug. 649, note 1; Maisonnaire v. Keating, 2 Gallis. But the admiralty, merely by its own inherent powers, never exercises jurisdiction as to captures or seizures as prize, made on shore, without the co-operation of naval forces, whether made in our own, or in a foreign territory. The Two Friends, 1 Rob. 271, 284; The Emulous, 1 Gallis. 563. Whenever such a jurisdiction is exercised, it is by virtue of powers derived *aliunde*. And though, when the jurisdiction has once attached, it may be lost by a hostile re-capture, escape or voluntary discharge (Hudson v. Guestier, 4 Cranch 293); yet it remains notwithstanding the goods are landed, for it does not depend on their local situation after capture; but the court will follow the goods or their proceeds with its process, wherever they may be found, or under whatever title acquired. Home v. Camden, 2 H. Bl. 533; 4 T. R. 388; Willis v. Commissioners of Prize, 5 East 22; The Noysomhed, 7 Ves. 593; The Louis, 5 Rob. 146; The Two Friends, 1 Ibid. 271; The Eliza, 1 Acton 336; Smart v. Wolff, 3 T. R. 223; The Pomona, 1 Dods. 25. Therefore, where the property is carried into a foreign port, and there delivered upon bail, by the captors, the prize court does not lose its jurisdiction, but may proceed to adjudication and enforce the stipulation. The Peacock, 4 Rob. 185.

(a) Connoitront (les juges de l'amirauté) des prises faites en mer, &c. Ordonnance de 1681, liv. 1, tit. 2, de la *Competence*, Art. 3. Cette attribution à l'Amirauté pour les prises, est

encore d'aussi ancien date que celle de l'établissement de sa Jurisdiction. Ordonnance de 1400, art. 4, et suiv. de 1517, art. 3, et suiv. de 1543, art. 20, et de 1584, art. 33. Valin, Id.

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So, if a prize be lost at sea, the court may, nevertheless, proceed to adjudication, either at the instance of the captors or of the claimants. The *Susanna*, 6 Rob. 48. So, although the property may be actually lying within a foreign neutral territory, the court may proceed to adjudication. *Hudson v. Guestier*, 4 Cranch 293; The *Christopher*, 2 Rob. 209; The *Henrick and Maria*, 4 *Ibid.* 43; The *Comet*, 5 *Ibid.* 285; The *Victoria*, Edwards 97. So, although the property has been sold by the captors, or has passed into other hands. The *Falcon*, 6 Rob. 194; The *Pomona*, 1 Dods. 25. But it

*3] rests in the sound discretion of the court, whether, when property has been sold or converted by the captors, it will proceed to adjudication in their favor; for it is only in cases where the same has been justifiably or legally converted by the captors, that they can claim its aid. The court will withhold that aid, where there has been a conversion by the captors, without necessity or reasonable cause. *L'Eole*, 6 Rob. 220; *La Dame Cecile*, *Ibid.* 257; The *Arabella and Madeira*, 2 Gallis. 367. (a)

When once the prize court has acquired jurisdiction over the principal cause, it will exert its authority over all the incidents. (b) It will follow, as has been already observed, prize proceeds into the hands of agents or other persons holding them for the captors, or by any other title; and in proper cases, will decree the parties to pay over the proceeds, with interest upon the same for the time they have been in their hands. *4] *Smart v. Wolff*, 3 T. R. 323; *Home v. Camden*, 2 H. Bl. 533; *4 T. R. 382; *Jennings v. Carson*, 4 Cr. 1; The *Two Friends*, 1 Rob. 273; The *Princessa*, 2 *Ibid.* 31; The *Louis*, 6 *Ibid.* 146; *Willis v. Commissioners of Prize*, 5 East 22; The *Noysomhed*, 7 Ves. 593. It may also enforce its decrees against persons having the proceeds of prize in their hands, notwithstanding no stipulation, or an insufficient stipulation, has been taken on a delivery on bail; for it may always proceed *in rem* where the *res* can be found, and is not confined to the remedy on the stipulation. *Per BULLER, J.*, in 3 T. R. 323; *Per GROSE, J.*, in 5 East 22; The *Pomona*, 1 Dods. 25; The *Herkimer*, Stew. 128; s. c. 2 Hall's Law J. 133. And in these cases, the court may proceed upon its own authority, *ex officio*, as well as upon the application of parties. The *Herkimer*, *ut supra*. Nor is the court *functus officio*, after sentence pronounced; for it may proceed to enforce all rights, and issue process therefor, so long as anything remains to be done touching the subject-matter. (*Home v. Camden*, 2 H. Bl. 533, and cases *ubi supra*.)

The prize court has also exclusive jurisdiction as to the question who are the captors, and joint captors, entitled to share in the distribution, and its decree is conclusive upon all parties. *Home v. Camden*, 2 H. Bl. 533; 4 T. R. 382; The *Herkimer*, Stew. 128; s. c. 2 Hall's Law Journ. 133; *Duckworth v. Tucker*, 2 Taunt. 7. It has the same exclusive authority as to the allowance of freight, damages, expenses and costs, in all cases of captures. *Le Caux v. Eden*, 2 Doug. 594; *Lindo v. Rodney*, *Ibid.* 613; *Smart v. Wolff*, 3 T. R. 223; The *Copenhagen*, 1 Rob. 289; The *St. Juan Baptista*, 5 *Ibid.* 33;

(a) S'il y a aucun qui rompe coffre, balle ou pippe ou autre marchandise que nostredit admiral ne soit présent en sa personne pour luy, il forfera sa part du butin et si sera par ice luy admiral puny selon le meffaict. Ordonnance de 1400, Art. 10, Coll. Mar. 79. Ordonnance de 1584, art. 38, Id. 111. Défendons de faire aucune ouverture des coffres, ballots, sacs, pipes, barriques, tonneaux et armoires, de transporter ni vendre aucune marchandises de la prise; et à toutes personnes d'en acheter ou recéler, jusqu'à ce que la prise ait été jugée, ou qu'il en ait été ordonné par justice; à peine de restitution de quadruple, et de punition corporelle. Ordonnance de 1681, liv. 3, tit. 9, *Des Prises*, art. 20. Quatre Juin 1783, jugement en dernier ressort de l'amirauté de Dunkerque,

contre les auteurs du pillage du navire l'*Amitié*, qui les condamne à la restitution du prix des choses pillées, les prive de leur part aux prises, et prononce le banissement contre l'un d'eux, avec injonction au capitaine du corsaire capteur, d'être plus circonspect à l'avenir. Code des Prises, tom. 1, p. 118, par Guichard.

(b) M. l'amiral et les commissaires connoîtront aussi des partages des prises et de tout ce qui leur est incident, même des liquidations, et comptes des dépositaires lorsqu'ils le jugeront à propos, comme aussi des échouements des vaisseaux ennemis qui arriveront pendant la guerre, circonstances et dépendances. Règlement du 23 Avril 1744, Art. 5. 2 Valin, *Sur l'Ordonnance*, 318.

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Die Fire Damer, 5 Ibid. 357; The Betsey, 1 Ibid. 93; Duckworth v. Tucker, 2 Taunt. 7; Jennings v. Carson, 4 Cr. 2; Bingham v. Cabot, 3 Dall. 19; United States, v. Peters, Ibid. 121; Talbot v. Jansen, Ibid. 133; 2 Bro. Civ. & Adm. Law 208. And though a mere maritime tort, unconnected with capture *jure belli*, may be cognisable by a court of common law; yet it is clearly established, that all captures, *jure belli*, and all torts *connected therewith, are exclusively cognisable in the prize court. [*5]

And the prize court will not only entertain suits for restitution, and damages in cases of wrongful capture, and award damages therefor; but it will also allow damages for all personal torts, and that, upon a proper case laid before the court, as a mere incident to the possession of the principal cause. And in such a case, it will not confine itself to the actual wrongdoer; but will apply the rule of *respondet superior*, and decree damages against the owners of the offending privateer. *Del Col v. Arnold*, 3 Dall. 333; *The Anna Maria, ante*, p. 327; *Bynk. Q. J. Pub. lib. 1, ch. 19*, Du Ponceau's translation, 147. And where the captured crew have been grossly ill-treated, the court will award a liberal recompense. *The St. Juan Baptista*, 5 Rob. 33; *Die Fire Damer*, Ibid. 357; *The Lively*, 1 Gallis. 315.

As the prize court has an unquestionable jurisdiction to apply confiscation, by way of penalty, for falsity, fraud and misconduct of citizens as well as of neutrals (*The Johanna*, 6 Rob. 72; *Oswell v. Vigne*, 15 East 70); so it may, in like manner, decree a forfeiture of the rights of prize against captors, where they have been guilty of gross irregularity, or criminal neglect, or wanton impropriety and fraud. It is a part of the ancient law of the admiralty, independent of any statute, that captors may, by their misconduct, forfeit the rights of prize; and in such cases, the property is condemned to the government generally. And this penalty has been frequently enforced, not only where the captors have been guilty of fraud (8 Cr. 421; *The George, ante*, p. 278); but also where they have violated the instructions of government relative to bringing in the prize-crew, and have proceeded, without necessity, to dispose of the property before condemnation. *La Reine des Anges*, Stew. 9. So, where the captors have rescued a prize-ship from the custody of the marshal, after a monition duly served. *The Cossack*, Stew. 513. In short, the court is the constitutional guardian of the public interests in relation to matters of prize; and wherever there is any deviation from the regular course of proceedings, it expects to have a sufficient reason *shown for that deviation, before it will give the captors any of the ordinary [*6] benefits of prizes captured by them. (a)

The usual course of the court is by way of monition, and if that process be dis-

(a) Et si aucuns des desdicts preneurs en leur voyage en especial auoient commis faute telle qu'ils fussent attaints d'auoir enfondré aucuns navires, ou voyez les corps des prisonniers descendus à terre en aucune loingtaine coste, pour céler le larrecin et meffaict, voulons que sans quelque délay, faueux ou déport, nostredit admiral en face faire punition et iustice selon le cas. Ordonnance de 1400, art. 7. Si aucuns si trouvent avoir commis faute en leur voyage, soit d'auoir mis a fonds aucun navires, ou robbé des biens d'iceux, ou noyé les corps des marchands, maistres, conducteurs, et autres personnes desdits navires, ou iceux descendus à terre en aucune loingtaine coste, pour céler le larcin et malfait, ou bien quand il adviendroit comme il a fait quelques fois, qu'aucuns d'eux se trouuans les plus forts viendront à ranconner à argent les navires de nos subjects, ou d'aucuns nos amis et alliez: Voulons que sans quelque délay, faueur ou deport, le dit admiral en face

ou face faire justice et punition, telle que ce soit exemples à tous autres, deues informations des cas preallablement faites, et selon qu'il sera cyaprès ordonné. Et pour ce que souuentes fois quand une prise estoit faite sur nos ennemis, les preneurs estoient si coustumiers de user de leur volonteé pour leur profit, qu'ils ne gordoyent l'usage toujours et de toute ancienneté sur ce ordonné et observé, mais sans crainte de justice, comme innobediens et pillleurs, eux estans encore sur mer rompent les coffres, balles, boujettes, malles, tonneaux et autres vaisseaux, pour prendre et piller ce qu'ils peuvent des biens de la prise, en quoy ceux qui ont équipié et mis sur les navires a gros despens sont grandement foullez, dont advient souvent de grandes noises, débats et contentions. Nous prohibons et deffendons à tous chefs, maistres, contre maîtres, patrons, quarterniers, soldats, et compagnons, de ne faire aucune ouverture des coffres et balles, etc., ny autres vaisseaux

obeyed, an attachment issues against the *parties in contempt. But the court may, in all cases, proceed in the first instance, by warrant of arrest of the person or property, to compel security to abide its decree.

Having said so much on the subject of prize jurisdiction, as seemed necessary to explain the practice of the court, we may now pass to the consideration of the rights and duties of captors in relation to property captured in war.

To enable a vessel to make captures, which shall inure to the benefit of the captors, it is necessary that she should have a commission of prize. But non-commissioned vessels of a belligerent nation may not only make captures in their own defence, but may, at all times, capture hostile ships and cargoes, without being deemed by the law of nations to be pirates; though they can have no interest in prizes so captured. 2 Bro. Civ. & Adm. Law, 524; Casaregis, Disc. 24, No. 24; 2 Wooddes Lect. 432; Consolato del Mare, ch. 287, 288; 3 Bulst. 27; 4 Inst. 152, 154; Zouch, Adm. Jurisd. ch. 4, 101; Com. Dig., Admiralty, E. 3; The Georgiana, 1 Dods. 397; The Diligentia, Ibid. 403; The Emulous, 8 Cr. 131; The Nereide, 9 Ibid. 449; The Dos Hermanos, *ante*, p. 76. (a) But every capture, whether made by commissioned or non-commissioned ships, is at the peril of the captors. If they capture property, without reasonable or justifiable cause, they are liable to a suit for restitution, and may also be *8] mulcted *in costs and damages. (b) If the vessel and cargo, or any part thereof be good prize, they are completely justified. And although the whole property may, upon a hearing, be restored, yet, if there was probable cause of capture, they are not responsible in damages. Opinion of M. Portalis, in the case of *The Statira*, 2 Cranch 102, note; but, on the other hand, they may, under circumstances, according to the degree of doubt or suspicion thrown upon the case, either from defects of the papers, the nature of the voyage, or the conduct of the captured crew, be entitled to receive their costs and expenses in bringing in the property for adjudication. It is not within the object of this note, to enumerate all the various circumstances which have been adjudged to constitute probable cause for captures. But, in general, it may be observed, that if the ship pretend to be neutral, and has not the usual documents of such ship on board (*The Anna*, 5 Rob. 332); if the cargo be without any clearance (*Ibid.*); if the destination be untruly stated; if the papers respecting the ship or cargo be false or colorable, or be suppressed or spoliated; or if the neutrality of the cargo does not distinctly and fully appear (*Report of Dr. Lee, &c., Chitty's Law of Nations, App'x, 303, Wheat. on Capt. App'x, 320*); if the voyage be from or to a blockaded port

de quelques prises qu'ils facent, ny aucunes choses des dits prises receler, transporter, vendre, ny eschanger, ou autrement aliener, ains ayent a represente le tout desdites prises, ensemble les personnes conduisans le navire, audit admiral, ou vice-admiral, le plustot que faire se pourra, pour en estre fait et disposé selon qu'il appartiendra, et comme contiennent nos presentes ordonnances, et ce sur peine de confiscation de corps et des biens. Ordonnance de 1584, art. 35, 37.

(a) Aucun ne pourra armer un vaisseau en guerre, sans commission de l'admiral. Ordonnance de 1681, liv. 8, tit. 9, *Des Prises*, art. 1. Il est tellement vrai qu'il n'y a que ceux qui ont commission de l'admiral, qui sont en droit de faire à leur profit des prises sur l'ennemi, que si le capitaine d'un vaisseau marchand a été attaqué en mer par un vaisseau ennemi dont il s'est rendu maître dans le combat, la prise qu'il a faite du vaisseau ennemi ne

lui appartient pas, mais appartient à l'amiral qui est à cet égard aux droits du roi: l'amiral a coutume d'en gratifier pour le tout ou pour partie celui qui a fait la prise, sans tirer à conséquence. Pothier, *de Propriété*, No. 93; Valin, *Sur l'Ordonnance, ubi supra*.

(b) Lesdits preneurs empeschans aucuns marchands, navire ou marchandise sans cause raisonnable, ou qu'ils ne soyent nos adversaires, nostredit admiral sera deuement restituer le dommage, et ne permettra plus l'usage qu'ont à ce contre raison tenué, iceux preneurs, en quoy ils ont fait et donné de grands dommages à aucuns de nos alliez par feinte, ou fausse couleur qu'ils mettoient de non cognoistre s'ils estoient nos aduersaires, ou non, qui est chose bien d'annable, contre raison et iustice, que homme soubz telle couleur deust porter dommage, ou destourbier. Ordonnance de 1400, art. 8. See the opinion of M. Portalis in the case of *The Pigou*, 2 Cranch 98, note.

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(The Frederick Molke, 1 Rob. 86); or not legal to the parties engaged in the traffic (The Washingham Packet, 2 Ibid. 77; The Hoop, 1 Ibid. 196; The St. Antonius, 1 Acton 113); if the cargo be of an ambiguous character as to contraband (The Endraught, 1 Rob. 22; The Ringende Jacob, Ibid. 89. The *Jonge Margaretha, Ibid. 189; The Twende Broder, 4 Ibid. 33; The Frau Margaretha, 6 Ibid. 92; The Ranger, Ibid. 125); and generally, if the case be a case of further proof; all or any of those circumstances furnish a probable cause for capture, and justify the captors in bringing in the ship and cargo for adjudication. [*9

Whenever the captors are justified in the capture, they are considered as having a *bonâ fide* possession, and are not responsible for any subsequent losses or injuries arising to the property from mere accident or casualty, as from stress of weather, re-capture by the enemy, shipwreck, &c. The Betsey, 1 Rob. 93; The Catharine and Anna, 4 Ibid. 39; The Carolina, Ibid. 256; Del Col v. Arnold, 3 Dall. 333. They are, however, in all cases, bound for fair and safe custody; and if the property be lost from want of proper care, they are responsible to the amount of the damage; for subsequent misconduct may forfeit the fair title of a *bonâ fide* possessor, and make him a trespasser from the beginning. The Betsey, 1 Rob. 93; The Catharine and Anna, 4 Ibid. 39. Therefore, if the prize be lost by the misconduct of the prize-master, or from neglecting to take a pilot, or to put on board a proper prize-crew, the court will decree restitution in value against the captors. The Der Mohr, 3 Rob. 129; The Speculation, 2 Ibid. 293; The William, 6 Ibid. 316; Del Col v. Arnold, 3 Dall. 333; Wilcocks v. Union Ins. Co., 2 Binn. 574. But although, in general, irregularity of conduct in captors makes them liable for damages, yet in case of a *bonâ fide* possession, the irregularity, to bind them, must be such as produces irreparable loss, as, for instance, such as may prevent restitution from an enemy who re-captures the property. The Betsey, 1 Rob. 93. And in cases of gross misconduct, the court will hold the commission of the captors forfeited. The Marianne, 5 Rob. 9. But if the injured parties lie by, for a great length of time, the court will not issue a monition to the captors, to proceed to adjudication, even when misconduct is laid as the ground of the application. The Purissima Conception, 6 Rob. 45.

When a ship is captured, it is the duty of the captors, to send her into some convenient port for adjudication. The Huldah, *3 Rob. 235; The Madonna del Burso, 4 Ibid. 169; The Saint Juan Baptista, 5 Ibid. 33; The Wilhelmsberg, Ibid. 143; The Elsebe, Ibid. 173; The Lively, 1 Gallis. 315.(a) And a convenient port is such a port as the ship may ride in with safety, without unloading her cargo. The Washington, 6 Rob. 275; The Principe, Edwards 70. And the captors are bound to put on board the captured ship a sufficient prize-crew to navigate the vessel into such a port, unless the captured crew consent to navigate her (which in general they are not bound to do); but if they consent, they cannot afterwards impute any fault to the captors. Wilcocks v. Union Ins. Co., 2 Binn. 574; The Resolution, 6 Rob. 13; The Pennsylvania, 1 Acton 33; The Alexander, 1 Gallis. 532; s. c. 8 Cranch 169. And in case of the capture of a neutral ship, the crew ought not to be handcuffed or put in irons, unless in extreme cases; for if unnecessarily done, the prize court will decree damages to the injured parties. The St. Juan Baptista, 5 Rob. 33; Die Fire Damer, Ibid. 357. Captors are not bound to explain the cause of capture, but it is highly proper so to do, as the master may explain it away. The Juffrow Maria Schroeder, 3 Rob. 147. They may chase under false colors; but the maritime law does not permit them to fire under false colors. The Peacock, 4 Rob. 185.(b) [*11 *They have no right to make any spoliation or damage to the captured ship; or to embezzle or convert the property;

(a) Enjoignons aux capitaines qui auront fait quelque prise, de l'amener ou envoyer, avec les prisonniers, au port où ils auront armé, à peine de perte de leur droits et d'amende arbitraire; si ce n'est qu'il fussent forcés par la tempête ou par les ennemis, de relâcher en quelque

autre port, auquel cas ils seront tenus d'en donner incessamment avis aux intéressés à l'armement. L'Ordonnance de 1681, liv. 3, tit. 9, *Des Prises*, art. 7. See also the ordinance of 1584, art. 43, Coll. Mar. 113.

(b) Sa Majesté a ordonné, et ordonne, que

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or to break bulk, or to remove any of the property from the ship, unless in cases of necessity, or where obvious reasons of policy, or the urgency of the occasion, justify them in so doing. The *Concordia*, 2 Rob. 102; *L'Eole*, 6 Ibid. 220; The *Washington*, Ibid. 275; *Clerke's Praxis* 163; *Del Col v. Arnold*, 3 Dall. 333. And in every case of a removal of property from a captured ship, the court expects to be satisfied as to the propriety of the removal, before it will proceed to adjudication. But if any of the captured property be shown to be missing, without any default on their part, as where it is lost by robbery or burglary, after unlivery, they are not responsible for the loss. The *Maria*, 4 Rob. 348; The *Rendsberg*, 6 Ibid. 142. And if captors, acting *bonâ fide*, and for the benefit of the parties, under peculiar circumstances, land or even sell the prize goods, this irregularity if not injurious to the parties, will not be held to deprive them of the effects of a lawful possession. The *Princessa*, 2 Rob. 31.

If the capture is made without probable cause, the captors are liable for damages, costs and expenses, to the claimants. Sir W. Scott and Sir J. Nichol's letter to Mr. Jay, *Wheat. on Capt.*, App'x, 312; Opinion of M. Portalis, in the case of *The Pigou*, 1 Cr. 101, note; *Del Col v. Arnold*, 3 Dall. 333; The *Charming Betsey*, 2 Cr. 64; *Maley v. Shattuck*, 3 Ibid. 458; The *Triton*, 4 Rob. 78; *Camden v. Hone*, 4 T. R. 385; *Fallijeff v. Elphinstone*, 5 Bro. P. C. 343; *Clerke's Prax.* 162; The *Lively*, 1 Gallis. 315.(a) And if the captors unjustifiably neglect to proceed to adjudication, the court will, in case of restitution, decree demurrage against them. The *Corier Maritimo*, 1 Rob. 287; The *Madonna del Burso*, 4 Ibid. 169; The *Peacock*, Ibid. 185;

*12] *The *Anna Catharina*, 6 Ibid. 10. So also, if the captors agree to restitution, but unreasonably delay it, demurrage will be allowed against them. The *Zee Star*, 4 Rob. 71. After an acquittal, a second seizure may be made by other captors, but it is at the peril of damages and costs, in case of failure (The *Mercurius*, 1 Rob. 80); and although a spoliation of papers be made, yet, if it be produced by the misconduct of captors, as by firing under false colors, it will not protect them from damages and costs. The *Peacock*, 4 Rob. 185. Nor is it an objection, in the prize court, against awarding damages and costs, that the ship is not navigated by a proper proportion of seamen of her own country, according to its navigation laws; for that is an irregularity which must be referred to another branch of the admiralty jurisdiction. The *Nemesis*, Edw. 50.

As to the time within which a suit may be brought in the admiralty, for damages for an illegal capture, it may be observed, that as the statute of limitations does not apply to prize causes, there is no time, during the existence of the prize commission, in which captors may not be legally called on to proceed to adjudication, for the purpose of awarding damages against them. The *Mentor*, 1 Rob. 179; The *Huldah*, 3 Ibid. 235. But the court will extend, by equity, the principles of the statute of limitations to prize causes; and therefore, it will not, after a great lapse of time, compel the captors to proceed to adjudication, or entertain a suit for damages for a supposed illegal capture. The *Susanna*, 6 Rob. 48.

In respect to the measure of damages, where the vessel and cargo are actually lost, it is usual to allow the actual value of the property. *Del Col v. Arnold*, 3 Dall. 333; *Maley v. Shattuck*, 3 Cr. 458; The *Anna Maria*, *ante*, p. 327. And where a prize had been illegally condemned by a vice-admiralty court, erected by the commanders in the

tous les capitaines commandans ses vaisseaux ou ceux armés en course par ses sujets, seront tenus d'arborer pavillon français avant de tirer le coup d'assurance ou de semonce. Défenses très-expresses leur sont faites de tirer sous pavillon étranger, à peine d'être privés, eux et leur armateurs, de tous le provenu de la prise, qui sera confisqué au profit de Sa Majesté si le vaisseau est jugé ennemi; et en cas que le vaisseau soit jugé neutre, les capitaines et armateurs

seront condamnés aux dépens, dommages et intérêts des propriétaires. Ordonnance de 17 Mars, 1696.

(a) Si la prise étoit évidemment mauvaise, de maniere, qu'il n'y eût rien qui fût capable d'excuser le corsaire; nul doute alors que la mainlevée n'en fût ordonnée, non-seulement avec exemption de tous frais: mais encore avec tous dépens, dommages et intérêts contre l'armateur. 2 Valin, *Sur l'Ordonnance*, 336.

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West Indies, under a misapprehension that they possessed an authority to erect such courts, and afterwards, restitution in value was decreed by the high court of admiralty in England, the court allowed the invoice value, ten per cent. profit and freight, as well where the ship and cargo belonged to the same persons as where they were separately owned. *The Lucy*, 3 Rob. 208. Indeed, what items may properly form a part of the damages, depends *upon the nature and circumstances of the case; and for [*13 guides to direct his judgment, the learned reader is referred to the following cases. *Le Caux v. Eden*, 2 Doug. 594, 596; *Talbot v. Jansen*, 3 Dall. 133, 170; *Cotton v. Wallace*, *Ibid.* 302, 304; *The Charming Betsey*, 2 Cr. 64; *Maley v. Shattuck*, 3 *Ibid.* 458; *The Narcissus*, 4 Rob. 20; *The Zee Star*, *Ibid.* 71; *Corier Maritimo*, 1 *Ibid.* 287; *The St. Juan Baptista*, 5 *Ibid.* 33; *Die Fire Damer*, *Ibid.* 357; *The Anna Catharina*, 6 *Ibid.* 10; *The Driver*, 5 *Ibid.* 145; *The Lively*, 1 Gallis. 315; *The Anna Maria*, *ante*, p. 327. Where damages and costs are allowed, if, after they are assessed, payment is delayed, the court will allow interest upon the principal sum, from the time of assessment, although it includes interest as well as principal. *The Driver*, 5 Rob. 145.

As to the mode of assessing damages, it is usual for the court to refer the subject to commissioners, to make inquiry, and return a regular report to the court, of the several items and amount of damages. But in their report, they should state the principles upon which they proceed in making allowances, where the items do not explain themselves, and not report a gross sum without specification or explanation. *The Charming Betsey*, 2 Cr. 64; *The Lively*, 1 Gallis. 315.

In respect to the persons who are liable for costs and damages, it may be observed, that the general rule, in respect to public ships, is, that the actual wrongdoer, and he alone, is responsible. *The Mentor*, 1 Rob. 179. It is not meant by this, that the crew of the capturing ship are responsible for the seizure made in obedience to the commands of their superior; for by the prize law, the act of the commander is binding upon the interests of all under him, and he alone is responsible for damages and costs. *The Diligentia*, 1 Dods. 404. The meaning of the rule is, that the person actually ordering the seizure is liable for the damages, and not his superior in command (who has not concurred in the particular act), simply from the fact, that the seizer is acting within the scope of his general orders. *The Mentor*, 1 Rob. 179. Therefore, a suit cannot be maintained against an admiral upon a station, who is not privy to the act of seizure. *Ibid.* Nor a commodore, who commands the *squadron, but gives no orders for [*14 the capture. *The Eleanor*, *ante*, p. 346. In short, the actual wrongdoer is the person to answer in judgment, and to him responsibility is attached by the court. He may have other persons responsible over to him, and that responsibility may be enforced; as, for instance, if a captain make a wrongful seizure under the express orders of his admiral, that admiral may be made answerable in the damages occasioned to the captain by the improper act. But it is the constant and invariable practice of the prize court, to have the actual wrongdoer the party before the court; and the propriety of the practice is manifest, because, if the court was once to open the door to complaints, founded on remote and consequential responsibility, it would be difficult to say where it is to stop. *The Mentor*, 1 Rob. 179. The principles applicable to this class of cases, are fully developed in the opinion in the case of *The Eleanor*, *ante*, p. 346, to which the reader is respectfully referred.

In the case of private armed vessels, the owners, as well as the master, are responsible for the damages and costs occasioned by illegal captures, and this, to the extent of the actual loss and injury, even if it exceeds the amount of the bond usually given, upon the taking out of commissions for privateers. *Bynk. Q. J. Pub. lib. 1, ch. 19, Du Ponceau's ed. p. 147; Talbot v. Three Brigs*, 1 Dall. 95; s. c. 1 *Hall's Law J.* 140; *Die Fire Damer*, 5 Rob. 357; *The Der Mohr*, 3 *Ibid.* 129; 2 *Bro. Civ. & Adm. Law* 140; *Del Col v. Arnold*, 3 Dall. 333; *The Anna Maria*, *ante*, p. 327.(a) But the

(a) Pothier holds, that the owner of the privateer may entirely discharge himself from the responsibility, beyond the amount of the penalty in his bond, by abandoning the vessel to

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sureties to the *bond are responsible only to the extent of the sum in which they are bound. Du Ponceau's Bynk. p. 149; 2 Valin, *Sur l'Ordonnance*, 223. And if a person appear in behalf of the captain of a private ship of war, and gives security in his own name, with sureties, instead of the captain, he is liable in the same manner as the captain, as a principal in the stipulation. *King v. Fergusson*, Edw. 84. And a part-owner of a private armed ship is not exempted from being a party to a suit, on a monition to bring in the prize proceeds, and proceed to adjudication, in consequence of having made compensation for his share to the claimant, and received a release from him; for the claimant has a right to the answer of all parties, even supposing that the decree ought not to be enforced against such part-owner. *The Karasan*, 5 Rob. 291. And in the court of the law of nations, a person may be held a part-owner of a privateer, although *his name has never been inserted in the bill of sale, or the ship's *16] register. *The Nostra Signora de los Dolores*, 1 Dods. 290.

Where the captors, from any cause whatsoever, as from loss of the property, or from fraud or negligence, omit to bring the case before the court for adjudication, the claimant may apply to the court for a monition to the captors, to proceed forthwith to adjudication (*The William*, 4 Rob. 214); and upon their neglect so to do, after service and return of the monition, the court will, if a proper case is laid before it, proceed to award restitution with damages and costs. *The HulDAH*, 3 Rob. 235; *The Susanna*, 6 *Ibid.* 48. It is the usual practice, for a party to give in his claim in the first instance, before calling upon the captors to proceed to adjudication; but it will not necessarily vitiate the process, if there has been no claim. If it should, in any manner, come to the knowledge of the court, that a seizure had been made, in the nature of prize, and that no proceedings had been instituted, it would be the duty of the court to direct proceedings to be commenced. *The William*, 4 Rob. 214. The same object is often effected by the claimants, by an original suit for restitution, on a petition, setting forth all the facts, and praying for a decree of restitution either *in rem* or in value, with damages. *Del Col v. Arnold*, 3 Dall. 333; *Maley v. Shattuck*, 3 Cr. 458; *Jennings v. Carson*, 4 *Ibid.* 2; *The Anna Maria*, *ante*, p. 327; *The Eleanor*, *ante*, p. 347. Whether the proceeding be in the one form or the other, the rights of all parties remain the same. The burden of the neutrality of the property rests on the claimants, and when that is shown, the existence of probable cause of capture is to be established by the other

the injured party. *De Propriété*, No. 92. But Valin decides, that the prize law controls, in this respect, the provision of the municipal law of France, by which the owners of merchant vessels are discharged from their responsibility, by abandoning the ship and freight, in like manner as they are by the British statute, 9 Geo. II., ch. 15. "En conformité desdits réglemens de 1704 et 1744 (giving costs and damages to neutrals wrongfully seized), il faut donc tenir, aujourd'hui sans égard à la disposition de l'art. 3 du titre des propriétaires, &c., et du présent article, en tant qu'il limite le cautionnement à la somme de 15,000 liv. que l'armateur répondra indéfiniment de tous les dommages et intérêts résultans des délits et déprédations des gens de son corsaire, et des prises irrégulières par eux faites; sans pouvoir même s'en défendre, en payant la somme de 15,000 liv. pour laquelle il aura donné caution, et en déclarant en même temps qu'il abandonne outre cela son navire avec tous ses agrès, apparaux et autres dépendances, relativement à l'art. 2, du même titre

des propriétaires, &c., dont la disposition n'est plus applicable en matière d'armement en course, que celle de l'art. 3, attendu ces mêmes réglemens qui forme une décision particulière à cet égard." *Sur l'Ordonnance*, liv. 3, tit. 9, *des Prises*, art. 2. Such appears to have been the former law of France, but it was changed by the new commercial code. "Les propriétaires des navires équipés en guerre, ne seront toutefois responsables des délits et déprédations commis en mer, par les gens de guerre qui sont sur leur navires, ou par les équipages, que jusqu'à concurrence de la somme pour la quelle ils auront donné caution, à moins qu'ils n'en soient participans ou complices." Code de Commerce, art. 217. But as our laws not only contain no such provision, but have not even adopted the British statute, by which the owners are discharged in ordinary cases, by abandoning the vessel and freight to the injured party, there can be no doubt, that the responsibility of the owners of privateers is not limited, either to the penalty of the bond or the value of the vessel.

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side; and each party has a right to the answer of the other, upon all proper interrogatories supported by oath. *Maley v. Shuttuck*, 3 Cr. 458.

*As soon as the captors have brought the property in for adjudication, and the preparatory examinations are taken, the captors, and if they neglect or refuse, the claimants, apply to the proper court for adjudication. In either case, the property is immediately taken into the custody of the court; for in all proceedings *in rem*, the court has a right to the custody of the thing in controversy; and as soon as libelled, it is always deemed in the custody of the law. *Jennings v. Carson*, 4 Cr. 2; *Home v. Camden*, 2 H. Bl. 533. In the United States, a warrant immediately goes to the marshal, to take possession of the property; and he is bound to keep it *salva et arcta custodia*; and if any loss happens by his negligence, he is responsible for it to the court. In England, though the property is now usually put into the hands of the captors, yet it still remains, in contemplation of law, in the custody of the public. Formerly, it actually did remain in its custody, as is still the case in other foreign countries. It is merely for the convenience of the captors, that the English admiralty permits them to take possession of the property. But it must be remembered, that it is so held by them, as agents of the court, and not in right of property; and therefore, their possession may be divested by the act of the court, either *ex officio*, or on the application of the parties interested, showing good cause for taking it out of their hands; *per* Sir W. Scott, *arguendo*, in *Smart v. Wolff*, 3 T. R. 323, 329; *The Herkimer*, Stew. 128; 2 Hall's Law J. 133. And the property still remains in the custody of the court, notwithstanding an unlivery and deposit in public warehouses. *The Maria*, 4 Rob. 343. In fact, in England, where the property is so unlivered, if it has been captured by a public or private commissioned vessel, it is, *de facto*, under the joint locks of the government and the captors, although in the legal possession of the marshal, under the tenor of his writ for unlivery; and if captured by a non-commissioned vessel, it is a *droit*, where the king, in his office of admiralty, being the captor, it is under his locks alone. *The Rendsberg*, 6 Rob. 142, 174. In the United States, the marshal holds the custody, at all times, for the court; and the latter is the guardian of the public rights and revenue, as well as of the rights of the captors and claimants, in all cases of prize. It is, indeed, usual and proper, for the collector of the customs to keep an officer on board, for the protection of the revenue, until the duties are duly secured, which the captors may secure, if they please; but since it cannot be ascertained, until a decree of condemnation, whether the property be good prize or not, many cases may occur, in which it would be highly inconvenient for them to adopt this course. If the property be restored specifically, and exported from the country, by the claimants, it is held not liable to duties; and if sold under an interlocutory order of sale, it is the duty of the court to reserve out of the proceeds the amount of duties which then attach upon it, and direct them to be paid over to the collector. *The Concord*, 9 Cr. 387; *The Nereide*, 1 Wheat. 171. It is true, that the prize act of last war (act of the 26th June 1812, ch. 107, § 14), seems to contemplate, that the duties may be paid or secured in prize cases, in the same manner as goods ordinarily imported. But this clause is, in terms, applied only to goods of British growth, produce or manufacture, or imported from British ports; and is, at all events, inapplicable to cases where it cannot be ascertained whether the goods are imported or not, until after a judicial decision. And the subsequent act of the 27th January 1813, ch. 155, manifestly contemplates, that the payment of the duties is, in cases of condemnation, to be made by the marshal, out of the proceeds of prize sales. And it has been repeatedly held in the circuit court for the first circuit, that no forfeiture accrued for not securing the duties upon prize goods, before condemnation; and that the court might, at any time, direct an unlivery and sale; and upon such sale, would deduct the amount of duties, and direct them to be paid to the collector.

It has already been stated, that when the marshal has possession of the property, he is bound for safe and fair custody; and if any loss be sustained, it is, at least, his duty to be prepared to show that it was not lost by any default of his. *The Hoop*, 4 Rob. 145. If, therefore, property be pillaged, while under his care, the court will hold him responsible for its value, if it arose from his negligence. If, indeed, upon

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an application to enforce their responsibility, he, by his answer, deny any negligence *19] *and loose custody, the court may, perhaps, think it no more than a legal and proper confidence in its own officer, to throw the burden of proof of culpable negligence or fraud on the other party. The Rendsberg, 6 Rob. 142, 157. And where the property is lost, while actually under the locks of the government, the marshal will not be liable, although he may still be considered as constructively having the legal custody. Ibid.

In prize causes, it is not usual, to file any special allegation of the particular circumstances on which the captors found their title to condemnation. The libel is, and always ought to be, the mere general allegation of prize, such as is used in undoubted cases of hostile property. The act of bringing the vessel in, and proceeding against her, allege her, generally, to be a subject of prize rights, and the captors are not called upon to state, at the commencement of the suit, the particular grounds on which they contend she is so. They have a right to institute the inquiry, and take the chance of the benefit of any fact that may be produced in the course of that inquiry. The Adeline, 9 Cr. 244; The Fortuna, 1 Dods. 81. This is a great advantage on the side of the captors, but is controlled by their liability to costs and damages, if the inquiry produce nothing; and is fully balanced by the advantage given to the claimant, in this species of proceeding, that no evidence shall be admitted against him, but such as proceeds from himself, from his own documents, and from his own witnesses, the captors not being permitted, except in cases marked by peculiar circumstances, to furnish any evidence whatever. The Fortuna, 1 Dods. 81. Considerations of this nature render it very important for proctors to adhere, with the greatest care, to the established form; and it is a great irregularity, equally evincing want of skill and judgment, to deviate from it.

Upon filing the libel, the usual practice is, immediately to issue a monition, citing all persons who are interested, to appear at a given day, and show cause why the property should not be condemned as prize; and this process, in the United States, *20] *usually includes a warrant to take possession of the property. But where the prize has been first seized in port, a monition issues, in the first instance, to bring in the papers, if they are in the possession of a subject or citizen. The Conqueror, 2 Rob. 303. The usual monition is directed to the marshal, and in England, is served, by posting up a copy at the Royal Exchange, in the city of London. In former times, fourteen days were allowed between the service of the monition and the day of hearing the cause; but in most of the later prize acts in England, twenty days are allowed after the execution of the monition. Robinson's Coll. Mar. 89, note; Mariott's Formulary 187. In the United States, the return-day of the monition depends upon the discretion of the district judge; but it is, usually, twenty days, at least, after the issuing of the process; and it is served, usually, by posting up a copy on the mast of the prize-vessel, and at such other public places as the judge may direct; and also by publication in the newspapers printed in or near the principal place or port of the district into which the prize is brought. This proceeding by monition and service, by public notice, is borrowed from the Roman law, by which, when it became impracticable to serve the party with a personal citation, recourse was had to this method, which is called a citation *per edictum*. Dig. lib. 5, tit. 1, § 68; Robinson's Coll. Mar. 88, note.

At the return-day of the process, if no claim be, at that time, or previously, interposed, and upon proclamation made, no person appear to claim, the default is entered on the record; and the court will then proceed to examine the evidence, and if proof of enemy's property clearly appear, it will immediately decree condemnation; if the case appear doubtful, it will postpone a decision. It is not now usual to condemn goods, for want of a claim, until a year and a day has elapsed, after the service of the process, except in cases where there is a strong presumption and reasonable evidence to show that the property belongs to an enemy. Rob. Coll. Mar. 89; The Harrison, 1

*21] Wheat. *298; The Staat Embden, 1 Rob. 26, 29. And if no claim be interposed, within that period, the property is condemned, of course, and the question of

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former ownership is precluded for ever, the owner being deemed in law to have abandoned it. *The Staat Embden, ut supra*; *The Henrick and Maria*, 4 Rob. 43, 44; *The Harrison, ut supra*; *Rob. Coll. Mar.* 89, note; *The Avery*, 2 Gallis. 386.

If, at or before the return-day of the process, a claim be interposed, the cause is then to be heard in its proper order, upon the ship's papers and the preparatory examinations. Accompanying every claim must be an affidavit which is called the test-affidavit, and which regularly should state that the property, at the time of shipment, and also at the time of capture, did belong, and will, if restored, belong to the claimant; and if there be any special circumstances in the case, these should be added. *The Adeline*, 9 Cr. 244. See *The Sally*, 3 Rob. 300, note. In respect to the manner of interposing claims, and the rules by which their admission or rejection are governed, it does not seem necessary to do much more than refer the reader to what is said on that subject in the appendix to the preceding volume (p. 500), and the case of *The Adeline*, 9 Cr. 244, 286. It may, however, be added, that a party, to be entitled to assert a claim in the prize court, must be the general owner of the property; for a person who has a mere lien on the property for a debt due, whether liquidated or unliquidated, is not so entitled. *The Eenroom*, 2 Rob. 1, 5; *The Tobago*, 5 *Ibid.* 218; *The Frances*, Thompson's claim, 8 Cr. 335; *Ibid.*, Irvin's claim, 8 Cr. 418; *The Marianna*, 6 Rob. 24. And the same rule has been applied to a mortgage, where the mortgagor is left in possession. *Bolch v. Darrel*, *Bee* 74. The rule that a claimant is not admitted to claim, who is engaged in a traffic prohibited by the municipal laws of the country, is applied only to citizens or subjects, and not to foreign neutral proprietors. *The Recovery*, 6 Rob. 341. But to citizens or subjects, the rule equally applies, whether the transaction is between original contractors or under a sub-contract. *The Cornelis and Maria*, 5 Rob. 28. And an inactive or sleeping partner cannot receive restitution, in a transaction in which he *could not be lawfully engaged as a sole trader. *The Franklin*, 6 Rob. 127, 131. [*22] If enemy's property be fraudulently blended in the same claim with neutral property, the latter is liable to share the fate of the former. *The St. Nicholas*, 1 *Wheat.* 481.

An appearance by a proctor for the claimants, duly entered, cures all defects of process, such as the want of a monition or of due notice. *Penhallow v. Doane*, 3 *Dall.* 54. And even assuming that one partner has no authority to appoint a proctor for all the partners, yet a general appearance for all, by a proctor is good and legally binding. *Hills v. Ross*, 3 *Dall.* 231. In cases of captures by government ships, the proceedings, in England, are exclusively carried on by the officers of the government, and no other persons can interfere to support or pursue a suit, where they do not consent. *The Elsebe*, 5 Rob. 173. Whether the same exclusive authority exists in the United States, has never been made the subject of question in the supreme court. (a)

*It has been already stated in the former note, that the cause is to be heard, [*23] at the first hearing, upon the ship's papers and the preparatory examinations, and that the *onus probandi* rests on the claimant. And see *the Rosalie*, 2 Rob. 343; *The Countess of Lauderdale*, 4 *Ibid.* 283. If, upon such hearing, the cause appear doubtful, and the parties have not forfeited their title to further proof, it is then in the

(a) In England, it is also held, that the power of the crown to direct the release of property seized as prize, before adjudication, and against the will of the captors, is not taken away by any grant of the prize, conferred in the order of council, the proclamation, or the prize act. *The Elsebe*, 5 Rob. 155. And in France, the captors cannot, after the prize is brought in for adjudication, terminate the proceedings, by a private arrangement with the claimants. Such an arrangement, to be valid, must be communicated to the *procureur-general*, and approved by the

court; because the rights and interests of the state, of the officers and crew of the capturing vessel, and of the subjects of neutral powers, might be compromised by such an arrangement. See the opinion of M. Portalis on this question (*Code des Prises, par Guichard*, tom. 2, p. 533). He distinguishes this case from that of ransoms, which are regulated by peculiar laws, but never favored; and he cites, in support of his opinion, several ancient *arrêts* of council, and rescripts of the admiral.

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discretion of the court, to allow further proof, either to the claimants alone, or to the captors as well as the claimants. The manner in which the preparatory examinations are taken, and the cases in which further proof is allowed or denied, have been briefly stated in the former note, and the standing interrogatories on which these examinations are taken, will be found in a subsequent note to this volume. (*Infra*, note 3.) It may not, however, be useless to glance at a few particulars which are either omitted, or not distinctly stated in the former note. Although the ship's papers, found on board, are proper evidence, yet they are so, only when properly verified; for papers by themselves prove nothing, and are a mere dead letter, if they are not supported by the oaths of persons in a situation to give them validity. The *Juno*, 2 Rob. 120, 122. (a) And even upon the original hearing, papers found on board another captured ship, may be invoked into the cause, and used by the captors. But if the papers are taken from a vessel, not so captured and carried in, they can only be used upon an order for further proof. The *Romeo*, 6 Rob. 351; The *Maria*, 1 *Ibid.* 340. But the authenticity of papers, thus invoked, must be verified by affidavit, and otherwise, to the satisfaction of the court. The *Romeo*, *ut supra*. So also, the depositions of the

*24] claimant in a former case, in which he was *owner and master, were permitted to be invoked by the captors, to prove his domicile. The *Vriendschap*, 4 Rob 166. But where nothing appears in the original evidence, which lays a foundation for prosecuting the inquiry further, it must be under very particular circumstances indeed, that the court will be induced to admit extraneous evidence. The *Sarah*, 3 Rob. 330. If the instructions found on board of a prize are transmitted from the department of state for foreign affairs to the prize court, they are considered as sufficiently authenticated, as having been found on board, without further proof to that effect. The *Maria*, 1 Rob. 340. A person skilled in nautical affairs may be called to examine the log-book of the captured ship, and to give his opinion as to the verity of the statement in respect to destination, &c., from the courses, winds, &c. The *Edward*, 4 Rob. 68.

The examinations of the prize-crew are to be taken in the manner which has been already alluded to; but if the prize be carried into a foreign port, where there is no commission, their affidavits, taken in such port, will be admitted in evidence. The *Peacock*, 4 Rob. 185; The *Arabella* and *Madeira*, 2 Gallis. 367.

In the prize court, as in every other judicial tribunal, there are certain presumptions which legally affect the parties, and are considered as of general application. Possession is presumptive evidence of property. *Miller v. The Resolution*, 2 Dall. 19. If there be a total defect of evidence, to establish the proprietary interest, it is presumed to belong to an enemy. Sir Walter Scott and Sir J. Nicholl's letter to Mr. Jay, *ubi supra*. The *Magnus*, 1 Rob. 31. So, goods found in an enemy's ship are presumed to belong to the enemy, unless a distinct neutral character, and documentary proof, accompany them. *Res in hostium navibus presumuntur esse hostium donec contrarium probetur*. Loccenius, lib. 2, ch. 4, n. 11; Grotius, de Jur. Bel. et Pac. lib. 3, ch. 6, § 6; Bynk. Q. J. Pub., lib. 1, ch. 13. And in cases where the property falls within the general character of contraband, if the claimant would avail himself of the favorable distinction that it is the produce of his own country, the *onus* of establishing that fact is on him.

*25] The *Twee Juffrowen*, *4 Rob. 242. *Prima facie*, a merchant is taken to be acting for himself, and upon his own account; but if a person is not a merchant, that may give a qualified character to his acts. The *Jonge Pieter*, 4 Rob. 79. If, in the ship's papers, property in a voyage from an enemy's port be described "for neutral account," this is such a general mode as points to no designation whatever; and under such a description, no person can say, that the cargo belongs to him, or can entitle himself to the possession of it as his property. In such a case, further proof is indispensable. The *Jonge Pieter*, 4 Rob. 79. When a ship has been captured and

(a) Il y a plus, et parceque les pieces en forme trouvées à bord peuvent encore avoir été concertées en fraude, il a été ordonné par Arrêt du Conseil du 26 Octobre 1692, que les deposi-

tions contraires des gens de l'équipage pris, prévaudroit à ces pieces. Valin, *sur l'Ordonnance*, liv. 3, tit. 9, des *Prises*, art. 6.

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carried into an enemy's port, and is afterwards found in possession of a neutral, the presumption is, that there has been a regular condemnation, and the proof of the contrary rests on the party claiming the property against the neutral possessor. The Countess of Lauderdale, 4 Rob. 283. Where a treaty expressly provides for the removal of persons who happen to be settled in a ceded port, the burden of proof rests on the other party, to show that they did not intend to remove, for the presumption is already to be taken in their favor. The Diana, 5 Rob. 60. Where the master of a captured ship is not fairly discredited, his testimony as to destination is generally conclusive on that point. The Carolina, 3 Rob. 75; The Convenientia, 4 Ibid. 200. So, his testimony of the ill-treatment of his crew, if uncontradicted. Die Fire Damer, 5 Rob. 357. Where the voyage is from the port of one enemy, to the port of another enemy, and further proof is required, the double correspondence of the shipper and consignee should be produced; for there is a double interest to be rebutted; but if the voyage be to a neutral port, the correspondence with the shipper is all that is usually required. The Vreede, 5 Rob. 231.

In respect to the persons who may be witnesses in prize causes, it is very clear, that an alien enemy, as such, is not, in general, disabled to be a witness. The Falcon, 6 Rob. 194; and, indeed, in ordinary cases, the prize crew, whether national, neutral or hostile, are the necessary witnesses in the cause. *The Henrick and Maria, 4 Rob. 43. And upon further proof ordered, the attestations of the claimant and his clerks, and the correspondence between him and his agents are admissible evidence, and proper proofs of property. The Adelaide, 3 Rob. 281. And upon further proof, the affidavits of the captors, even without a release, are good evidence of facts within their own knowledge. The Maria, 1 Rob. 340; The Resolution, 6 Ibid. 13; The Sally, 1 Gallis. 401. But under peculiar circumstances, the affidavits of captors are not received in our prize courts. The Henrick and Maria, 4 Rob. 57, note *a*; The Grotius, 9 Cr. 368; The Sally, 1 Gallis. 401; The Haabet, 6 Rob. 54; The Glierktigkeit, Ibid. 58, note *a*; The Charlotte Caroline, 1 Dods. 192, 199. Upon allegations of joint capture, the affidavits of any of the joint-captors are not received, unless they are discharged of all interest, by a release, for in such questions, the general rules of law as to competency prevail. And where a witness declares, that he expects to share from the bounty of the joint captors, he is competent; but it is otherwise, if he says that he thinks himself entitled in law. The Drie Gebroeders, 5 Rob. 333, 343, note *a*; The Anna Catharina, 6 Ibid. 269. And the log-book of asserted joint-captors is inadmissible evidence, since it goes to establish their interest. Le Niemen, 1 Dods. 9. Where further proof is ordered, affidavits taken in foreign countries, before notaries-public, whose attestations are properly verified, are, in general, proper evidence. But in the supreme court of the United States, it is, by a rule of the court, required, that all such evidence should be taken under a commission from the court. The London Packet, *ante*, p. 371. And this practice is certainly more conformable to the general purposes of justice, and less liable to abuse, than any other. It seems, however, to be a general rule of the prize court, not to issue any commission to be executed in the enemy's country. The Magnus, 1 Rob. 31; The Diana, 2 Gallis. 93.

The questions which are most ordinarily discussed in prize courts, at the hearing of the cause, respect the national character of the property; and this depends sometimes upon the habits and trade of the ship, upon the nature of the voyage or of the cargo, or upon the legal or illegal conduct of the parties themselves; but, ordinarily, it depends upon the national domicile of the asserted proprietor, or upon the nature of the title which he asserts over the property. In all these cases, where the property is condemned, it is, by fiction, or rather, by intendment of law, deemed the property of enemies, that is, of persons who are so to be considered in the particular transaction, and is condemned *eo nomine*. The Elsebe, 5 Rob. 173; The Nelly, 1 Ibid. 219, note to The Hoop; The Alexander, 8 Cr. 169; The Julia, Ibid. 181; The Thomas Gibbons, Ibid. 421; The St. Lawrence, 1 Gallis. 532; The Joseph, Ibid. 545. It is beside the purpose of this note, to discuss these topics at large, with all the distinctions which belong to them. Indeed, such a discussion would of itself require a very con-

siderable treatise. It may, however, be of some use, to give a rapid sketch of the leading principles which regulate the decisions of prize courts on some of these subjects.

In respect to the question who are to be considered enemies or not, the general principle is, that every person is to be considered as belonging to that country where he has his domicil, whatever may be his native or adopted country. The *Vigilantia*, 1 Rob. 1; The *Endraught*, Ibid. 19; The *Sarah Christina*, Ibid. 237; The *Indian Chief*, 3 Ibid. 23; The *President*, 5 Ibid. 277; The *Neptunus*, 6 Ibid. 403; The *Venus*, 9 Cr. 253; The *Frances*, Gillespie's claim, 1 Gallis. 614; The *Mary and Susan*, Richardson's claim, 1 Wheat. 46, 55 n.; *McConnel v. Hector*, 3 Bos. & Pul. 113; *Bynk. Q. J. Pub. ch. 3*, Du Ponceau's ed., p. 19, 25. (a) And the masters and crews of ships are deemed *28] to possess the national character of the ships to which they belong, during the time of their employment. The *Endraught*, 1 Rob. 21; The *Bernon*, Ibid. 101. See The *Embden*, Ibid. 17; The *Frederick*, 5 Ibid. 8; The *Ann*, 1 Dods. 221. And even if a person goes into a belligerent country originally for temporary purposes, he will not preserve his neutral character, if he remain there several years, paying taxes, &c. The *Harmony*, 2 Rob. 322; The *Embden*, 1 Ibid. 17. And a neutral consul, resident and trading in a belligerent country, is, as to his mercantile character, deemed a belligerent of that country. The *Indian Chief*, 3 Rob. 22; The *Josephine*, 4 Ibid. 25. And the same rule applies to the subject of one belligerent country, resident in the country of its enemy, and carrying on trade there. The *Citto*, 3 Rob. 38; *McConnel v. Hector*, 3 Bos. & Pul. 113. But a character acquired by mere domicil ceases upon removal from the country. The *Indian Chief*, 3 Rob. 12. The native character easily reverts, and it requires fewer circumstances to constitute domicil, in the case of a native, than to impress the national character on one who is originally of another country. *La Virginie*, 5 Rob. 98. And in his favor, a party is deemed to have changed his domicil, and his native character reverts, as soon as he puts himself *in itinere* to return to his native country *animo revertendi*. The *Indian Chief*, 3 Rob. 12; The *St. Lawrence*, 1 Gallis. 467.

In general, a neutral merchant, trading in the ordinary manner, with a belligerent country, does not, by the mere accident of his having a stationed agent there, contract the character of the enemy. The *Anna Catharina*, 4 Rob. 107, 121. But it is otherwise, if he be not engaged in trade upon the ordinary footing of a neutral merchant, but as a privileged trader of the enemy; for then it is in effect a hostile trade. The *Anna Catharina*, *ut supra*. So, if the agent carry on a trade from the hostile which is not clearly neutral. Ibid. And if a person be a partner in a house of trade, in the enemy's country, *29] he is, as to the concerns and trade of that house, deemed an enemy, and his share is liable to confiscation, as such, notwithstanding his own residence is in a neutral country; for the domicil of the house is considered in this respect as the domicil of the partners. The *Vigilantia*, 1 Rob. 1, 14, 19; The *Susa*, 2 Ibid. 255; The *Indiana*, 3 Ibid. 44; The *Portland*, Ibid. 41; The *Vriendschap*, 4 Ibid. 166; The *Jonge Klassina*, 5 Ibid. 297; The *Antonia Johanna*, 1 Wheat. 159; The *St. Joze Indiano*, 2 Gallis. 268. But if he has a house of trade in a neutral country, he has not the benefit of the same principle; for if his own personal residence be in the hostile country, his share in the property of the neutral house is liable to condemnation. Ibid.; and The *Frances*, 1 Gallis. 618; s. c. 8 Cr. 348. However, where a neutral is engaged, in peace, in a house of trade in the enemy's country, his property so engaged in the house is not, at the commencement of war, confiscated; but if he continues in the house,

(a) On n'aura aucun égard aux passe ports accordés par les princes neutres ou alliés, tant au propriétaires qu'aux maîtres des navires sujets des états ennemis, s'ils n'ont été naturalisés, et n'ont transféré leur domicile dans les états desdits princes avant la déclaration de la présente guerre: Ne pourront pareillement les-

dits propriétaires et maîtres des navires ou sujets des états ennemis, qui auront obtenu lesdites lettres de naturalité, jouir de leur effet, si depuis qu'elles ont été obtenues ils sont retournés dans les états ennemis pour y continuer leur commerce. Règlement du 21 Octobre 1744, art. 11. Dec. 26 Juillet 1778, art. 6.

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after knowledge of the war, it is liable, as above stated, to confiscation. The *Vigilantia*, 1 Rob. 1, 14, 15; The *Susa*, 2 Ibid. 251, 255. It is a settled principle, that traffic alone, independent of residence, will, in some cases, confer a hostile character on the individual. Ibid.; The *Susa*, 2 Rob. 252, 255; The *Vriendschap*, 4 Ibid. 166. And if a neutral be engaged in the enemy's navigation, it not only affects the particular vessel in which he is employed, but all other vessels belonging to him, that have no distinct national character impressed upon them. The *Vriendschap*, *ut supra*.

Ships are deemed to belong to the country under whose flag and pass they navigate, and this circumstance is conclusive upon their character. The *Vigilantia*, 1 Rob. 1, 19, 26; The *Vrouw Anna Catharina*, 5 Ibid. 161; The *Success*, 1 Dods. 131. So, even if purchased by a neutral, if they are habitually engaged in the trade of the enemy's country. The *Vigilantia*, *ut supra*; The *Planter's Wench*, 5 Rob. 22; even though there be no sea-port in the territory of the neutral. Ibid. But in general, and unless under special circumstances, the national character of ships depends on the residence of the owner. Ibid.; The *Magnus*, 1 Rob. 31. When, however, it is said, that the flag and pass is conclusive on the character of the ship, the *meaning is this, [*30 that the party who takes the benefit of them is himself bound by them; he is not at liberty, when they happen to turn to his disadvantage, to turn round and deny the character which he has worn for his own benefit, and upon the credit of his own oath or solemn declarations. But they do not bind other parties, as against him: other parties are at liberty to show that these are spurious credentials, assumed for the purpose of disguising the real character of the vessel; and it is no inconsiderable part of the ordinary occupation of a prize court, to pull off this mask, and exhibit the vessel, so disguised, in her true character of an enemy's vessel. The *Fortuna*, 1 Dods. 87; The *Success*, Ibid. 131. Ships and cargoes engaged in the privileged and peculiar trade of a nation, under a special contract, and the sanction of the government, are considered as affected by the character of the nation, and if it be hostile, the trade is stamped with the same character. The *Princessa*, 2 Rob. 49; The *Anna Catharina*, 4 Ibid. 197; The *Rendsborg*, Ibid. 121; The *Vrouw Anna Catharina*, 5 Ibid. 161; The *Commercen*, 1 Wheat. 382. See 5 Rob. 5, note *a*. And the produce of an estate situated in a hostile colony, is so impressed with the character of the soil, that although the owner of the estate be resident in a neutral country, his interest in the produce is deemed enemy's property. The *Phoenix*, 5 Rob. 20; The *Vrouw Anna Catharina*, Ibid. 161; The *Dree Gebroeders*, 4 Ibid. 232; Bentzon's claim, 9 Cr. 191.

In respect to the transfers of enemies' ships, during war, it is certain, that purchases of them by neutrals is not, in general, illegal; but such purchases are liable to great suspicion, and if good proof be not given of their validity, by a bill of sale, and payment of a reasonable consideration, it will materially impair the validity of the neutral claim (The *Bernon*, 1 Rob. 102; The *Sechs Gedchwistern*, 4 Ibid. 100); and if the purchase be made by an agent, his letters of procuracy must be produced and proved. The *Argo*, 1 Rob. 158. (*a*) And if, after such transfer, the ship *be employed habitually in the enemy's trade, or under the management of a hostile proprietor, the [*31 sale will be deemed merely colorable and collusive. The *Jemmy*, 4 Rob. 31; The *Omnibus*, 6 Ibid. 71. But the right of purchase, by neutrals, extends only to merchant ships of enemies (The *Minerva*, 6 Rob. 396, 399); for the purchase of ships of war belonging to enemies, is held to be invalid. The *Minerva*, *ut supra*. And a sale of a merchant ship, made by an enemy to a neutral, during war, must be an absolute, unconditional sale. The *Packet de Bilboa*, 1 Rob. 133; The *Noydt Gedecht*, Ibid. 137, note *a*. Anything tending to continue the interest of the enemy in the ship vitiates a contract of this description altogether. The *Sechs Gedchwistern*, 4 Rob. 100.

(*a*) Que tout vaisseau qui sera de fabrique ennemie, ou qui aura eu originaiement un propriétaire ennemi, ne pourra être censé neutre, s'il n'en a été fait une vente pardevant les officiers publics qui doivent passer cette sorte

d'actes, et si cette vente ne se trouve à bord et n'est soutenue d'un pouvoir authentique donné par le premier propriétaire, lorsqu'elle ne vend pas lui-même. Règlement du 17 Février 1694; Du 12 Mai 1696.

In respect to proprietary interests in cargoes, though, in general, the rules of the common law apply, yet there are many peculiar principles of prize law to be considered. It is a general rule, that during hostilities, or imminent and impending danger of hostilities, the property of parties belligerent cannot change its national character, during the voyage, or, as it is commonly expressed, *in transitu*. The *Dankebaar Africaan*, 1 Rob. 107; The *Herstelder*, *Ibid.* 114. This rule equally applies to ships and cargoes; and it is so inflexible, that it is not relaxed even in favor of owners, who become subjects, by capitulation, after the shipment and before the capture. *Ibid.* But if the ship sails before hostilities, when there is a decided state of amity between the two countries, and before the capture, the owner again becomes a friend, and at the time of the capture, and also at the time of adjudication, he is in a capacity to claim; the prize courts will, then, give him the benefit of the principle, that the national character cannot be altered *in transitu*, and will restore to him. *Ibid.* The same distinction is applied to purchases made by neutrals, of property *in transitu*; if purchased during a *32] state of war existing, or imminent and impending danger *of war, the contract is held invalid, and the property is deemed to continue as it was at the time of shipment, until the actual delivery. It is otherwise, however, if the contract be made during a state of peace, and without contemplation of war; for, under such circumstances, the prize courts will recognise the contract, and enforce the title acquired under it. The *Vrouw Margaretha*, 1 Rob. 336; The *Jan Frederick*, 5 *Ibid.* 128. And property is still considered *in transitu*, if it be ultimately destined to the hostile country, notwithstanding it has arrived at a neutral port, and the ship is there changed. The *Carl Walter*, 4 Rob. 207. The reason why courts of admiralty have established this rule as to transfers *in transitu*, during a state of war, or expected war, is asserted to be, that if such a rule did not exist, all goods shipped in the enemy's country would be protected by transfers, which it would be impossible to detect. The *Vrouw Margaretha*, 1 Rob. 336.

The same public policy has established the rule of the prize courts, that property going, during war, to be delivered in the enemy's country, and under a contract to become the property of the enemy, immediately on arrival, if taken *in transitu*, is to be considered as enemy's property. The *Sally*, 3 Rob. 300, note *a*. And all contracts of purchase effected on the part of the belligerent, where the payment is executory and contingent on delivery at an ulterior port, at the risk of the neutral vendor or shipper, are considered as contracts in fraud of the prize law, and the goods, if captured *in transitu*, are condemned as the absolute property of the enemy. The *Atlas*, 3 Rob. 299; The *Anna Catharina*, 4 *Ibid.* 107, 113, note. But when the contract is made in time of peace, and without any contemplation of war, no such rule exists. *Ibid.* But the rule is applied, where such a contract is originally made between allies in the war, if a party to it becomes neutral, after the contract, and before the execution of it, and the shipment is made afterwards. The *Anna Catharina*, 4 Rob. 107, 112. A contract by a neutral, with a privileged company of the enemy, with a view to the transportation of the whole produce of a colony, or of the company itself, if made during war, or in *33] contemplation of war, is pronounced illegal, and the property is liable to *condemnation as hostile property. The *Rendsborg*, 4 Rob. 121; The *Jan Frederick*, 5 *Ibid.* 128. But if a neutral, during peace, and without contemplation of war, purchase goods in a colony, from a regular privileged company there, and it is agreed, that they shall be transported and sold in the mother country, by the company's agents, for the benefit of the neutral, the contract is good, and the property remains neutral, during its transit, notwithstanding an intervening war of the mother country. The *Vrouw Anna Catharina*, 5 Rob. 161.

In ordinary shipments of goods, unaffected by the foregoing principles, the question of proprietary interest often turns on minute circumstances and distinctions, the general principle being, that if they are going for account of the shipper, or subject to his order or control, the property is not divested *in transitu*. If there be any condition annexed to the delivery of the goods to the consignee, the proprietary interest remains in the shipper, notwithstanding the goods are sent in pursuance of the orders of the

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consignee. Thus, if a merchant in H. send goods to A., in another country, by order of B., and on account of B., but with directions not to deliver them, unless satisfaction could be given for the payment, the property is not divested from the shipper, but remains his *in transitu*: cited in *The Aurora*, 4 Rob. 319. The same principle applies, where goods are shipped to the order of the shippers, but to be delivered by their agents to the consignee, upon the agents being satisfied for the payment. *The Aurora*, 4 Rob. 218; *The Merrimack*, Kimmel & Albert's claim, 8 Cr. 317. See *The Marianna*, 6 Rob. 24. So, even if the goods are stated in the invoice to belong to the claimants; yet if these papers are inclosed to the consignee, as agents to the shippers, and are to be delivered to the claimants, only upon conditions, in the discretion of the agent, the property remains in the shippers. *The Merrimack*, 8 Cr. 317. But if the goods are consigned to an agent of the shippers, but the invoice, &c., show them to be for the account of the claimants, and the invoice, &c., are, by the shippers, sent directly to the claimants, the possession of these documents gives them a title, and establishes the intention of the shipper to vest the property in the claimants at the time of the shipment. *The Merrimack*, Messrs. *Wilkins' claim, 8 Cr. 317. So, if the goods are shipped to the consignee unconditionally, for the use of the claimants. *Ibid.*, [*34 Messrs. McKean & Woodland's claim, 8 Cr. 317. But if the goods are consigned to the agent of the shippers, and there are discretionary orders given, but no direction for an absolute delivery to the claimants, the property remains in the shippers. *The St. Joze Indiano*, Lizaaur's claim, 2 Gallis. 268; s. c. 1 *Wheat*. 208. In all these cases, the goods are supposed to have been purchased, in pursuance of the orders of the claimants; for if they are sent by the shippers, without orders, or contrary to, or different from orders, either in quantity or kind, the proprietary interest remains in the shipper, during the transit, notwithstanding they are sent by direct consignment to the consignee. *The Venus*, 8 Cr. 253; *The Frances*, Dunham & Randolph's claim, 1 Gallis. 445; s. c. 8 Cr. 354; 9 *Ibid.* 183; *The Frances*, French's claim, 8 *Ibid.* 359.

It is certainly competent for an agent abroad, who purchases goods in pursuance of orders, to vest the proprietary interest in his principal, immediately on the purchase. This is the case, when he purchases exclusively on the credit of the principal, or makes an absolute appropriation and designation of the property for his principal. But where he sells his own goods, or purchases goods on his own credit (and thereby in reality becomes the owner), no property in such goods vests in his correspondent, until he has done some notorious act to divest himself of his title, or has parted with the possession, by an actual and unconditional delivery for the use of such correspondent. *The St. Joze Indiano*, 2 Gallis. 268; s. c. 1 *Wheat*. 208. But such delivery or appropriation to the use of his correspondent, need not be by a direct act, but it may constructively arise from the circumstances of the case, even where the shipper has made an intermediate assignment of the goods. *The Mary and Susan*, 1 *Wheat*. 25.

In all these cases, the material question is, whether the shipper retains or possesses any control over the property (independent of the mere right of stoppage *in transitu*, in cases of insolvency), or has parted with the possession, and all authority *over [*35 *H.*, for the purpose of answering drafts of his correspondent in A., without any letter of advice or document making it the absolute property of such correspondent, or putting it out of his own control, it still remains the property of the shipper, for he may, at any time, countermand the order, or give the goods, or money, a new direction. In substance, it is the same transaction, as if a person send a sum of money to his private banker, directing him to hold it subject to the order of A.; in which case, if, on the next day, and before any such order had been given, or even the fact of lodgment known to the other party, he had changed his purpose, and directed a conversion of the money, to another object, it is clear, that the bankers could not resist with effect. *The Josephine*, 4 Rob. 25.

In respect to questions of illegal trade, little is necessary to be said, in addition to the observations and cases cited in the former volume. It is a fundamental principle of prize law, that all trade with the enemy is prohibited, to all persons, whether natives,

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naturalized citizens or foreigners domiciled in the country, during the time of their residence, under the penalty of confiscation. The *Vigilantia*, 1 Rob. 1, 14, 26; The *Hoop*, Ibid. 196; *Potts v. Bell*, 8 T. R. 548; The *Rapid*, 8 Cr. 155; s. c. 1 Gallis. 295; The *Alexander*, 8 Cr. 169; s. c. 1 Gallis. 532; The *Joseph*, 8 Cr. 451; s. c. 1 Gallis. 545. (a)

*36] The same penalty is applied to subjects of allies in the war, trading with the common enemy. The *Nayade*, 4 Rob. 251; The *Neptunus*, 6 Ibid. 403; *Bynk*, Q. J. Pub. ch. 10, Du Ponceau's ed., p. 81. But a citizen of a belligerent country, domiciled in a neutral country, may lawfully trade with the enemy of his native country (The *Danaos*, 4 Rob. 255, note), with the exception of the case of trade in articles contraband of war. The *Neptunus*, 6 Rob. 403; The *Ann*, 1 Dods. 221. And if the party intends to trade with the enemy, but during the voyage, the port becomes neutral, the penalty is saved, for there must be the act as well as the intention. The *Abby*, 5 Rob. 251. And even assuming, that after the knowledge of a war, a citizen, domiciled in the enemy's country, may lawfully withdraw his property, without a license from his government (which has been denied, The *Mary*, 1 Gallis. 620), at all events, it must be done in a reasonable time, and ten months after the war is too late, and the party will then be deemed engaged in a trade with the enemy. The *St. Lawrence*, 1 Gallis. 467; s. c. 9 Cr. 120. And if a vessel take on board a cargo from an enemy's ship, under the pretence that it is ransomed, it is an illegal traffic. Even admitting the ransoming of captured property to be legal, it cannot be admitted to be made at any distance of time, and by any new voyages undertaken for this special purpose. The *Lord Wellington*, 2 Gallis. 103. And sailing under the enemy's license is deemed, *per se*, an efficient cause of condemnation. The *Julia*, 1 Gallis. 549; s. c. 8 Cr. 181; The *Aurora*, Ibid. 203; The *Hiram*, Ibid. 444; s. c. 1 Wheat. 440; The *Ariadne*, *ante*, p. 143.

These observations on the subject of proprietary interests, may be concluded, with the remark, that to entitle the claimant to sustain his claim in the prize court, the property must be proved to be neutral, at all periods from the time of shipment, without intermission, to the arrival and subsequent sale in the port of the enemy. The *Atlas*, 3 Rob. 299; The *Sally*, 4 Ibid. 92, note *a*. And if it be hostile at the time of shipment, it is (as has been already stated), a universal rule, to condemn it, *although the

*37] owner has become a friend or subject. The *Boedes Lust*, 5 Rob. 233.

In this connection, we might treat of the principles of international law respecting blockade, contraband of war (*vide* 1 Wheat. 38-9; Ibid. 394 n.), engagements in the coasting and colonial trade of an enemy (*vide* 1 Wheat. 507, app'x, note III.), the right of search, the effect of resistance or rescue of neutral ships, and the circumstances of unneutral conduct, which are visited with a forfeiture of the ship or cargo, or both. These topics would lead us into a very enlarged inquiry, incompatible with the object of this summary sketch; but they deserve the attention of all students of the law of prize, and it is to be hoped, that some eminent jurist will, hereafter, examine them with a diligence and learning proportioned to their importance. It may, however, be useful here to consider how far the illegal acts of the master bind the interests of the owner of the ship or cargo.

It is a general principle, that the act of the master, at all events, binds the owner of

(a) Au surplus, l'intention de l'ordonnance exigeant que la police contienne, le nom et le domicile de celui qui se fait assurer—les effets sur lesquels l'assurance sera faite—le nom du navire, du lieu où les marchandises seront chargées et déchargées, est encore de connoître en temps de guerre, si malgré l'interdiction de commerce qu'emporte toujours toute déclaration de guerre, les sujets du Roi ne font point commerce avec les ennemis de l'Etat, ou avec des amis ou alliés, par l'interposition desquels on

feroit passer aux ennemis des munitions de guerre et de bouche, ou d'autres effets prohibés : car tout cela étant défendu comme préjudiciable à l'Etat, seroit sujet à confiscation, et à être déclaré de bonne prise, étant trouvé, soit sur les navires de la nation, soit sur ceux des amis et alliés, comme il sera observé sur le tit. des Prises. Valin, Sur l'Ordonnance, liv. 3, tit. 6, *Des Assurances*, art. 3; Ibid. tit. 9, *Des Prises*, art. 7.

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the ship, as much as if the act were committed by himself. The *Vrow Judith*, 1 Rob. 150. If, therefore, the master deviate into a blockaded port, the owner is bound by the act, and is not permitted to aver his ignorance of the act, or that the master acted against his orders. The *Adonis*, 5 Rob. 256. And the same principle is applied to the case of carrying goods contraband of war. The *Imina*, 3 Rob. 167. But Grotius (*de Juri Belli ac Pacis*, lib 3, ch. 6, § 6), Loccenius (*de Jur. Mar.* lib. 2, ch. 4, no. 12), Pothier, (*de Propriété*, No. 103), and Bynkershoek, *Q. J. Pub.* lib. 1, ch. 12, p. 97, Du Ponceau's ed.), all contend for a favorable distinction, where the owner is ignorant of the fact of unlawful goods being on board. They are, however, contradicted by Valin (*Sur l'Ord.* tom. 2, p. 253), and Emerigon (*Des Assurances*, tom. 1, p. 449), whose doctrine is followed in the practice of prize courts. The law, indeed, is established, that the principal is answerable for the acts of his agent (and the master *is the accredited agent of the ship-owner), not only civilly, but penally, to the amount of the property intrusted to his care. The *Mars*, 6 Rob. 79, 87. It [*38] would be impossible for a court of prize to affect the proprietor in any other way: and whatever the hardship may be, it is very much softened, by recollecting, that if he has sustained any injury by the fraudulent and unauthorized acts of his agent, he will be entitled to his remedy against him. The *Mars*, *ut supra*. But the act of the master does not, in general, bind the owner of the cargo, unless he be owner of the ship, or consutant of the intended violation of law, or the master be his agent. The *Vrow Judith*, 1 Rob. 150; The *Imina*, 3 Ibid. 169; The *Rosalie and Betty*, 2 Ibid. 343, 351; The *Alexander*, 4 Ibid. 93; The *Elsebe*, 5 Ibid. 173. In cases of blockade, the deviation into the blockaded port is presumed to be in the service of the cargo, and therefore, the owner is bound by it, unless where there was no notice of the blockade, at the time the ship sailed. The *Alexander*, 4 Rob. 93; The *Shepherdess*, 5 Ibid. 256. And if the master, at the time of sailing, put his ship under convoy, whose instructions he is presumed to know, the act is illegal, and binds both the ship and cargo. The *Elsebe*, 5 Rob. 173. It is not considered like the case of an unforeseen emergency happening to a ship at sea, where the fact itself proves the owners to be ignorant and innocent, and where the court has held, that being proved innocent by the very circumstances of the case, the owners of the cargo should not be bound by the mere principle of law, which imposes on the employer a responsibility for the acts of his agent. On the contrary, it is a matter done *antecedently* to the voyage, and must, therefore, be presumed to be done, on communication with the owners, and with their consent; the effect of this presumption is such, that it cannot be permitted to be averred against, inasmuch as all the evidence must come from the suspected parties themselves, without a possibility of meeting it, however prepared. The court, therefore, applies the strict principle of law, and holds, as it does in blockade cases of that description, that the master must be taken to be the authorized agent of the cargo, and that if he has exceeded his authority it is barratry, for which he is *per- [*39] sonally answerable, and for which the owner must look to him for indemnification. The *Elsebe*, 5 Rob. 173, 175. Whether a like principle ought not to be applied to the owner of the cargo, in cases where the ship originally sails on the voyage, under an enemy's license, has not been decided. The point was made in the supreme court in a recent case; but knowledge being brought home to the actual agent of the owners of the cargo, it became unnecessary to decide the more general principle. The *Hiram*, 1 Wheat. 440. There are many other cases, in which the act of the master will bind the owner of the cargo as well as the ship; such are resistance of the right of search, suppressing or fraudulently destroying the ship's papers, rescue by the neutral crew, after capture, &c. The *Elsebe*, 5 Rob. 173; The *Dispatch*, 3 Ibid. 279; The *Nereide*, 9 Cr. 388, 451. But though the act of a *neutral* master, in resisting search, binds both ship and cargo, yet it has been solemnly settled by the supreme court, that the resistance of a *belligerent* master does not bind a neutral shipment, unless the proprietor has co-operated in the resistance. The *Nereide*, 9 Cr. 388. In a very recent case, however, Sir W. Scott has asserted the contrary doctrine. The *Fanny*, 1 Dod. 443. But the act of the agent or consignee of the cargo, whether he be the master or not, is

conclusive upon the owner of the cargo. The *Vrow Judith*, 1 Rob. 150. And the act of a general agent of the cargo, in covering the enemy's property, in the same shipment with his principal's property, affects the whole with condemnation, although the principal had no knowledge of the illegal act. The *St. Nicholas*, 1 Wheat. 417; *Phoenix Ins. Co v. Pratt*, 2 Binn. 308. And the same principle is applied in the case of simulated papers; for the carrying of simulated papers is an efficient cause of condemnation. *Oswell v. Vigne*, 15 East 70. But in peculiar circumstances, the act of an agent of the cargo will be liberally construed in favor of his principal. As, if the agent be a belligerent, and has received orders to purchase goods, before the war, or before a blockade, his acts in making the shipment, during a blockade, are not binding on his principal, unless he had had an opportunity to countermand the orders, and neglected it; for the agent, in such cases, may have a personal interest in exporting *the goods. The *Neptunus*, 1 Rob. 173; Cases cited in *The Hoop*, *Ibid.* 196. *40] The *Dankbaarheid*, 1 Dods. 183. But the act of the master will not bind even the owner of the ship, unless it be in cases within the scope of his ordinary authority. If, therefore, the master of a non-commissioned merchant ship make a capture, the owner is not responsible in damages, if it turn out to be illegal. *Bynk. Q. J. Pub.*, lib. 1, ch. 19, *Du Ponceau's ed.* p. 147, 153.

It frequently turns out, on examination of the claims and evidence in the prize court, that the case is of one mere re-capture; and questions arise, whether the original belligerent owner is entitled to restitution or not, and if so entitled, what is the compensation to be allowed by way of salvage? *Bynkershoek* asserts, that by the general maritime law, if, after capture, the ship and cargo be carried *infra presidia* of the enemy, or of his ally, or of a neutral, the title of the original belligerent proprietor is completely gone, and is not revived by a re-capture. *Q. J. Pub. lib.* 1, ch. 5, *Du Ponceau's ed.* p. 36. And in this he stands supported by learned authorities. The *Ceylon*, 1 Dods. 105; *L'Actif*, *Ibid.* 185. But see *Martens on Re-captures*, ch. 3, p. 107. In most of the states of Europe, municipal regulations have been made, which settle the rights of their own subjects. *Bynk. ubi supra*; *Valin, Des Prises*, ch. 6, p. 84; *Azuni*, part 2, ch. 4; *Martens on Re-captures*, ch. 3, § 2, p. 146; *The Adeline*, 9 Cr. 244, *41] 288.(a) And in *England, the right of postliminy is, by statute, as between subjects, preserved for ever, except where the vessel, after capture, has been fitted out by the enemy for war; so that the original owner may, in all other cases, claim restitution, upon the payment of a stipulated salvage. *Horne's Compend.* ch. 4, p. 34; *Marshall on Ins.* b. 1, ch. 12, § 8; *The Sedulous*, 1 Dods. 253. In cases, however, not governed by municipal regulations, although all nations agree, that to change the property by capture, a firm and secure possession is necessary, yet the practice of nations is so various, that it seems difficult to collect a general rule, as to what constitutes such firm and secure possession, which might properly be asserted to be the law of nations. The *Santa Cruz*, 1 Rob. 49; *L'Actif*, 1 Dods. 185; *The Ceylon*, *Ibid.* 105. The rule of bringing *infra presidia*, or, in proper cases, the rule of pernoctation, or twenty-four hours' possession, seems generally recognised by the most eminent jurists on the continent of Europe. The *Ceylon*, 1 Dods. 105; *L'Actif*, *Ibid.* 185 (see the *Santa Cruz*, 1 Rob. 50); and it appears to have been anciently the doctrine of the British

(a) Si aucun navire de nos sujets pris par nos ennemis, a été entre leurs mains jusques à vingt quatre heures, et après, qu'il soit recous et repris par aucuns de nos sujets, la prise sera déclarée bonne: mais si ladite reprise est faite auparavant les vingt-quatre heures, il sera restitué avec tout ce qui étoit dedans, et en aura toutefois le navire de guerre qui l'aura recous et repris, le tiers. Ordonnance de 1584, art. 61; *Emérigon, Des Assurances*, tom. 1, p. 495.

Si aucun navire de nos sujets est repris sur nos ennemis, après qu'il aura demeuré entre leurs mains pendant vingt-quatre heures, la prise en sera bonne: et si elle est faite avant les vingt-quatre heures, il sera restitué au propriétaire avec tout ce qui étoit dedans, à la réserve du tiers qui sera donné au navire qui aura fait la recousse. Ordonnance de 1681, liv. 3, tit. 9, *Des Prises*, art. 7. *Ibid.* Ordonnance du 15 Juin 1779. *Emérigon, ubi supra.*

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law. Ibid. (a) According, however, to the present law in Great Britain, property captured is not deemed to be changed so as to bar the owner, in favor of a vendee or re-captor, until there has been a sentence of condemnation; and therefore, until that period, the title of the original owner is not divested, and he is entitled to *restitution, in the hands of whoever he may find the property. *Le Caux v. Eden*, [*42 2 Doug. 613, 616; *Goss v. Withers*, 2 Burr. 694; *The Flad Oyen*, 1 Rob. 134; *The Santa Cruz*, Ibid. 49; *The Fanny and Elmira*, Edw. 117; *The Ceylon*, 1 Dods. 105; *L'Actif*, Ibid. 185. If such sentence of condemnation is passed, it is a sufficient title to a vendee (*The Purissima Conception*, 6 Rob. 45; *The Victoria*, Edw. 97); and would also have entitled a re-captor to condemnation of the property, if the statute had not stepped in, and as to British subjects, revived the *jus postliminii* of the original owner, on payment of salvage. As to the interests of British subjects, a condemnation by an incompetent court is a mere nullity (*The Flad Oyen*, 1 Rob. 134); though, as to the interests of other parties, the British prize courts will not inquire into the sufficiency of the sentence. *The Cosmopolite*, 3 Rob. 333. A condemnation by an enemy's consul, in a neutral port, is deemed invalid. *The Flad Oyen*, 1 Rob. 134. But a condemnation of a prize ship, while lying in a neutral port, by a regular court of admiralty, in the hostile country, is clearly valid. *The Henrick and Maria*, 4 Rob. 43; *The Christopher*, 2 Ibid. 207; *The Victoria*, Edw. 97; *Hudson v. Guestier*, 4 Cr. 293; s. c. 6 Ibid. 281; *The Arabella*, 2 Gallis. 368. A condemnation, originally defective, from the incompetency of the court, may be made good by the valid decree of an appellate court. *The Falcon*, 6 Rob. 194. And a title, originally defective, being acquired under the sentence of an incompetent court, is cured by an intervening peace, which has the effect of quieting all titles of possession arising from the war. *The Schooner Sophie*, 6 Rob. 138. Where a party has purchased a captured ship, under an invalid title, but which was not notoriously bad, the court, on decreeing restitution to the original owner, will allow the party for any amelioration beyond the ordinary repairs, but not for ordinary repairs. *The Kierlighett*, 3 Rob. 96; *The Perseverance*, 2 Ibid. 239; *The Nostra de Conceicas*, 5 Ibid. 294. And where a ship has been captured and carried into a hostile port, and is afterwards sold to a neutral, a presumption arises, that she has been regularly condemned, *and the proof of the contrary rests on the claimant, and [*43 not the purchaser. *The Countess of Lauderdale*, 4 Rob. 283.

In the United States, cases of re-capture have been the object of several legislative provisions, which, so far as they apply, supersede all discussions upon the principles of general law. The act of congress of the 3d March 1800, ch. 14 (2 U. S. Stat. 16), directs, that in cases of re-captures of vessels or goods belonging to persons resident within, or under the protection of, the United States, the same not having been condemned as prize by competent authority, before the re-capture, shall be restored, on payment of salvage of one-eighth of the value, if re-captured by a public ship, and one-sixth, if re-captured by a private ship; and if the re-captured vessel shall appear to have been set forth and armed as a vessel of war, before such capture, or afterwards, and before the re-capture, then the salvage to be one moiety of the value. If the re-captured vessel belong to the government, and be unarmed, the salvage is to be one-sixth, if re-captured by a private ship, and one-twelfth, if re-captured by a public ship; if armed, then the salvage to be one moiety, if re-captured by a public ship. In respect to public armed ships, the cargo pays the same rate of salvage as the vessel, by the express words of the act; but in respect to private ships, the rate of salvage (by some probable omission in the act) is the same on the cargo, whether the vessel be armed or unarmed. *The Adeline*, 9 Cr. 244.

(a) Quoiqu'il en soit, ce délai de vingt-quatre heures adopté par ladite ordonnance de 1584 et par celle-ci, passé lequel la prise par recousse est bonne, et exclut la réclamation du propriétaire du vaisseau pris et repris, ne peut-être regardé que comme un sage règlement, puisqu'il est du droit commun de l'Europe, comme Loc-

enius l'atteste, de jure maritimo, lib. 2, cap. 4, n. 4 et 8, fol. 157, 162 et 163: où il dit que c'est l'usage observé en France, en Espagne, en Hollande, et chez les autres nations commerçantes par mer. Valin, sur l'Ordonnance, liv. 3, tit. 9, *Des Prises*, art. 8.

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What constitutes a setting forth as a vessel of war, within the act, has not been settled by any adjudications in the United States; but the same question has been decided by the British prize courts, in cases arising under a similar clause in the British prize acts, which, indeed, seems recognised as a part of their common law of prize. The *Ceylon*, 1 Dods. 105, 119. And it has been there settled, that where a ship was originally armed for the slave-trade, and after capture, an additional number of men were put on board, but there was no commission of war, and no additional arming, it was not a setting forth as a vessel of war, under the prize act. The *Horatio*, 6 Rob. 320. But a commission of war is decisive, if there be guns on board. The *Nostra* *44] *Signora del Rosario*, 3 Rob. 10; The *Ceylon*, 1 *Dods. 105. And where the vessel has, after the capture, been fitted out as a privateer, it is conclusive against her, although when re-captured, she is navigating as a mere merchant ship; for where the former character of a captured vessel had been obliterated by her conversion into a ship of war, the legislature meant to look no further; but considered the title of the former owner for ever extinguished. *L'Actif*, 1 Dods. 185. Where it appeared, that the vessel had been engaged in the military service of the enemy, under the appointment of the minister of marine, it was held a sufficient proof of a setting forth as a vessel of war. The *Santa Brigada*, 3 Rob. 56. So, where she is armed, and is in the public military service of the enemy, by those who have competent authority so to employ her, although she be not regularly commissioned. The *Ceylon*, 1 Dods. 105. But the mere employment in the military service of the enemy, is not a sufficient setting forth for war; but if there is a fair semblance of authority in the person directing the vessel to be so employed, and nothing upon the face of the proceedings to invalidate it, the court will presume that he is duly authorized; and the commander of a single ship may be presumed to be vested with this authority, as a commander of a squadron. The *Georgiana*, 1 Dods. 397. The valuation of the property, when restored under the acts respecting re-capture, is to be made upon its value at the place of restitution, and not of re-capture. The *Progress*, Edw. 210, 222.

In respect to re-captures of the ships and cargoes of allies or co-belligerents, from the hands of a common enemy, the general rule is, to apply the principle of reciprocity; and if they, under like circumstances, restore on salvage, or condemn generally, to deal out to them the same measure of reciprocal justice. The *Santa Cruz*, 1 Rob. 50. (a) If there should exist a country having no rule on the subject, then the re-capturing country applies its own rule, as to its own subjects, to the case, and rests on the presumption that the same rule will be administered in the future practice of the other *45] party. The *Santa Cruz*, 1 Rob. 50; The *San Francisco*, Edw. 179. The act *of congress of the 3d March 1800, ch. 14, adopts the same regulation. The *Adeline*, 9 Cr. 244.

Salvage is not, in general, allowed on the re-capture of neutral property, unless there be danger of condemnation, or such unjustifiable conduct on the part of the government of the captors, as to bring the property into jeopardy. The *War Onskan*, 2 Rob. 299; The *Eleonora Catharina*, 4 Ibid. 156; The *Carlotta*, 5 Ibid. 54; The *Huntress*, 6 Ibid. 104; The *Acteon*, Edw. 254; The *Sansom*, 6 Rob. 410; *Talbot v. Seeman*, 4 Dall. 34; s. c. 1 Cr. 1. (b) But even if, in such a case of re-capture, the re-captors have entitled themselves to salvage, they may forfeit the claim, by the irregularity of their conduct. The *Barbara*, 3 Rob. 171.

It is no objection to an allowance of salvage on a re-capture, that it was made by a non-commissioned vessel; for no letters of marque are necessary for this purpose, nor is a re-capture at all made under the authority of prize. It is the duty of every citizen, to assist his fellow-citizens in war, and to retake their property out of the possession of

(a) Vide Valin, *Sur l'Ordonnance*, tom. 2, p. 262.

(b) Sa Majesté a jugé pendant la dernière guerre, que la reprise du navire neutre, faite par un corsaire Français (lorsque le navire

n'était pas chargé de marchandises prohibées ni dans le cas d'être confisqué par l'ennemi), était nulle. Code des Prises, ed. 1784, tom. 2. See also the opinion of M. Portalis, in the case of *The Statira*, 1 Cr. 102, note.

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the enemy; and no commission is necessary to give a person so employed a title to the reward, which the law allots to that meritorious act of duty. *The Helen*, 3 Rob. 224. And if a convoying ship actually re-capture one of her convoy, which has been previously captured by the enemy, it entitles her to salvage. *The Wight*, 6 Rob. 315. But a mere rescue of a ship associated in the same common enterprise, gives no right to salvage. *The Belle*, Edw. 66.

To entitle a party to salvage, as upon a re-capture, there must have been an actual or constructive capture; for military salvage will not be allowed, in any cases where the property has not been actually rescued from the enemy. *The Franklin*, 4 Rob. 147. But it is not necessary, that the enemy should have *actual possession; it [*46 is sufficient, if the property be completely under the dominion of the enemy. *The Edward and Mary*, 3 Rob. 305; *The Pensamento Felix*, Edw. 115. If, however, a vessel be captured going in distress into an enemy's port, and is thereby saved, it is merely a case of civil and not of military salvage. *The Franklin*, 4 Rob. 147. But to constitute a re-capture, it is not necessary, that the re-captors should have a bodily and actual possession; it is sufficient, if the prize be actually rescued from the grasp of the hostile captor. *The Edward and Mary*, 3 Rob. 305.

Where a hostile ship is captured, and afterwards is re-captured by the enemy, and is again re-captured from the enemy, the original captors are not entitled to restitution, on paying salvage, but the last captors are entitled to all the rights of prize, for, by the first re-capture, the whole right of the original captors is divested. *The Polly*, 4 Rob. 217, note *a*. *The Astrea*, 1 Wheat. 125. (*a*) And where the original captors have abandoned their prize, and she is subsequently captured by other persons, the latter are solely entitled to the property. *The Lord Nelson*, Edw. 79; *The Diligentia*, 1 Dods. 404. But if the abandonment be involuntary, and produced by the terror of superior force, and especially, if produced by the act of the second captors, the rights of the original captors are completely revived. *The Mary*, *ante*, p. 123. And where the enemy has captured a ship, and afterwards deserted her, and she is then re-captured, it is not to be considered as a case of derelict, for the original owner never had the *animus derelinquendi*; and therefore, she is to be restored on the payment of salvage; but as it is not strictly a re-capture within the prize act, the rate of salvage is discretionary. *The John and Jane*, 4 Rob. 216; *The *Gage*, 6 *Ibid.* 273; *The Lord Nelson*, Edw. 79. (*b*) But if the abandonment by the enemy, be produced by the terror [*47

(*a*) Veut et entend Sa Majesté que les prises des navires ennemis, faites par ses vaisseaux ou par ceux de ses sujets armés en course, recousses par les ennemis, et ensuite reprises sur eux, appartiennent en entier au dernier preneur. Arrêt du Conseil d'Etat du 5 Novembre 1748. Valin, *Sur l'Ordonnance*, tom. 2, p. 257, 258, 259; *Traité des Prises*, ch. 6, § 1. Pothier, *De Propriété*, No. 99.

(*b*) Si le navire, sans être recous est abandonné par les ennemis, ou si par tempête ou autre cas fortuit, il revient en la possession de nos sujets, avant qu'il ait été conduit dans aucun port ennemi; il sera rendu au propriétaire qui le réclamera dans l'an et jour, quoiqu'il ait été plus de vingt-quatre heures entre les mains des ennemis. Ordonnance de 1681, liv. 3, tit. 9, *des Prises*, art. 9. Pothier is of the opinion, that these words, *avant qu'il soit entré dans aucun port ennemi*, are to be understood, not as restricting the right of restitution on payment of salvage, to the particular case mentioned, of a vessel which is abandoned by the

enemy, before being carried into port, which case is mentioned merely as an example of what ordinarily happens, parce que c'est le cas ordinaire auquel un vaisseau échappe à l'ennemi qui l'a pris, ne pouvant plus guere lui échapper lorsqu'il a été conduit dans ses ports. *De Propriété*, No. 99. But Valin holds, that the terms of the ordinance to be literally construed, and that the right of the original proprietor is completely divested by the carrying into an enemy's port. *Sur l'Ordonnance*, *Ibid.* He is also of the opinion, that this species of salvage is to be analogized to the case of shipwreck, and that the re-captors are entitled to one-third of the value of the property saved. *Ibid.* But Azuni contends, that the rate of salvage in this case is not regulated by the ordinance, but is discretionary, to be proportioned to the nature and extent of the service performed, which can never be equal to the rescue of property from the hands of the enemy, by military force, or to the recovery of goods lost by shipwreck. Part 2, ch. 4, § 8, 9. Emerigon is also opposed

of hostile force, it is a re-capture within the terms of the prize act. The *Gage*, 6 Rob. 273. Where the captors abandon their prize, and she is afterwards brought into port by neutral salvors, it has been held, that the neutral court has jurisdiction to decree salvage, but cannot restore the property to the original belligerent owners; for, by the capture, the captors acquired such a right of property as no neutral nation could justly impugn or destroy; and consequently, the proceeds (after deducting salvage) belong to *48] the original captors, and neutral nations *ought not to inquire into the validity of a capture as between belligerents. The *Mary Ford*, 3 Dall. 188. But if the captors make a donation of the captured vessel to a neutral crew, the latter are entitled as salvors, but after deducting salvage, the remaining proceeds will be decreed to the original owner. The *Adventure*, 8 Cr. 227; s. c. 1 *Wheat*, 128 n. And it seems to be a general rule, liable to but few exceptions, that the rights of capture are completely divested by a hostile re-capture, escape or a voluntary discharge of the captured vessel. *Hudson v. Guestier*, 4 Cr. 293; s. c. 6 *Ibid.* 281; The *Diligentia*, 1 Dods. 404. And the same principle seems applicable to a hostile rescue; but if the rescue be made by a neutral crew of a neutral ship, it may be doubtful, how far such an illegal act, which involves the penalty of confiscation, would be held, in the courts of the captor's country, to divest his original right, in case of a subsequent re-capture.

As to re-captors, though their right to salvage is extinguished by a subsequent hostile re-capture, and regular sentence of condemnation, carried into execution, divesting the owners of their property, yet, if the vessel be restored upon such re-capture, and resumes her voyage, either by an acquittal in court, or a release of the sovereign power, the re-captors are reintegrated in their right of salvage. The *Charlotte Caroline*, Dods. 192. And re-captors and salvors have a legal interest in the property, which cannot be divested by other subjects, without an adjudication in a competent court; and it is not for the government's ships or officers, or for other persons, upon the ground of superior authority, to dispossess them, without cause. The *Blendenhall*, 1 Dods. 414.

In all cases of salvage, where the rate is not fixed by positive law, it is in the discretion of the court, as well upon re-captures, as in other cases. *Talbot v. Seeman*, 1 Cr. 1; The *Apollo*, 3 Rob. 308; *Bynk. Q. J. Pub. lib. 1, ch. 5, Du Ponceau's ed. p. 36, 41, 42.* And where, upon a re-capture, the parties have entitled themselves to a military salvage, under the prize acts, the court may also award them, in addition, a civil salvage, if they have subsequently rendered services, by succouring *the vessel *49] in distress from perils of the seas. The *Louisa*, 1 Dods. 317.

In the construction of the British prize acts (and similar questions may arise under our own act respecting re-captures), it has been held, that a revenue-cutter, having a letter of marque, is to be deemed a private ship of war, and entitled to a salvage of one-sixth. The *Helen*, 3 Rob. 224; The *Sedulous*, 1 Dods. 253. But the British revenue-cutters, belonging to private individuals, although fitted out, manned and armed at the expense of the government, it may be thought doubtful, whether this authority applies in the United States, where the revenue-cutters are generally built and owned, as well as equipped, manned and armed, by the government. But a store-ship, armed at the public expense, and commanded by commissioned officers, is clearly to be deemed a public armed ship. The *Sedulous*, 1 Dods. 253.

In the progress of the cause, an unlivery of the cargo often becomes necessary, either to ascertain its nature and quality (The *Liverpool Packet*, 1 Gallis. 513; *Marriott's Form.* 229; The *Carl Walter*, 4 Rob. 207; The *Richmond*, 5 *Ibid.* 325; The *Jonge Margaretha*, 1 *Ibid.* 189; The *Oster Risoer*, 4 *Ibid.* 199), or more effectually to preserve it from injury and pillage (*Marriott's Form.* 323), or because the ship stands in a predicament altogether distinct from that of the cargo. The *Hoffnung*, 6 Rob. 231; The *Prosper*, Edw. 72; *Marriott's Form.* 224. In all these, and other proper cases, the prize court will, upon proper application, decree an unlivery. Upon ordering an unliv-

to Valin on this subject, and cites, in support of his own doctrine, the *Consolato del Mare*, ch. 287, and *Targa*, ch. 46, n. 10. Emerigon *Des Assurances*, tom. 1, p. 504, 505.

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ery, a warrant or commission of unlivery is directed to some competent person, and usually to the marshal, to unlade the cargo, and to make a true and perfect inventory thereof. Marriott's Form. 224. At the same time, a warrant or commission of appraisement is usually directed to some competent persons, who are to reduce into writing a true and perfect inventory of the cargo, and upon oath, to appraise the same, according to its true value. In England, this commission is sometimes *directed to a person who is authorized to choose and swear the appraisers and himself. Marriott's [*50 Form. 227. But in the United States, the general practice is, for the courts to appoint the appraisers, in the first instance. And where it becomes necessary or proper to unlade the cargo, for inspection of its nature or quality, a commission of inspection is issued, directed to some competent persons, in like manner, to return an inventory thereof, with a certificate of the particulars, names, descriptions and sortments of the goods, together with their several marks and numbers, and the nature, use, quantities and qualities thereof. Marriott's Form. 229. (a) The court may also, in its discretion, order the ship or cargo, or both, to be removed to another place or port; for having the custody of the thing, it is bound to use all reasonable precautions to preserve it, and to consult the best interests of all parties; and in such case, a commission of removal is issued, which is usually directed to the marshal; but the court may direct it to any other person. Marr. Form. 234; The Rendsberg, 6 Rob. 142; The Sacra Familia, 5 Ibid. 360.

An unlivery of the cargo is considered as done for the benefit of all parties, and therefore, the expense is generally borne by the party ultimately prevailing. If the captors apply for an unlivery, and the property is condemned, the expense falls on the captors; but if restitution be awarded, the court, in its discretion, usually makes the expense a charge on the cargo. The Industrie, 5 Rob. 88. (b.)

*After unlivery and appraisement, the court sometimes decrees a sale, or [*51 delivery on bail, of the property, to the captors or claimants. Where a sale is ordered, which is usually done, where the ship and cargo are in a perishing condition, or liable to deterioration pending the process (The St. Lawrence, 1 Gallis. 467; The Frances, Ibid. 451; Jennings v. Carson, 4 Cr. 2; Stoddart v. Read, 2 Dall. 40; Marriott's Form. 237, 318; The Copenhagen, 3 Rob. 178), in England, a commission of appraisement and sale usually issues to some competent persons, jointly and severally, to reduce into writing a true inventory of the goods, and to choose appraisers, who are to appraise the same on oath; and after appraisement, the commissioners are to expose the same to public sale, and bring the proceeds into the registry of the court. Marriott's Form. 237, 318. And in England, it is the regular practice of the court, that one of the commissioners should be named by the claimant. The Carl Walter, 4 Rob. 207, 211. And in the United States, a sale is sometimes ordered, without a previous appraisement; or, if an appraisement be ordered, the appraisers are always named by the court itself. In case of an appraisement and sale, the expenses of taking out the commission, &c., are, in the first instance, borne by the party applying for the sale, and ultimately as the court may direct (The Carl Walter, 4 Rob. 207); and such sale is usually, in England, made by the marshal; but it seems, that the court may direct it to be made by any other person. The Rendsberg, 6 Rob. 142. In the United States, the sale is invariably made by the marshal; and it would seem highly proper,

(a) S'il est nécessaire avant le jugement de la prise de tirer les marchandises du vaisseau, pour en empêcher le dépérissement, il en sera fait inventaire en presenee de notre procureur et des parties intéressées, qui le signeront si elles peuvent signer, pour ensuite être mises sous la garde d'une personne solvable, ou dans des magasins fermans à trois clefs différentes, dont l'une sera délivrée aux armateurs, l'autre au receveur de l'amiral, et la troisième aux reclamateurs, si aucun se présente, sinon à no-

tre procureur. L'Ordonnance de 1687, liv. 3, tit. 9, des Prises, art. 27.

(b) Qu'à l'avenir, tous les frais faits tant pour la conservation ou la vente des marchandises des prises, dans le cas ou elle sera permise, que pour la subsistance du maître et autres officiers mariners ou matelots qui y seront restés, seront pris sur le bâtiment, et payés par le réclamateur qui en aura obtenu la main-levée, lorsqu'il en sera remise en possession. Arrêt du Conseil du 23 Décembre 1705.

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in all cases, to have a previous inventory and appraisement, with a view to check any attempt of fraud, and to establish the proper responsibility of the officers of the court, in cases of negligent custody. This is the regular practice of the prize court, and the most obvious reasons of public policy require a strict adherence to it.

*52] The subject of delivery, either of the property itself, or of its *proceeds, has been already partially discussed in the former note, and to the authorities there referred to may be added the following: The Rendsberg, 6 Rob. 142, 144; The Frances, 1 Gallis. 451; The Diana, 2 Ibid. 93. Sometimes, the property is delivered on bail, to return the same, or the full value, to answer the decree; and in such case, the court have a right to inquire what is the full value, and to decree accordingly. *Brymer v. Atkins*, 1 H. Bl. 264. And if the bail security be taken by way of recognisance (which is irregular), and not by way of stipulation, still the court may enforce it as a stipulation. *Brymer v. Atkins*, *ut supra*; The Alligator, 1 Gallis. 145. Upon such a delivery on bail, the sureties are not responsible beyond the sum in which they become bound. *Smart v. Wolff*, 3 T. R. 323. But the principal may be made to respond to the full value of the property. In ordinary cases, however, the property is delivered on bail, at an appraised value; and in such cases, the principal and sureties are bound to the stipulated value, but not further. If, therefore, there be a delivery on bail, at an admitted value, the court will not listen to an application to diminish the amount to the proceeds of a subsequent sale, but will hold the parties to the appraised or admitted value. The Betsey, 5 Rob. 295, and note *a*, 296. In case of a delivery on bail, the expenses of the delivery are to be borne by the delivering party, unless it is otherwise directed by the court. The Rendsberg, 6 Rob. 142. But generally, the court directs the expenses of the application to be borne by the party who applies for the delivery on bail. And all expenses, after the delivery, are exclusively borne by the party receiving the property. 5 Rob. 295, note *a*. Bail-bonds or securities to answer adjudication are not discharged by lapse of time; but may, at any distance of time, be enforced by the court; but after a great length of time, the court will, in its discretion, refuse a monition or attachment to enforce the bond, unless some reasonable ground for the delay be established. The Vreede, 1 Dods. 1. Nor are these bonds considered as mere personal securities, given to the individual captors, although taken in their names; they are considered as securities given to the court, to abide the adjudication of all events at the time impending before it. The court is not in the habit of *53] considering bonds precisely in the *same limited way as they are viewed by the courts of common law. In those courts, they are very properly considered as mere personal securities, for the benefit of those parties to whom they are given. In prize courts, they are subject to more enlarged considerations; they are there regarded as pledges or substitutes for the thing itself, in all points fairly in adjudication before the court. If, therefore, a bond be given to the actual captors, to answer the adjudication of the property, which should, from the locality of the capture, or from other circumstances, be condemned to the government, the bail would, in such case, be answerable, in the admiralty, to the government. The Neil Elwin, 1 Dods. 50. But if the property, at the time of capture, was neutral, and delivered on bail, pending the proceedings, and hostilities subsequently intervene with the neutral country, and in consequence thereof, the property is condemned to the government, it seems, that the court is not in the habit of enforcing the bail-bond in such cases, because the event was not originally in the contemplation of the parties, at the time they entered into the security. The Neil Elwin, *ut supra*. Whether this doctrine would be sustained in the United States, is a question upon which there is no decision to guide the judgment; but certainly, much argument may be used against the asserted exemption; for the bail-bond being a substitute for the property itself, there does not seem any very conclusive reason, why it should not be subject to all the events which would have affected the property, if still in the custody of the court.

It frequently happens, that enemies' goods are found on board of neutral ships; and conversely, that neutral goods are found on board an enemy's ship. In these cases,

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questions often occur, as to the right of the parties to freight, expenses, &c. And first, in respect to neutral ships. In general, where enemies' goods are captured in a neutral ship, the captors take *cum onere*, and if the conduct of the neutral has been perfectly fair and impartial, it is the practice of the prize court, to allow him his *full freight, in the same manner as if the original voyage had been performed. The Hoop, 1 Rob. 196, 219; The Antonia Johanna, 1 Wheat. 159. And in like manner, to allow him his expenses. The Hoop, 1 Rob. 196; The Bremen Flugge, 4 Ibid. 90; The Der Mohr, Ibid. 314; Smart *v.* Wolff, 3 T. R. 323; Vattel, lib. 3, ch. 7, § 115; The Consolato del Mare, ch. 273; Sir W. Scott and Sir J. Nicholl's letter to Mr. Jay, *ubi supra*; The Copenhagen, 1 Rob. 289; The Anna Catharina, 6 Ibid. 10; The Catharina Elizabeth, Acton 309; The Fortuna, Edw. 56. The freight allowed is not, however, necessarily the rate agreed on by the parties, if it be inflated by extraordinary circumstances; but a reasonable freight only will, in such cases, be allowed. The Twilling Riget, 5 Rob. 82. And where the goods have been once unlivered, by order of court, the whole freight for the voyage is due, and the owner of the goods, even in case of restitution, cannot demand the ship to reload them, and carry them to the original port of destination; for, by the separation, the ship is exonerated. The Hoffnung, 6 Rob. 231; The Prosper, Edw. 72. But it would be otherwise, if there had been no unlivery. The Copenhagen, 1 Rob. 289. And the neutral will be allowed his freight, where he carries the goods of one belligerent to its enemy, for though such a trade be illegal as to the subjects, it is not so as to neutrals. The Hoop, 1 Rob. 196, 219. So, on a voyage from the port of one enemy to the port of another enemy. The Wilhelmina, 2 Rob. 210, note. But if the neutral has conducted himself fraudulently or unfairly, or in violation of belligerent rights, he will not be allowed freight or expenses, and in flagrant cases, will be visited with confiscation, even of the ship itself. And he is never allowed freight, where he has used false papers (The Atlas, 3 Rob. 299, 304, note; Sir W. Scott and Sir J. Nicholl's letter to Mr. Jay, *ubi supra*); nor upon the carriage of contraband goods (Ibid.; Bynk. Q. J. Pub., Du Ponceau's ed., 81; The Sarah Christina, 1 Rob. 237; The Mercurius, Ibid. 288; The Emanuel, Ibid. 286; The Neptunus, 3 Ibid. 108; The Neutralitet, Ibid. 295; The Oster Risoer, 4 Ibid. 199; The Commercen, 1 Wheat. 382); nor where there has been a spoliation of papers (The Rising Sun, 2 Rob. 104; The Madonna del Burso, *4 Ibid. 169, 183); nor where the cause of capture was the ship and not the cargo. The Fortuna, Edw. 56. But where part of the goods are condemned as contraband, and part restored, after unlivery of the cargo, freight may be decreed as a charge upon the part restored. The Oster Risoer, 4 Rob. 199. If the goods are unlivered, under a hostile embargo upon neutral ships, they are discharged of the lien of the freight; and if freight be decreed, it can only be against the original consignees or freighters, and not against a prior purchaser, who has received them on bail. The Theresa Bonita, 4 Rob. 236.

When a decree is made that the freight shall be a charge on the cargo, application must be made to the court, for the sale of so much as is necessary for this purpose. The Vrow Margaretha, 4 Rob. 304, note. In general, where a ship and cargo are restored, with a decree that the freight shall be a charge on the cargo, if the proceeds of the cargo are not sufficient to pay the freight, the captors are not responsible for the deficiency. The Haabet, 4 Rob. 302. But although the capture be right, yet, if afterwards, the cargo be lost by the negligence of the captors, and the freight be decreed a charge on the cargo, the captors are responsible to pay it. The Der Mohr, 4 Rob. 314. Where the freight of the neutral, and the expenses of the captors, are both decreed to be a charge on the cargo, and the proceeds are insufficient to discharge both, priority of payment of the freight is, in ordinary cases, allowed by the court, as a lien that takes place of all others. The Bremen Flugge, 4 Rob. 90.

In the next place, as to the allowance of freight to the captors. This may happen, when the ship is hostile, and the cargo, or a part thereof, is neutral. The general rule is, that if neutral goods are found on board of a hostile ship, the captors are not entitled to freight therefor, unless they carry the goods to the port of destination. Bynk. Q. J. Pub. lib. 1, ch. 13, Du Ponceau's ed., p. 105; The Diana, 5 Rob. 67; The Fortuna,

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Edw. 56. And the rule is applied, notwithstanding there may have been a sale of the goods, beneficial to the owners. The Vrow Anna Catharina, 6 Rob. 269; The Fortuna, Edw. 56. But there are exceptions to the rule itself; for if the captors bring *the cargo to the country where the claimants ultimately designed to send it, but were compelled to take a circuitous route, under existing circumstances, the captors are entitled to freight, notwithstanding the ship was actually destined to another country, there to land it. The Diana, 5 Rob. 67. So, if brought to the same country, but not to the port of actual destination. The Vrow Henrietta, 5 Rob. 75, note. But see The Wilhelmina Eleonora, 3 Ibid. 234. So, where the goods are brought to the country where the proceeds were ultimately destined, and would have been brought directly, but for a prohibition of municipal law. The Ann Green, 1 Gallis. 274. Where freight is decreed to the captors, it will be paid by the court, out of the cargo or its proceeds, if yet remaining in the admiralty. The Fortuna, 4 Rob. 278. And under particular circumstances, application may be made to the court, to decree the sale of so much of the cargo as may be necessary to be sold for the discharge of freight. 4 Rob. 304, note. And where freight is allowed to the captors, if they have done any damage to the cargo, the amount may be deducted by way of set-off or compensation. The Fortuna, 4 Rob. 278.

As to the allowance of costs and expenses. In cases where further proof is directed, costs and expenses are never allowed to the claimant (The Einigheden, 1 Rob. 323); nor where the neutrality of the property does not appear, by the papers on board, and the preparatory evidence (Sir W. Scott and Sir J. Nicholl's letter to Mr. Jay, *ubi supra*; Opinion of M. Portalis in The Statira, 2 Cr. 102, note); nor where papers are spoiled or thrown overboard, unless the act be produced by the captor's misconduct, as by firing under false colors (The Peacock, 4 Rob. 185); nor where the master or crew, upon the preparatory examinations, grossly prevaricate (Ibid.); nor where any part of the cargo is condemned (The William, 6 Rob. 316); nor where the ship comes from a blockaded port (The Frederick Malke, 1 Rob. 36; The Betsey, Ibid. 93; The Vrow Judith, Ibid. 150); nor if the ship be restored by consent, *without reserving the question of costs and expenses. The Maria Powlona, 6 Rob. 236. But in all these cases, it is in the discretion of the court, to allow the captors their costs and expenses. Sir W. Scott and Sir J. Nicholl's letter to Mr. Jay, *ubi supra*. And in general, wherever the captors are justified in their capture, their costs and expenses are decreed to them by the court, in case of restitution of property. The Imina, 3 Rob. 167; The Principe, Edw. 70. Therefore, they are allowed, where the original destination was to a blockaded port, although changed on hearing of the blockade (The Imina, 3 Rob. 167); where ships, even of our own country, are captured sailing under false papers (The Sarah, 3 Rob. 330); where the nature of the cargo is ambiguous as to contraband (The Twende Brodre, 4 Rob. 33; The Gute Gesellschaft Michael, Ibid. 94; The Christina Maria, Ibid. 166); and generally, in all cases of false papers (The Nostra Signora de Piedade Nova Aurora, 6 Rob. 41); and in all cases where further proof is required. (See the Frances, 1 Gallis. 445; The Apollo, 4 Rob. 158; The Mary, 9 Cr. 126.) In cases where the captors' expenses are allowed, the expenses intended are such as are necessarily incurred in consequence of the act of capture. The Catharine and Anna, 4 Rob. 39. Such are the expenses of the captors' agent (The Asia Grande, Edw. 45); but not insurance made by the captors (The Catharine and Anna, 4 Rob. 39); nor expenses of transmitting a cargo from a colony to the mother country. The Narcissus, 4 Rob. 17. And property restored to the claimant is not be charged with any expenses for agency, or for taking care of it, unless made a charge by the court. The Asia Grande, Edw. 45. And the expense of an unlivery or delivery of the property which is restored, is to be borne by the captors or releasing party, and not by the property, unless it is so directed by the court. The Rendsberg, 6 Rob. 142. In general, where the property is condemned, the expenses of unlivery and warehousing, &c., fall on the captors (The Industrie, 5 Rob. 88); and where it is restored, the court will apportion them, in its discretion, on the captors and on the cargo. Ibid.

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*In cases of neutral ships, it is usual to allow the master his adventure and personal expenses, if his conduct has been fair and unimpeachable. The Calypso, 2 Rob. 298; The Anna Catharina, 6 Ibid. 10. But where the master and crew prevaricate in their evidence, their adventures are never restored (The Anna Catharina, 4 Ibid. 120); nor where the ship is engaged in a fraudulent trade. The Christiansberg, 6 Ibid. 376.

Claims of joint capture are often interposed in prize causes; and though it is not usual for joint captors to assert their interest, until after a final decree of condemnation (*per* CROKE, J., in *The Herkimer*, 2 Hall's Law J. 133, 146; s. c. Stew. 128, 144; *Home v. Camden*, 2 H. Bl. 533); yet, as it may be asserted, with legal propriety, at any stage of the cause, it may be as well here to examine the doctrines which have been applied to this subject.

In respect to privateers, it is a general principle, that no right to share as joint captors accrues, merely by being in sight at the time when the prize is captured. There must be actual intimidation, or actual or constructive assistance. *Bynk. Q. J. Pub. lib. 1*, ch. 18. and a learned note of Mr. Du Ponceau, in his Translation, p. 144; *Talbot v. Three Brigs*, 1 Hall's Law J. 266; s. c. 1 Dall. 95; *Martens on Capt. § 32*, p. 91; *The Santa Brigada*, 3 Rob. 52; *The Forsighied*, Ibid. 311; *L'Amitié*, 6 Ibid. 261. (a) And the same principle is applied to *captures in sight of fortresses, and of land forces and armies, for they do not share, unless there be actual co-operation. [*59] *Bynk. Q. J. Pub. lib. 1*, ch. 18, *Du Ponceau's ed.*, p. 146; *The Dordrecht*, 2 Rob. 55. And in such cases, the assistance ought to be material, in order to entitle the parties to share as joint captors. *The Dordrecht, ut supra*. The reason of this rule in relation to privateers, is, that the being in sight is not sufficient, with respect to them, to raise the presumption of co-operation in the capture. They clothe themselves with commissions of war, from views of private advantage only. They are not bound to put their commissions in use, on every discovery of an enemy. And therefore, the court does not presume, in their favor, from the mere circumstance of their being in sight, that they were there, with a design of contributing assistance, and engaging in the contest. There must be, as to them, the *animus capiendi*, demonstrated by some overt act; by some variation of conduct, which would not have taken place, but with reference to that particular object, and if the intention of acting against the enemy had not been entertained. *L'Amitié*, 6 Rob. 261; *La Flore*, 5 Ibid. 268. Formerly, the principle of constructive assistance was carried a great way; but the later inclination of courts has been rather to restrain than to extend the rule. *The Vryheid*, 2 Rob. 16; *The Odin*, 4 Ibid. 318; *La Furieuse*, Stew. 177. And where no actual assistance is alleged, the presumption of law leans in favor of the actual captors. *The Robert*, 3 Rob. 194. But even with respect to privateers, it is not necessary that a joint chaser should actually board a prize; it will be enough, if there is the *animus perseguendi*, sufficiently indicated by the conduct of the vessel. The act of chasing, therefore, if continued for any length of time, and not abandoned at the time of capture, will be sufficient to found a title of joint capture. *L'Amitié*, 6 Rob. 261. But if the chase be discontinued, it is otherwise. Ibid.; *The Waaksamheid*, 3 Rob. 1. And if a ship has actually engaged another, and been beaten off, and yet remains in sight, about the enemy, with an evident intention *of persisting in the contest, and another vessel then comes up and makes the capture, the first is entitled to share in the capture. *La Virginie*, [*60] 5 Rob. 124.

Public policy has introduced a different rule as to public ships of war; and all such

(a) I. Aucun ne pourra être admis au partage d'un vaisseau pris sur les ennemis, s'il n'a contribué à l'arrêter, ou contracté société avec celui qui s'en est rendu maître. II. Celui qui prétend partager un vaisseau, ne sera point sensé avoir contribué à l'arrêter, s'il n'a combattu, ou s'il n'a fait tel effort, qu'en intimidant

l'ennemi par sa présence, on en lui coupant chemin, et l'empêchant de s'échapper, il l'aît obligé à se rendre, sans qu'il lui suffise d'avoir été en vues et d'avoir donné chasse, lorsqu'il sera prouvé que cette chasse aura été inutile Règlement du 27 Janvier 1706.

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ships being in sight, are deemed to be constructively assisting, and therefore, entitled to share in the capture. The Dordrecht, 2 Rob. 55; The Robert, 3 Ibid. 194; The Forsigheid, Ibid. 311; La Flore, 5 Ibid. 268; The Bellona, Edw. 63; The Furieuse, Stew. 177; The Sparkler, 1 Dods. 359. (a) The reason of this distinction is, that public ships are under a constant obligation to attack the enemy, wherever seen; and therefore, from the mere circumstance of being in sight, a presumption is sufficiently raised, that they are there *animo capiendi*. In the case of privateers, the same obligation does not exist; the law, therefore, does not give them the benefit of the same presumption. La Flore, 5 Rob. 268. Where the actual captor is a public armed ship, the rule is additionally supported, by the obvious policy of promoting harmony in the service. But the rule equally applies where the actual captor is a privateer (La Flore, 5 Rob. 268); though the privateer, in the converse case, is not entitled to share, from merely being in sight. The Santa Brigada, 3 Rob. 52. There are exceptions; however, to the rule, where the circumstances of the case repel the presumption of the *animus capiendi*; such is the case, where a public ship is in sight, but steering an opposite or *61] different course, inconsistent with the notion of an intent *to capture. The Robert, 3 Rob. 194; The Drie Gebroeders, 5 Ibid. 339. But the mere sailing on a different course is not sufficient to defeat a title of joint capture; for it is not necessary that the two ships should pursue the enemy in the same line. If one vessel sail in one direction, and the other in a different direction, with the purpose of capturing, that difference of course would not defeat a unity of purpose, nor destroy the claim of joint capture. Le Niemen, 1 Dods. 9. But if the ship, claiming as joint captor, has changed her course, and discontinued the chase, before the capture, the claim is defeated, unless this conduct be occasioned by the fraud or misconduct of the capturing ship; for then the court will let in the claim, with a view to punish the fraud or misconduct. The Waaksamheid, 3 Rob. 1; The Robert, Ibid. 194; La Virginie, 5 Ibid. 124; The Drie Gebroeders, Ibid. 339. So, if the persons claiming as joint captors, have reconnoitred the prize, and abandoned all design of capture, they are not entitled to share. The Lord Middleton, 4 Rob. 153; The Drie Gebroeders, 5 Ibid. 339; L'Amitié, 6 Ibid. 261.

But even with regard to public ships, cases of constructive assistance in joint capture are not to be extended, and therefore, the court requires that the ship should be actually in sight. The Vryheid, 2 Rob. 16; The Odin, 4 Ibid. 318; The Furieuse, Stew. 177. Therefore, being in sight, a day or two before the capture, is not sufficient. It must be at the commencement of the engagement, or chase, or during its continuance. The Vryheid, 2 Rob. 16. And being in sight, when the enemy was first descried, and being detached before the chase, or preparations therefor, is not sufficient. Ibid. But it would be otherwise, if detached in sight of the enemy, at the moment of chase, and under preparation for chase; for there must be some actual contribution of endeavor as well as of general intention. Ibid. And it would seem to be very doubtful, whether the prize being seen from the mast-head, would bring the case within the rule of being in sight. The Robert, 3 Rob. 194. And a like rule is applied to the capitulation of an island; for, to entitle a public ship to share in the capture, she must *62] not be detached upon another service, *but must be actually in sight at the time. The Island of Trinidad, 5 Rob. 92. And no antecedent or subsequent services in the expedition, will help the case, where the party would not otherwise be entitled to share. Buenos Ayres, 1 Dods. 28.

(a) Si plusieurs vaisseaux ont part à une même prise, et par vaisseaux preneurs sont entendus ceux qui se seront trouvés ensemble et à vue de la prise lorsqu'elle aura été faite, ou faisant partie d'une même escadre, le montant de ce qui reviendra à chaque vaisseau, frégat et autre bâtiment de Sa Majesté, sera constaté sur la proportion du nombre de leur canons en batterie et de leur calibre, à commencer par ce-

lui de quatre livres et au dessus, et du nombre d'équipage étant à bord de chaque vaisseau; et cette proportion ainsi établie, la répartition de ce qui reviendra à chaque vaisseau, sera faite sur le pied qui est prescrit dans l'article précédent. Ordonnance du Roi, concernant les prises faites par les vaisseaux, frégates et autres bâtimens de S. M., du 15 Juin 1757.

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In respect also to a joint chase, if both ships are in chase, without any common cooperation, except such as the two parties, acting separately, with a common object in view, might produce, and during the chase, night comes on, and the enemy is lost sight of, and the ships still are in pursuit, but one of them cruising merely in search, and from conjecture adopts an erroneous course, and in consequence thereof, the prize is captured, either by the other, or by a third ship, on the next day, out of sight, the ship so erroneously cruising is not entitled to share as a joint captor, for it is a discontinuance of the chase, to change a course upon conjecture. *Le Niemen*, 1 Dods. 9; *The Financier*, *Ibid.* 61. Nor will it vary the case, that the position or course run by such ship had the effect of throwing the prize into the hands of the other ship, by inducing the prize to alter her own course. *Ibid.* It would, indeed, be an extravagant position, to admit, that every fleet or ship which, either by accident or design, diverts the course of an enemy, and by so doing occasions her capture by a totally distinct force, should be considered as a joint captor. *Le Niemen*, 1 Dods. 9. It is certainly true, that darkness, preventing sight, will not universally exclude from a right to share; nor can the rule be laid down universally the other way; for there may not, in every case, be evidence to show the proximity to the scene of action. Where it can be shown, that the asserted joint captor was in sight, when the darkness came on, and that it continued steering the same course, by which it was before nearing the prize, and that the prize itself also continued the same course, it amounts almost to demonstration, that the ships would have seen, and been seen by, each other, at the time of capture, if darkness had not intervened; and in such case, it ought to be let in to the benefit of joint capture. *The Union*, 1 Dods. 346. But if the chase be lost sight of, in the night, and the capture is afterwards made, at such a distance, that the asserted joint captor would not, at the time of capture, have been in sight, even if it *had been day, the claim [*63 of joint capture cannot be sustained. Indeed, Sir W. SCOTT has declared, that where a ship is lost sight of, in the night, the pursuit of that ship cannot properly be denominated a chase; it is a conjectural pursuit only; it is a feeling about in the dark, a search and inquiry, but no chase. *The Financier*, 1 Dods. 61. And where a ship is herself only a constructive captor, it is not a sufficient ground to let in another ship, that she had joined in a previous chase with the constructive captor, and lost sight of the prize in the night. *Ibid.* Therefore, in a case where one or two joint chasers were ordered to pick up the boats of the other, and in consequence of the delay occasioned by her obedience to those orders, she lost sight of the prize, which was, in the mean time, captured by a third ship coming up in the presence of the other, it was held, that the ship, so out of sight, was not entitled to share. *Ibid.* A revenue-cutter, though having a letter of marque, is not considered, in England, as a public ship of war, entitled to the benefit of the rule of constructive assistance from being in sight. *The Bellona*, *Edw.* 63. A conveying ship, notwithstanding her special employment, may be entitled as a joint captor, if, by chase or intimidation, she aid in the capture, when it does not interfere with convoy duty. *The Waaksamheid*, 3 Rob. 1; *La Furie*, 3 *Ibid.* 9. In captures made by boats, it is a general rule, that the ships to which they belong are entitled to share. *The Anna Maria*, 3 Rob. 211; *The Odin*, 4 *Ibid.* 318. But if a boat be detached from the ship to which she belongs, and attached to another, the ship only shares, to which she is attached at that time; for she must be taken, at that time, and in those operations, to be acting under the authority and for the benefit of such ship only. *The Melomane*, 5 Rob. 41. But constructive assistance by boats will not entitle the ships to which they belong to share in the prize, though actual capture by the boats would be sufficient for this purpose; for they are a part of the force of the ship. And in cases of mere constructive assistance, the right of participation must be in proportion to the intimidation caused, and cannot go beyond the force actually seen by the enemy. *La Belle Coquette*, 1 Dods. 18; *The Odin*, *4 Rob. 318; *The Nancy*, *Ibid.* 327, note *a*. And it is extremely questionable, whether a boat of a ship of war could support a title to share, on the mere principle of being in sight. In the case of mere constructive capture, the construction which is laid upon the supposed intimidation of the enemy, and the encouragement of the friend, from a ship of

war being seen or in sight, applies very weakly to the case of a boat, an object that attracts very little notice upon the water, and whose character, even if discerned by either of the parties, may be totally unknown to both. *The Odin*, 4 Rob. 318. Nor will the fact, that the ship to which the boat belongs is in sight, lying at anchor in a harbor, entitle the ship to share. *Ibid.*; *The Nancy*, 4 Rob. 327, note *a*; *La Belle Coquette*, 1 Dods. 18.

In respect to captures made by ships which are associated in the same service, or are engaged in a joint enterprise, under the orders of the same superior officer, it is a general rule, that they are entitled to share in each other's prizes, made while in such service or joint enterprise. *The Forsigheid*, 3 Rob. 311; *The Guillaume Tell*, Edw. 6; *The Empress*, 1 Dods. 368. Therefore, if one ship of a squadron take a prize, in the night, unknown to the rest, it will entitle the whole fleet to share, although, possibly, the capture may have been made at a distance out of sight of most of the ships of war, even if it had been noonday, for the fleet so associated is considered as one body, unless detached by orders, or entirely separated by accident; and what is done by one, continuing to compose in fact a part of the fleet, inures to the benefit of all. *The Forsigheid*, 3 Rob. 311; s. c. Edw. 124. Where a fleet is employed in a blockade, the service is considered as joint, and all the ships are entitled to share in all captures, although all the ships have not joined in the chase, and the capture has been made, after the chase, at a great distance from the blockaded port. *The Guillaume Tell*, Edw. 6; *The Forsigheid*, *Ibid.* 124. But if a part of the fleet be detached on a separate service, or if the capture be not within the purposes for which they were associated, then the rest of the fleet, not actually or constructively assisting in the capture, are not entitled to share. *The Forsigheid*, 3 Rob. 311; *The *Nordstern*, *65] cited in *The Forsigheid*, Edw. 124, 127; s. c. 1 *Acton* 128; *The Island of Trinidad*, 5 Rob. 92; *The Stella del Norte*, 5 *Ibid.* 349. And this rule applies to all detachments for some distant and separate purpose, which, though possibly connected with the main service, carries the detached ships out of the scene of the common operations for the time. *The Forsigheid*, 3 Rob. 311. But if they are only sent to look out, and they preserve their connection with the fleet, and maintain their dependence upon it, and keep within signal distance, this is not a detached service. It is more like stretching one of the arms of the fleet, without dissolving, in any manner, the connection between them and the main body. *Ibid.* In respect to transports, mere association in service is not sufficient to entitle them to share, as constructive joint captors; but for this purpose, they must actually acquire a military character, and must be employed in military operations, and there must be an *animus capiendi*, while so employed. *The Cape of Good Hope*, 2 Rob. 274. It is not sufficient, that the enemy may have been intimidated by their presence. Mere intimidation may be produced, without any co-operation having been given or intended. If a frigate were going to attack an enemy's vessel, and four or five large merchant ships, unconscious of the transaction, should appear in sight, they might be objects of terror to the enemy, but no one would say, that such terror would entitle them to share. Though the fact of terror were ever so strongly proved, there would not be that co-operation which the law requires to entitle non-commissioned vessels to be considered as joint captors. *Ibid.* But if non-commissioned ships chase, *animo capiendi*, they are entitled to share, if the capture be made by their contribution in this service. *The Twee Gesuster*, and *Le Franc*, cited 2 Rob. 284, 285, notes *a*, *b*.

As to conjunct operations by land and naval forces, how far the former are permitted to share in prizes made by the latter, where no express provision is made by statute, depends upon the circumstances of the case. A mere general co-operation in the same general objects would not be sufficient. *The Stella del Norte*, 5 Rob. 349. But an actual co-operation in the particular *capture, is clearly sufficient. *Ibid.*; *The Dordrecht*, 2 Rob. 55.

If the fleet of an ally, and our own fleet, serve together under our commander, who detaches the squadron of the ally, the latter is not entitled to share in captures subsequently made. But if an ally actually co-operate in effecting a capture, he is entitled

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to share as a joint captor; but the question whether he is a joint captor or not, is a question of which courts of common law have no jurisdiction, and which belongs exclusively to the admiralty. *Duckworth v. Tucker*, 2 Taunt. 7.

As to the manner in which claims of joint capture are to be asserted. It has been already stated, that it is usual not to file such claims, before a decree of condemnation; but if they are not filed before a decree ascertaining who are the captors, and who are entitled to share, and especially after a distribution decreed, it is too late to assert the right. (See *The Stella del Norte*, 5 Rob. 34; *Duckworth v. Tucker*, 2 Taunt. 7; *Home v. Camden*, 2 H. Bl. 533.) But if the sentence below be suspended by an appeal, it seems, that a joint claim may be interposed, upon the appeal. *Home v. Camden*, 2 H. Bl. 533; *The Nostra Signora de los Dolores*, 1 Acton 262; *The Soci  t  *, 9 Cr. 209. It is, however, best to interpose such claims, at an earlier stage of the proceedings, and before any decree of condemnation has passed in any court.

A question of joint capture is never permitted to be settled by affidavits. It must be brought forward by a regular allegation, containing a statement of the facts; and if the allegation contain such facts as, if proved, may entitle the parties to share, the court direct it to be admitted and filed; and thereupon, the actual captors are entitled to file a counter-allegation; and the cause is then regularly to be sustained by proofs, to be taken and established as in other causes, that is to say, by documentary proofs, and the depositions of competent witnesses. *The Urania*, 5 Rob. 148; *La Virginie*, *Ibid.* 124. If, indeed, upon the statement made in the original allegation, the claim cannot, in point of law, be sustained, the court will not inquire into the facts, but reject the application *in limine*. *The Waaksamheid*, 3 Rob. 1. The case, however, must be very clear, *where this course is adopted. When the claim of joint capture is admitted to proof, the *onus probandi* lies on the asserted joint captor. *The Union*, 1 Dods. 346; *The John*, *Ibid.* 363. The single testimony of witnesses on board of the claiming ship, though they release their right, is never deemed sufficient to establish the fact of joint capture; it must be corroborated by evidence *aliunde*, or it will be rejected. *The Fadrelandet*, 5 Rob. 120; *La Flore*, *Ibid.* 268; *The John*, 1 Dods. 63. If, at the moment of capture, the capturing ship admits the fact of joint capture, it is conclusive, unless there be some circumstance invalidating the admission. *The San Jose*, 6 Rob. 244. And if the asserted joint captors expressly renounce all claim to the prize, at the time of capture, their claim is entirely waived, though from subsequent circumstances, they may be disposed to assert it. *The William and Mary*, 4 Rob. 381.

In case of joint captures by public ships, the rule as to the proportion in which they are to share, is established, generally, by statute. This is fixed in the United States, by the act of the 22d April 1800, ch. 33, which provides, that the capturing ships shall share "according to the number of men and guns on board each ship in sight." In respect to privateers, no statute regulation exists; and by the general rule of the prize law, they are to share in proportion to their relative strength. *Bynk. Q. J. Pub. lib.* 1, ch. 18, *Du Ponceau's ed.*, p. 164. This relative strength, is, by the law of Great Britain and the United States, ascertained by the number of men on board of such ship assisting in the capture. *Roberts v. Hartley*, 1 Doug. 311; *The Despatch*, 2 Gallis. 1. Such, too, is the rule, where an ally co-operates in the capture. *Duckworth v. Tucker*, 2 Taunt. 7. And the same rule seems applicable to the case of a joint capture by a public ship and a private ship of war; and this, whether the latter be commissioned or not. *The Twee Gesuster*, 2 Rob. 284; *Le Franc*, *Ibid.* 285.

*Upon the hearing of the proofs, if the case does not require or admit further proof, the court proceeds to pronounce a sentence of acquittal or condemnation, as the justice of the case requires. And it may proceed to make its decree, as well after as before the death of the parties; for in proceedings *in rem*, the suit does not abate by the death or absence of all or any of the parties named in the proceedings. *Penhallow v. Doane*, 3 Dall. 54, 86, 117; *The Falcon*, 6 Rob. 194, 199. It may be proper, in many cases, where all the parties on either side are dead, not to proceed to

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make a decree *in rem*, without serving a monition upon the representatives of the deceased party to appear and pursue or defend his rights. And where the decree is *in personam*, the court will generally require that the representative should be cited duly to appear, to protect his interests, so far as they may be affected by the decree. (*Vide* The Nostra Signora de los Dolores, 1 Dods. 290.) It is, indeed, the duty of the court, to take notice of all interests that result from evidence before it, and not to suffer any persons to be precluded from their just demands, from want of notice of any facts that appear in the course of the proceedings. The Maria Françoise, 6 Rob. 282. And where parties are not formally before the court, it acts as a general guardian of all interests which are brought to its notice. *Ibid.* Indeed, in the common cases of condemnation, the enemy proprietor is necessarily absent, by operation of law; and yet the sentence is completely valid, as well against him as against all the world. The Falcon, 6 Rob. 194, 199. To give validity, therefore, to decrees *in rem*, it is not necessary that the adverse parties should be before the court. *Ibid.*

When a sentence is pronounced, either of acquittal or condemnation, it is, in general, by an interlocutory decree. An interlocutory decree is proper in all cases, where anything further remains to be done by the court, as, in ascertaining damages in cases of illegal capture, or in deciding who are captors, after deciding that the property is to be condemned. The right to decide who are captors entitled to distribution, belongs exclusively to the prize court, and its adjudication cannot be examined by a court of common law (*Home v. Camden*, 2 H. Bl. 533; *4 T. R. 332; *Duckworth v. Tucker*, 2 Taunt. 7); and no title vests in the captors, until the final adjudication of the prize court. *Ibid.* In England, the usual practice is, to acquit or condemn by interlocutory decree, in all cases (*Marriott's Form.* 194, 196); and a definitive sentence is reserved, until all other questions and interests are finally disposed of. *Ibid.* 193, 203. In the United States, it is more common to reserve a decree, until a final decision of all the questions before the court; but there can be no doubt of the propriety of an adherence to the English practice, where the circumstances of the case require a suspension of a final sentence, although the propriety of an acquittal or condemnation is perfectly clear. And in case of an acquittal or condemnation, by interlocutory decree, there can be no question, that an appeal immediately lies to the proper appellate court, by the parties affected by that decree; for, as to them, it is an interlocutory having the effect of a final decree.

In respect to cases of acquittal. This may be either with or without damages and costs, or upon the terms of paying costs and expenses. In either case, where the damages or expenses are uncertain, and to be ascertained, the court itself may proceed directly to assess them. *The Lively*, 1 Gallis. 315. But the usual practice is, to refer it to commissioners to hear the parties, examine their statements and accounts, and to report to the court in detail, such allowance as they think equitably or legally due to the parties. Accompanying the report, the reasons of the commissioners for the allowance or disallowance of any particular item, are usually given; and the report, when returned to the court, is heard upon exceptions by the parties, substantially, though not formally, as in a suit in chancery; for the prize court almost always proceeds as in summary suits, and not as in plenary suits, in the civil law.

When restitution is decreed, if the property remains specifically in the custody of the court, a warrant issues for the delivery to the claimant; and in such case, unless it is otherwise ordered by the court, the expenses of the delivery are to be borne by the captors. *The Rendsberg*, 6 Rob. 142. If the proceeds of the property are in court, an order for delivery is usually made by the court; and after a decree of restitution, the *70] *captors have no right to arrest the proceeds in the registry of the court by a *caveat*; that can only be done by an application to the court itself. *The Fortuna*, 4 Rob. 278. If the proceeds are in the hands of the captors, or their agents, a monition, and, if necessary, an attachment, issues to them, to bring in the proceeds. But where the captors have not conducted unfairly, on restitution decreed, they will not be held answerable for more than the proceeds, although the sale made was less than the original value of the property. *The Two Susannahs*, 2 Rob. 152. The prop-

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erty, upon a decree of restitution, may be delivered to the master as agent of the shipper, for in such case, the master is the agent of the shipper, and is answerable to him. Sir W. Scott and Sir J. Nicholl's letter to Mr. Jay, *ubi supra*. But in such a case, neither the master, nor any other prize-agent, can claim the property, against his principal, unless so far as to cover his expenses; and the court will thus far protect his rights; but when his expenses and his liens on the property are discharged, the court will deliver it directly to the principal, upon his own application. The Franklin, 4 Rob. 404; The St. Lawrence, 2 Gallis. 19. After a decree for restitution of partnership property, to a foreign house *in solidum*, the court will not sever the property, merely because one partner is a bankrupt here; but if the assignees put in a claim for this purpose, before a decree, it would be otherwise. The Jefferson, 1 Rob. 325.

Where damages are decreed, the decree is either against the parties, by name, or by a description of their relation to the ship. Where a decree is against the owners of a privateer, generally, a monition issues against them, personally, to pay the damages assessed; and it may also issue against the sureties in the bond given on taking out the commission. In a court of the law of nations, a person may be considered as a part-owner, though his name has not been inserted in the bill of sale, or ship's register; and the representatives of a person, so deemed a part-owner, is responsible for costs and damages decreed against the owners generally, though the party of whom he is the representative was not the actual wrongdoer. The Nostra Signora de los Dolores, 1 Dods. 290. And as has been *already stated, a part-owner is not exempted from being [*71 a party to a suit for the proceeds, by having a release from the claimant for his share. The Karasan, 5 Rob. 291.

In respect to cases of condemnation. Where an interlocutory decree of condemnation passes in favor of a privateer, it seems to be usual, in England, to deliver that decree, with a proper commission, to the master of the privateer, to make sale of the prize, and to return an account into court. (*Semble*, The Venus, 6 Rob. 235.) But in the United States, all sales of prizes, before, as well as after condemnation, are made by the marshal; and in respect to sales after condemnation, this practice is further enforced by the statute of January 27th, 1813, ch. 155 (2 U. S. Stat. 792).

It has already been stated, that no right vests in the captors, until after a final sentence of condemnation, and that the right to decide who are the captors entitled to distribution, belongs exclusively to the prize court, and cannot be entertained in a court of common law. *Duckworth v. Tucker*, 2 Taunt. 7; *Home v. Camden*, 2 H. Bl. 533. When the case is pronounced to be one of condemnation, the next question, therefore, is, to whom it is to be condemned. This generally depends upon the question, whether the capturing ship be a commissioned or non-commissioned ship; and if the former, whether a public or private armed vessel; and in each of these cases, questions as the rights of asserted joint captors may also arise before the court. Captures or seizures may also take place in port; or be made on land, by conjunct land and naval forces; and in these cases, questions may arise as to the right of the army and navy to share in the prizes or booty.

It is an elementary principle of prize law, that all rights of prize belong originally to the government (The Melomasne, 4 Rob. 41); and the beneficial interests derived to others can proceed only from the grant of the government; and therefore, all captures wherever made, inure to the use of the government, unless they have been granted away. The Elsebe, 5 Rob. 173; *Sterling v. Vaughan*, 11 East 619; The Maria Françoise, 6 Rob. 282; The Joseph, 1 Gallis. 545. In cases of public armed ships, duly commissioned for the capture, the condemnation *is always to the government, [*72 but the proceeds are to be distributed according to the act of the 23d April 1800, ch. 33, § 5, 6. In cases of privateers, duly commissioned for the capture, condemnation is, by the prize act of the 26th of June 1812, ch. 107, to the owners, officers and crew of the privateer, and the proceeds are to be distributed according to the regulations of the same statute. But captors, even though duly commissioned, may forfeit their rights of prize, by misconduct; and this, independent of any statutory provision, by the old established law of the admiralty. La Reine des Anges, Stew. 9;

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The Cossack, *Ibid.* 513, 517; The Herkimer, *Ibid.* 128; s. c. 2 Hall's Law J. 133; The Clarissa, cited in Stew. 144, and 2 Hall's Law J. 145. And an obstinate neglect or refusal to comply with the instructions of the government, or the regulations of the prize act, have been held sufficient to authorize an infliction of the forfeiture; and in such case, the prize is condemned to the government. *Ibid.*; The Bothnea and Janstoft, 2 Gallis. 78, 92. So, the unlawful rescue of the prize by the captors from the custody of the court. The Cossack, Stew. 513. And where the claimant has not affected his property with a hostile character, as by a trade with the enemy, &c., but has been engaged in some other traffic, contravening the municipal law of his own country, so that he cannot entitle himself to a restitution of the property, it will be condemned to the government, and not to the captors. The Walsingham Packet, 2 Rob. 77; The Etrusco, 4 *Ibid.* 262, note; The Venus, 8 Cr. 277, 287.

In cases of non-commissioned ships, and ships commissioned against one enemy, having no commission against another, whose property is captured, the captors are not entitled to any share in the prize, and the property is to be condemned to the government, or to its special grantee, if any such exist. Bynkershoek, indeed, contends, that if a non-commissioned ship is attacked, and captures the assailant, in her own defence, the officers and crew are solely entitled to the prize; and this doctrine seems also to be supported by Grotius. Bynk. Q. J. Pub. lib. 1, ch. 20, Du Ponceau's ed., 155-61; Grotius, *de Jure Belli ac Pacis*, lib. 3, ch. 6, § 10. However, the general prize law of *France, Great Britain and the United States, is as has been above stated. *73] Du Ponceau's Bynk. p. 162, note *d*; 1 Valin, Sur l'Ord. tom. 1, p. 79; The Hasse, 1 Rob. 286; The Rebeccah, *Ibid.* 227; The Amor Parentum, *Ibid.* 303; The Two Gessuster, 2 *Ibid.* 284, note *a*; The Melomane, 5 *Ibid.* 41; The Joseph, 1 Gallis. 545. If, at the time of a capture by a letter of marque, the master of the capturing vessel be not on board, the capture is considered as made without a commission, and it inures to the government, or its special grantee. The Charlotte, 5 Rob. 280. And if a capture be made by a cutter fitted out by a captain of a man of war as a tender, and manned from his ship, but without any authority or commission, it is deemed to be made by a non-commissioned vessel, and the capture will not inure to the benefit of the man of war. It would be otherwise, if the tender were attached to the ship by public authority; for then the ship would share. The Melomane, 5 Rob. 41; The Charlotte, *Ibid.* 280; Capture of Curacoa, 4 *Ibid.* 282, note *a*; The Dos Hermanos, *ante*, p. 76. And if persons in the navy land from their ships and man a fort, and thereby compel a ship to strike as prize, it is considered as a capture made at sea, by a force upon land, which is a non-commissioned capture. The Rebeccah, 1 Rob. 227. But it would be otherwise, if the place on shore were a resort for naval purposes, by persons in the navy only, for then it may be deemed a stationary tender, rather attached to, and dependent upon, the vessels, than having the vessels attached to, and dependent upon, it. *Ibid.* If a foreign cartel-ship be engaged in trade, it is contrary to the duties of the ship, and the goods will be condemned to the government. La Rosine, 2 Rob. 372. And the cartel-ship also, if belonging to our own citizens, will, if the trading has been very gross, be condemned also. The Venus, 4 Rob. 355.

In England, by very ancient grants from the crown, the lord high admiral has the benefit of all captures made at sea, by non-commissioned vessels, and also of all captures by whomsoever made, of all ships and goods coming or already come into ports, creeks or roads of England and Ireland, by stress of weather or other accident, or by *74] mistake of port, or by ignorance, not knowing *of the war; and also of all derelicts. But the crown has still reserved to itself all such ships and goods as shall be seized in port, before any declaration of war or reprisals; and also all such as shall voluntarily come in, upon revolt from the enemy, and as shall be driven or forced into port by the king's men of war. The Rebeccah, 1 Rob. 227, and 230, note *a*; The Gertruyda, 2 *Ibid.* 211; The Melomane, 5 *Ibid.* 22. The Maria Françoise, 6 *Ibid.* 282; The Joseph, 1 Gallis. 545. The office of lord high admiral has for more than a century past been put in commission. But as the office is still considered to have a legal existence, though now residing in the person of the king, the rights and per-

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quisites of that office are still distinguished, as they were anciently, and are ascertained by an observance of the ancient rules, with the same exactness as if the proceeds were carried in the ancient and distinct course. The *Gertruyda*, 2 Rob. 211; The *Maria Française*, 6 Ibid. 282. Hence arises the well-known distinction of condemnation to the king *jure coronæ*, and to the king in his office of admiralty, as *droits* of admiralty; the former applying in all cases where the crown is still entitled to the prize property, in virtue of its sovereignty and inherent prerogatives; the latter applying to all cases where the same belongs to the office of lord high admiral.

In the United States, strictly speaking, there are no *droits* of admiralty; for all prizes, to which no persons can entitle themselves by a public or private commission of war, are condemnable to the government itself, in its sovereign capacity. The *Joseph*, 1 Gallis. 545. But the phrase, *droits* of admiralty, is often used in legal adjudications in the United States, as equivalent to condemnations to the United States, in virtue of their general sovereignty and prerogative, as enforced in the courts of admiralty.

But although non-commissioned persons cannot, by making a capture, entitle themselves to the benefits of prize, yet where their conduct has been fair, in all cases of condemnation as *droits* of admiralty, the prize court will, in its discretion, award them a recompense; and even in some cases, will award them the whole value of the prize, where there has been great personal gallantry and merit. The *Haase*, 1 Rob. 286; *The *Amor Parentum*, Ibid. 303. It is not necessary to enumerate at large the various cases in which property is deemed a *droit* of admiralty, or a prize to the government *jure coronæ*. The preceding authorities will be found to contain almost all the learning on the subject. [*75]

It being ascertained who are the captors, and that they are duly commissioned, the next subject is, the distribution of the prize proceeds; and this is regularly to be done by the prize court having possession of the cause. The *St. Lawrence*, 2 Gallis. 19. Regularly, there should be a decree of distribution; and neither any officer of the court, nor any prize-agent, having prize proceeds in his hands, can be safe in distributing them, without a decree to this effect. *Kean v. The Brig Gloucester*, 2 Dall. 36; *Penhallow v. Doane*, 3 Ibid. 54; The *Herkimer*, Stew. 128; s. c. 2 Hall's Law J. 133. And the prize court have a most unquestionable and exclusive jurisdiction to decree a distribution, either upon its own motion, or upon the application of the parties interested. *Kean v. The Brig Gloucester*, 2 Dall. 36; *Bingham v. Cabot*, Ibid. 19; *Home v. Camden*, 1 H. Bl. 476, 524; s. c. 2 Ibid. 633; 4 T. R. 382; *Duckworth v. Tucker*, 2 Taunt. 7. Nor can any person claim a share in a prize, whose claim has not been admitted and supported in the prize court. *Duckworth v. Tucker*, 2 Taunt. 9.

In respect to public ships, the distribution is to be made according to the act of congress of April 23d, 1800, ch. 33, § 5, 6. Besides the officers and crew of the capturing ship, the commander of the fleet or squadron is entitled to one-twentieth, which is called the flag-twentieth. In England, the commander of the fleet or squadron is entitled to a flag-eighth. Many cases have arisen in England as to the circumstances under which the commander is or is not entitled to share. These cases are collected in a recent decision in our own courts, to which the reader is referred. *Decatur v. Chew*, 1 Gallis. 506. And to the authorities there collected, may be added the following: The *Diomede*, 1 Acton 69, 239; *Gardner v. Lyne*, 13 East 574; *Drury v. Gardner*, 2 Maule & Selw. 150; *Duncan v. Mitchell*, 4 Ibid. 105. [*76] Upon the construction of our own act, it has been held, that the commander of a squadron, to whose command a ship of war is attached, and under whose orders she sails, is entitled to the flag-twentieth of all prizes made by such ship, although the other part of such squadron may never have sailed on the cruise, in consequence of a blockade by a superior force; and that to deprive such a commander of his flag-twentieth, on account of his having left his station, under the act, is indispensable, that some local limits should have been assigned to him. *Decatur v. Chew*, 1 Gallis. 506. And it seems, that a person acting by regular authority as commander of a ship *pro*

tempore, though not commissioned as such, is entitled to the commander's share of all prizes taken. *Pill v. Taylor*, 11 East 414. And the captain of a ship, actually on board, at the time of the capture, is entitled to prize-money, though under arrest at the time, and though another officer had been sent on board to command the ship. *Lumby v. Sutton*, 8 T. R. 224. But to entitle a person to share as an officer of the ship, under the prize act, he should not only be on board, but also an officer of, and attached to, the ship, and not a mere passenger. *The Nostra Signora del Carmen*, 6 Rob. 302. (See *Weyms v. Linzee*, 1 Doug. 324; *Lumley v. Sutton*, 8 T. R. 224.) But soldiers who are on board a public ship are, under the English prize act, entitled to share, although they are invalided, and returning home in the capturing ship. *The Alert*, 1 Dods. 236. And even passengers, under the expression in our prize act, as well as the English prize act, are entitled to share in the lowest class of distribution, as "persons doing duty on board." *Ibid.*; *Wemys v. Linzee*, 1 Doug. 324.

Beside the prize proceeds, by the act of April 23d, 1800, ch. 33, § 7, a bounty of \$20 is given for each person on board any ship of an enemy, at the commencement of an action, which shall be sunk or destroyed by any ship of the United States of equal or inferior force, to be divided among the officers and crew as prize-money. No legal adjudications have as yet taken place on this clause of the act. But under *the *77] British act giving this bounty, or head-money, as it is called, it has been decided, that head-money is not due, when the captured ship was not a duly-commissioned ship of war (*Several Dutch Schuyts*, 6 Rob. 48); that constructive joint captors are not entitled to head-money (*L'Alerte*, *Ibid.* 238); that it is not due for British prisoners on board of the captured ships (*The San Joseph*, *Ibid.* 331); but is due for all the crew on board at the time of the attack, although some afterwards escape. *The Babillion*, *Edw.* 39. Head-money is also due, whether the surrender has been produced by actual combat or not; but it is never granted, unless the act of capture or of destruction is consummated. *La Clorinde*, 1 Dods. 436; *L'Elise*, *Ibid.* 442. The military character of a hostile vessel is not so lost by capture and re-capture, as to extinguish the right to head-money. *The Matilda*, *Ibid.* 367.

In respect to privateers, the prize act of June 26th, 1812, ch. 107, § 4, gives the whole proceeds, after condemnation, and deducting duties and other public charges, to the captors, according to any written agreement among them; and if there be no written agreement, then, one moiety to the owners, and the other moiety to the crew, to be distributed as nearly as may be among the officers and crew, as in cases of public ships. A mariner who has engaged for the cruise, but is disabled, by sickness and other inevitable casualty, from doing duty on the cruise, is entitled to share; but it would be otherwise, if the disability occurred during the cruise. *Ex parte Giddings*, 2 Gallis. 56. And if one of the crew be illegally turned on shore, during the cruise, he is entitled to share in all the prizes made during the cruise. *Kean v. The Brig Gloucester*, 2 Dall. 36. And the persons of the crew who are put on board of prizes are entitled to share in all subsequent prizes made by the privateer; and so, in the converse case, the privateer will share in the prizes made by any prize-vessel, after capture. *The Frederick and Mary Ann*, 6 Rob. 213; *The Brutus*, 2 Gallis. 526. Agreements between the owners and officers of two privateers, to share in all prizes, are valid; but the master and officers have no authority to make such an agreement, without the consent of the owners. *Bynk. Q. J. Pub. lib.* 1, ch. 18, *Du Ponceau's ed.* p. 139, 141.

*78] *When a distribution has been decreed, it often becomes necessary, in order to prevent the decree of the court, where the proceeds are in the hands of prize-agents, or of officers of the court, to institute a suit to compel the proper parties to come in and account for the proceeds, and make due distribution. And for this purpose, a suit may be maintained in the prize court, by any party interested, or by any representative of the party, or by any assignee duly entitled. *The St. Lawrence*, 2 Gallis. 19; *The Brutus*, *Ibid.* 526. Where the cause is in possession of an appellate court, the application may be made there, by a supplementary intervention or petition; or it may be made by a direct original suit *in personam*, brought in the district court. *Ibid.*;

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Home *v.* Camden, 1 H. Bl. 474, 524; s. c. 2 Ibid. 533; Willis *v.* Commissioners, &c., 5 East 22; The Noysomhed, 7 Ves. 593; Smart *v.* Wolff, 3 T. R. 323; Bingham *v.* Cabot, 3 Dall. 19; Kean *v.* Brig Gloucester, 2 Ibid. 36; The Pomona, 1 Dods. 25; The Herkimer, Stew. 128; s. c. 2 Hall's Law J. 133. And it is a general principle, that the power of the prize court subsists, after a general adjudication, to compel captors and other persons having proceeds of prize in their hands, to bring the same into court, until all claims respecting the prize are definitively settled. Ibid. And the remedy is not confined to the stipulation taken in the cause; but the prize proceeds will be followed, in whose hands soever they may be, unless they have been purchased *bond fide*, and without notice of the claim. *Per* BULLER, J., 3 T. R. 323; *per* GROSE, J., 5 East 22; The Pomona, 1 Dods. 25. This subject, indeed, has been already treated of in an early part of the present note, when we were considering the subject of prize jurisdiction; and to that part the reader is respectfully referred for further information. A few additional particulars, respecting prize-agents, &c., may, however, not be without use.

It is no discharge of a prize-agent, that he has paid over to his principal the prize proceeds, after full notice of a libel pending for restitution of the property (Hills *v.* Ross, 3 Dall. 331); *nor to a marshal, that he has distributed prize proceeds, pending an appeal, or where an appeal is wrongfully denied. Penhallow *v.* Doane, [79] 3 Dall. 54. But an agent is only liable for the prize proceeds which have come to his own hands, and not for the proceeds which have come to the hands of his co-agents. Ibid.

Where the prize court has decreed distribution, and allotted the shares, and required the prize-agent to make payment of the proceeds accordingly, if he refuses to obey the order, the court may proceed *in personam* (*per* Lord LOUGHBOROUGH, Home *v.* Camden, 1 H. Bl. 474, 524); and in such case, it will decree interest, to be paid by the agent. And in general, the prize court may compel prize-agents, or others having prize proceeds in their hands, to pay interest on the proceeds, where a proper case is laid before it; for such proceeding is a mere incident to the prize jurisdiction. The Louis, 5 Rob. 46; Willis *v.* Commissioners, &c., 5 East 22; The Pomona, 1 Dods. 25. And it is no objection, that there has been a previous decree for interest against the captors personally. The Polly, 5 Rob. 147, note; Willis *v.* Commissioners, &c., 5 East 22. Interest is not usually allowed against a prize-agent, unless it has been actually made by him, or there has been an unjustifiable delay in payment. But it seems, that a prize-agent has no right to detain property condemned, and in his hands for distribution, to answer demands arising, or which may arise, against the ship, for other unjustifiable captures. The Printz Henrick Von Preussen, 6 Rob. 95. And interest is not usually allowed against a commissioner for appraisement and sale, or a marshal, after sale, unless in cases of a fraudulent detainer or gross delay. The Exeter, 1 Rob. 173; The Princessa, 3 Ibid. 31; Willis *v.* Commissioners, &c., 5 East 22.

This note must now be brought to a conclusion, although some of the topics discussed are far from being exhausted. To some, perhaps, an apology may be necessary for the length to which it has already extended. When, however, it is considered, that *no treatise exists in print, containing even a summary view of prize practice, any attempt, however humble, to collect and arrange what is so little methodized, and so little known, may be entitled to indulgence, or, at least, escape the severity of criticism. [80]

NOTE II.

President's Instructions to Private Armed Vessels.

1. The tenor of your commission, under the act of congress, entitled, "an act concerning letters of marque, prizes and prize goods," a copy of which is hereto annexed, will be kept constantly in your view. The high seas, referred to in your commission, you will understand, generally, to refer to low-water mark; but with the exception of the space within one league, or three miles, from the shore of countries at peace both with Great Britain and the United States. You may, nevertheless, execute your commission within that distance of the shore of a nation at war with Great Britain, and even on the waters within the jurisdiction of such nation, if permitted so to do.

2. You are to pay the strictest regard to the rights of neutral powers, and the usages of civilized nations; and in all your proceedings towards neutral vessels, you are to give them as little molestation or interruption as will consist with the right of ascertaining their neutral character, and of detaining and bringing them in for regular adjudication, in the proper cases. You are particularly to avoid even the appearance of using force or seduction, with a view to deprive such vessels of their crews or of their passengers, other than persons in the military service of the enemy.

*81] 3. Towards enemy vessels and their crews, you are to proceed, in exercising the rights of war, with all the justice and humanity which characterize the nation of which you are members.

4. The master, and one or more of the principal persons belonging to the captured vessels, are to be sent, as soon after the capture as may be, to the judge or judges of the proper court in the United States, to be examined upon oath, touching the interest or property of the captured vessel and her lading; and at the same time, are to be delivered to the judge or judges, all passes, charter-parties, bills of lading, invoices, letters and other documents, and writings found on board; the said papers to be proved by the affidavit of the commander of the capturing vessel, or some other person present at the capture, to be produced, as they were received, without fraud, addition, subduction or embezzlement.

By the command of the President of the United States.

JAMES MONROE, Secretary of State.

NOTE III.

The Standing Interrogatories.

1st Interrogate.—What is your name, where were you born, and where have you lived for the last seven years? Where do you now live, and how long have you lived in that place? To what prince or state, or to whom are you, or have you ever been, a subject? Are you a married man, and if married, where do your wife and family reside?

2d Interrogate.—Were you present at the time of taking and seizing the ship, or her lading, or any of the goods or merchandises concerning which you are now examined? Had the ship concerning which you are now examined any commission; what, and from whom?

*82] 3d Interrogate.—In what place, latitude or port, and when, was the *said ship and goods concerning which you are now examined, taken and seized? Upon what pretence, and for what reasons were they seized? Into what port were

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they carried, and under what colors did the said ship sail? What other colors had you on board, and for what reason had you such other colors? Was any resistance made, at the time when the said ship was taken? and if yea, how many guns were fired? and by whom? and by what ship or ships were you taken? Was the ship or vessel by which you were captured, a ship of war, or a vessel acting without any commission, as you believe? Were any other and what ships in sight, at the time of the capture?

4th Interrogate.—What is the name of the master or commander of the ship or vessel taken? How long have you known the said master, and who appointed him to the command of said vessel? Where did said commander take possession of her, at what time, and what was the name of the person who delivered the possession to the said master? Where doth he live? Where is the said master's fixed place of abode, and where doth he generally reside? How long has he lived there, where was he born, and of whom is he now a subject? Is he married? If yea, where does his wife and family reside?

5th Interrogate.—Of what burden is the vessel which has been taken? What was the number of her mariners, and of what country were the said seamen and mariners? Did they all come on board at the same port, or at different ports, and who shipped or hired them, and when and where?

6th Interrogate.—Had you, or any of the officers or mariners belonging to the ship or vessel, concerning which you are now examined, any, and what, part, share or interest in the said vessel or her lading? If yea, set forth who and what goods or interest you or they have? Did you belong to the said vessel, at the time she was seized and taken? In what capacity did you belong to her? How long have you known her? When and where did you first see her, and where was she built?

7th Interrogate.—What is the name of the vessel? How long has she been so called? Do you know of any other name or names, and what are they, by which she has heretofore been called? Had she any passport or sea-chart on board, and from whom? To what ports and places did she sail, during her said voyage, before she was taken? Where did her last voyage begin, and where was the said voyage to have ended? From what port, and at what time, particularly from the last clearing port, did the said ship sail, previously to the capture? Set forth all the ports to which she has sailed, and at which she has touched and traded, during her whole voyage, out and home.

*8th Interrogate.—What lading did the said vessel carry, at the time of her first setting sail on her last voyage, and what sort of lading and goods had she on board, at the time she was taken? When was the same put on board? Set forth the different species of lading, and the quantity of each sort. Has any part of the cargo of said vessel been unladen, since the commencement of her original voyage? If so, at what ports or places was it unladen? State the articles which were unladen. [*83]

9th Interrogate.—Who were the owners of the vessel, at the time when she was seized? How do you know that they were owners at that time? Of what nation or country are such owners by birth? Where do they reside, and where do their wives and families reside? How long have they resided there? Where did they reside before, to the best of your knowledge? To whom are they subject? How long have the present owners been in possession? and of whom did they purchase?

10th Interrogate.—Was any bill of sale made, and by whom, to the aforesaid owners of said vessel? and if any such were made, in what month and year, and where, and in the presence of what witnesses? Was any, and what, engagement entered into concerning the purchase, further than appears on the bill of sale? If yea, was it verbal or in writing? Where did you last see it, and what has become of it?

11th Interrogate.—Was the said lading put on board in one port and at one time, or at several ports and at several times, and at what ports, by name? Set forth what quantities of each sort of goods were shipped at each port.

12th Interrogate.—What are the names of the respective laders or owners, or con-

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signees of said goods? What countrymen are they? Where do they now live and carry on their business? How long have they resided there? Where did they reside before, to the best of your knowledge? And where were the said goods to be delivered, and for whose real account, risk or benefit? Have any one of the said consignees or shippers, any and what interest in the said goods? If yea, whereon do you found your belief, that they have such interest? Do you verily believe, that at the time of the lading the cargo, and at the present time, and also if said goods shall be restored and unladen at the destined port, the goods did, do, and will belong to the same persons, and to none others?

13th Interrogate.—How many bills of lading were signed for the goods seized on board the said ship? Were any of those bills of lading false or colorable, or were any *84] bills of lading signed, which were *different in any respect from those which were on board the ship, at the time she was taken? What were the contents of such other bills of lading, and what became of them?

14th Interrogate.—Are there in the United States of America any bills of lading, invoices, letters or instruments relative to the ship and goods, concerning which you are now examined? If yea, set forth where they are, and in whose possession, and what is the purport thereof, and when they were brought or sent to the United States.

15th Interrogate.—Was there any charter-party signed for the voyage, in which the ship, concerning which you are now examined, was seized and taken? What became thereof? When, where, and between whom, was such charter-party made? What were the contents of it?

16th Interrogate.—What papers, bills of lading, letters or other writings, were on board the ship, at the time she took her departure from the last clearing port, before her being taken as prize? Were any of them burnt, torn, thrown overboard, destroyed or cancelled, or attempted to be concealed, and when, and by whom, and who was then present?

17th Interrogate.—Has the ship, concerning which you are now examined, been, at any time, and when, seized as prize, and condemned as such? If yea, set forth into what port she was carried, and by whom, and by what authority, or on what account she was condemned?

18th Interrogate.—Have you sustained any loss by the seizing and taking the ship, concerning which you are now examined? If yea, in what manner do you compute such your loss? Have you already received any indemnity, satisfaction or promise of satisfaction, for any part of the damage which you have sustained, or may sustain, by this capture and detention, and when, and from whom?

19th Interrogate.—Is the said ship, or goods, or any, and what part, insured? If yea, for what voyage is such insurance made, and at what premium, and when and by what persons, and in what country was such insurance made?

20th Interrogate.—In case you had arrived at your destined port, would your cargo, or any part thereof, on being unladen, have immediately become the property of the consignees, or any other person, and whom? Or was the lader to take the chance of the market for the sale of his goods?

21st Interrogate.—Let each witness be interrogated of the growth, produce, and manufacture of what country and place was the lading of the ship or vessel, concerning which you are now examined, or any part thereof?

*85] *22d Interrogate.—Whether all the said cargo, or any, and what part thereof, was taken from the shore or quay, or removed or transhipped from one boat, barque, vessel or ship, to another? From what, and to what shore, quay, boat, barque, vessel or ship, and when and where, was the same so done.

23d Interrogate.—Are there, in any other country, and where, or on board any and what ship or ships, vessel or vessels, other than the ship and vessel concerning which you are now examined, any bills of lading, invoices, letters, instruments, papers or documents, relative to the said ship, or vessel and cargo, and of what nature are such bills of lading, invoices, letters, instruments, papers or documents, and what are the

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contents? In whose possession are they, and do they differ from any of the papers on board, and in what particular do they differ?

24th Interrogate.—Were any papers delivered out of the said ship or vessel, and carried away in any manner whatsoever? And when, and by whom, and to whom, and in whose custody, possession or power, do you believe the same now are?

25th Interrogate.—Was bulk broken during the voyage in which you were taken, or since the capture, of the said ship? And when, and where, by whom, and by whose orders, and for what purpose, and in what manner?

26th Interrogate.—Were any passengers on board the aforesaid ship? Were any of them secreted, at the time of the capture? Who were the passengers, by name? Of what nation, rank, profession or occupation? Had they any commission? for what purpose, and from whom? From what place were they taken on board, and when? To what place were they finally destined, and upon what business? Had any, and which of the passengers, any, and what property or concern, or authority, directly or indirectly, regarding the ship and cargo? Were there any officers, soldiers or mariners secreted on board, and for what reason were they secreted? Were any of the citizens of the United States on board, or secreted or confined, at the time of the capture? How long, and why?

27th Interrogate.—Were, and are, all the passports, sea-briefs, charter-parties, bills of sale, invoices and papers, which were found on board, entirely true and fair? Or are any of them false or colorable? Do you know of any matter or circumstances to affect their credit? By whom were the passports or sea-briefs obtained, and from whom? Were they obtained for this ship only? And upon the oath, or affirmation, of the persons therein described, or were they delivered to, or on behalf of the person or persons who appear to have been sworn, or to have affirmed thereto, without their having ever, in fact, made any such oath or affirmation? How long time [*86 were they to last? Was any duty or fee payable, and paid, for the same? And is there any duty or fee to be paid on the renewal thereof? Have such passports been renewed, and how often? And has the duty or fee been paid for such renewal? Was the ship in a port in the country where the passports and sea-briefs were granted? and if not, where was the ship at the time? Had any person on board any let-pass, or letters of safe-conduct? If yea, from whom and for what business? Had the said ship any license or passport from any foreign power or authority during the voyage? if so, state from whom been obtained, and for what purpose and use.

28th Interrogate.—Have you written or signed any letters or papers concerning the ship and her cargo, other than those found on board and delivered to the captors? If yea, what was their purport, to whom were they written and sent, and what is become of them?

29th Interrogate.—Towards what port or place was the ship steering her course, at the time of her being first pursued and taken? Was her course altered, upon the appearance of the vessel by which she was taken? Was her course, at all times, when the weather would permit, directed to the place or port for which she appears to have been destined by the ship's papers? Was the ship, before or at the time of her capture, sailing beyond, or wide of the said place or port to which she was so destined by the said ship's papers? At what distance was she therefrom? Was her course altered, at any, and what time, and to what other port or place, and for what reason?

30th Interrogate.—By whom, and to whom, hath the said ship been sold or transferred, and how often? At what time, and at what place, and for what sum or consideration, hath such sum or consideration been paid or satisfied? Was the sum paid, or to be paid, a fair and true equivalent? Or what security or securities have been given for the payment of the same, and by whom, and where do they live now? Do you know, or believe, in your conscience, such sale or transfer has been truly made, and not for the purposes of covering or concealing the real property? Do you verily believe, that if the ship should be restored, she will belong to the persons now asserted to be the owners, and to none others?

31st Interrogate.—What guns were mounted on board the ship, and what arms and

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ammunition were belonging to her? Why was she so armed? Were there on board any other, and what, arms and ammunition, and when and where they put on board? *87] and by *whom, or by what authority, or for what purpose or destination, and on whose account were they put on board?

32d Interrogate.—What is the whole which you know or believe, according to the best of your knowledge and belief, regarding the real and true property and destination of the ship and cargo, concerning which you are now examined at the time of the capture?

Form of the Oath to be administered to each Witness.

You shall true answer make to all such questions as shall be asked of you on these interrogatories; and therein you shall speak the truth, the whole truth, and nothing but the truth. So help you God!