

The FORTUNA : KRAUSE *et al.*, Claimants.*Prize.—Further proof.*

A question of proprietary interest and concealment of papers. Further proof ordered, open to both parties. On the production of further proof by the claimants, condemnation pronounced.

*237] Where a neutral ship-owner lends his name to cover a fraud with regard to the cargo, this circumstance will subject the ship to condemnation.

It is a relaxation of the rules of the prize court, to allow time for further proof, in a case where there has been concealment of material papers.

The Fortuna, 1 Brock. 299, affirmed.

THIS is the same cause which is reported in 2 Wheat. 161, and which was ordered to further proof, at the last term. It was submitted, without argument, upon the further proof, at the present term.

February 26th, 1818. JOHNSON, Justice, delivered the opinion of the court. —Both vessel and cargo, in this case, are claimed in behalf of M. & J. Krause, Russian merchants, resident at Riga. The documents and evidence exhibit Martin Krause as the proprietor of the ship, but the master swears that he considered her as the property of the house of M. & J. Krause, from their having exercised the ordinary acts of ownership over her; and in this belief, he is supported by the fact, that his contract is made with John Krause, by whom he appears to have been put in command of the ship. (a)

*238] Martin Krause, *who appears in the grand bill of sale, is the same Martin Krause who is member of the firm of M. & J. Krause.

In all its prominent features, this case bears a striking resemblance to the case of *The St. Nicholas*. A vessel, documented as Russian, is placed under the absolute control of a British house, is dispatched, under the orders of that house, to the Havana, where she is loaded, under the directions of an individual of the name of Muhlenbruck, who assumes the character of agent of the Russian owners; she is then ostensibly cleared out for Riga, but with express orders to call at a British port, and terminate her voyage, under the orders of the same house, under the auspices of which, the adventure had originated and been so far conducted.

Under these circumstances, it was certainly incumbent upon the claimant

(a) Translation of Exhibit, 287, A. "On the following conditions, have I given to Captain Henry Behrens, the command of the ship Fortuna, under Russian colors, lying at present in Riga. 1. Captain Behrens shall have 25 Alberts dollars, monthly wages. 2. The whole cabin freight has been allowed him. 3. He is to receive five per cent. primage. 4. Travelling expenses for the benefit of the vessel, as likewise, victualling expenses for the use of the ship in port, consistent with moderation, have been allowed to the captain. Captain Behrens, on his part, promises to watch the interest of his owner in every respect, and do the best he can for the benefit of the vessel. For the fulfilment of the present contract I bind myself by my signature.

"Riga, the 12th of August 1813.

Per Proc.

(Signed)

John Krause,

SCHULTZ."

man, 18 Wall. 457; Knowles v. Logansport Gas-Light and Coke Co., 19 Id. 58. The states have power to enact statutes of limitation, as to actions on judgments rendered in other states, provided a reasonable time be allowed for the commencement of a suit, before the bar

takes effect. Bank of Alabama v. Dalton, 9 How. 522; Bacon v. Howard, 20 Id. 22; Terry v. Anderson, 95 U. S. 628. But they cannot create an absolute immediate bar to an existing right of action. Christmas v. Russell, 5 Wall. 290.

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to show the previous correspondence of the British with the Russian house, and the immediate dependence of the agent at the Havana upon the Russian house for authority, instructions and resources. When we come to compare the correspondence of Muhlenbruck with that of Smith, the agent in the St. Nicholas, we find here also a striking similitude. In that case, the supposed correspondence with the Russian principal is inclosed, *under [239 cover, to the British house, with a request that they would forward it. In this case, the letters covering the invoice and bill of lading, and directed to M. & J. Krause, is confided to the master, but with express instructions to forward it to the British house, and await their orders.

The material facts on which the court relies, in making up its judgment on the claim of the cargo, are the following: In the first place, there is a general shade of suspicion cast over the whole case, by the fact, that all the material papers relating to the transaction were mysteriously concealed in a billet of wood. Had there been nothing fraudulent intended, these papers ought to have been delivered along with the documentary evidence. But they were not discovered, until betrayed by one of the crew. It is upon the investigation of these papers, principally, that the circumstances occur, which discover the true character of this voyage. Secondly. There is no evidence that this adventure was ever undertaken under instructions from M. & J. Krause. But there is evidence that everything is set in motion at the touch of Bennet & Co., of London. And although they affect to act in the capacity of agents of the Russian house, even the rules of the common law would constitute them principals, in a case in which they cannot exhibit the authority under which they assume the character of agents. Again, there is no evidence that any funds were furnished by the Russian house, for the purchase of this cargo. But there is evidence, and *we think [240 conclusive evidence, to show, that it was purchased on funds of the British house, remitted through the medium of the cargo of the Robert Bruce, a ship loaded by Bennet & Co., and dispatched, about the same time, for the Havana. In the letter of instructions of the 18th of March 1813, (a)

(a) "London, 18th November 1813, Capt. Henry Behrens:—As we have settled your ship's accounts by paying you a balance of 206*l.* 16*s.* 11*d.*, up to November 13th, we now agree, that the arrangement made with Messrs. M. & J. Krause, when you were last at Riga, shall continue in force for the pending voyage, so far as relates to your pay and primage, and we agree to pay you a gratuity of one hundred pounds (100*l.*) sterling, at the exchange current, whenever your voyage shall end, and likewise to allow you your cabin freight at the rate which the ship receives for her cargo. We have ordered Mr. J. F. Muhlenbruck to supply you with the cash necessary for your expenses in the Havana, when arrived out, which we beg may be as little as possible. And in case of your wanting any aid in Portsmouth, apply to Mr. Andrew Lindergreen, or in Plymouth, to Messrs. Fuge & Son, or in Falmouth, to Messrs. Fox & Son, who will supply you, on showing this letter. We desire that you will, with your ship Fortuna, as speedy as possible, join the West India convoy, now lying at Portsmouth, taking sailing instructions, and proceed with the same convoy to the Havana, where you will apply to Mr. J. F. Muhlenbruck, at Messrs. Ychazo & Carricabura, merchants there. You will receive at the Havana, Mr. J. F. Muhlenbruck's instructions, which you will follow implicitly. Mr. J. F. Muhlenbruck goes out to the Havana, on board the Robert Bruce, or some other vessel in the convoy, if the Robert Bruce is too late. Should any accident befall him, in the vessel on board of which he goes, so that it is ascertained that Mr. J. F. Muhlenbruck cannot arrive at the Havana, or if he should

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the *master is told to proceed to the Havana and await the arrival of Muhlenbruck, in the Robert Bruce, for orders; and in case of any accident befalling that vessel, to apply to the Spanish house of Ychazo & Carrickabura, at the Havana, for further instructions. And in a letter to the house of Lorent & Steinwitz, of Charleston, Bennet & Co. inform them, that the Fortuna is dispatched to the Havana, to the address of Ychazo & Carrickabura, to obtain a freight for the Baltic, and request Lorent & Steinwitz to advise that house, if they could obtain a freight for her to any port in Europe. This correspondence is explained thus: the cargo of the Robert Bruce would probably be sufficient to load this ship with colonial produce; if she arrives in safety, the original adventure can then proceed, but should she be captured or lost, some return freight must then be found for the Fortuna. And accordingly, we find in the letter to Bennet & Co., of the 24th *242] March, (a) Muhlenbruck solicits *a credit on Jamaica or Cadiz, as he expresses it, "to be able to settle the surplus of the amount already

not be arrived there, sixty days (60) after you have arrived there, you will consult with Messrs. Ychazo & Carrickabura, what is best to be done. Should the convoy be gone, on your arrival at Portsmouth, you are at liberty to follow it, without convoy. Wishing you a good voyage, we remain, &c.

(Signed)

BENNET & Co.

"On your arrival at Leith, apply to Ogilvie & Patterson."

(a) "Messrs. Bennet & Co., London.

Havana, 24th March 1814.

"Gentlemen:—I have the honor to refer you to my last letters of 1st of February, and the 1st of March, of which I have sent you, by different opportunities, triplicates. The first letter principally contained to request the favor of your opening me a credit in Jamaica or Cadiz, to be able to settle the surplus of the amount already shipped, which may be left out of the proceeds of the outbound shipment of the Robert Bruce. I hope that the above letter has reached you, in time to grant me, as soon as possible, the favor, and beg to be convinced that only the greatest necessity engages me to request it; not being able to draw on either America or England. I have now the greatest pleasure to inform you, of the safe arrival of the Robert Bruce, James Chessel, master, on the 19th, under protection of his majesty's ship North Star, Captain Thomas Coe, from Jamaica. From Cork, she sailed with convoy, consisting of his majesty's ship Leviathan 74, Captain Adam Drummond, the Talbot 20, Captain Spelman Swaine, and the Scorpion of 18 guns. Therefore, she has been the whole voyage under convoy, and the insurers have to pay the full returns of six per cent. The North Star which sails to-morrow, takes all the ready vessels for Europe out to Bermuda; from thence, another convoy will be granted to protect them to England, or at least, as far as the latitude of Halifax. The Russian ship Fortuna, Captain Behrens, laden with 1520 boxes assorted sugars, bound to Riga, and for account and risk of Messrs. M. & J. Krause, at that place, is ready to join this convoy. I inclose you invoice and bill of lading, which you will be pleased to forward with the first opportunity to the above friends. The Captain Behrens has got instructions from me, to touch, according to the prevailing winds, either in Leith, or in the channel. By the present circumstances on the continent of Europe, Messrs. M. & J. Krause may have been induced to send this cargo to a better market than it probably meets at Riga. Should they have given you any instructions concerning this vessel, then Captain Behrens has orders to wait for your kind information in regard of the farther destination, which orders from you I beg to send him as soon as you know at what port of the above mentioned he has arrived, in England. Please to inform also Messrs. M. & J. Krause, that I have advanced here the captain 1332 dollars 4 cents, for the use of the ship Fortuna. Next week, the cargo of the Robert Bruce will be all delivered, and I endeavor to procure the highest prices possible. The Oznaburgs will sell as well as the Estopillas, but I am sorry you was

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shipped, which may be left out of the proceeds of the outward bound shipment of the Robert Bruce." Now, the only shipment he had then made was by the Fortuna; and this letter gives advice of that *shipment, as also of the arrival of the Robert Bruce, and the progress he had made in [*243 disposing of her cargo. The passage quoted means, therefore (although somewhat obscurely expressed), "It is possible that the outward cargo of the Robert Bruce may not be sufficient to pay for the shipment already *made by the Fortuna, and you must, therefore, furnish me with a [*244 credit to make up the deficiency." Ychazo & Carrickabura, no doubt, advanced for the purchase of the cargo of sugars, upon the credit of the cargo of the Robert Bruce, and accordingly, we find that house charging a commission for advancing. On these facts, we are satisfied, that the cargo was purchased with British funds.

Lastly, there is no evidence that Muhlenbruck was the agent of M. & J. Krause, and there is abundant evidence of his being the avowed and confidential agent of the British house. We see, in the midst of the greatest anxiety to keep up the character of agent to the Russian house, this gentleman, without being aware of it, does an act which at once shows to whom he holds himself accountable. In his letter to Bennet & Co., of the 24th of March, he requests them to inform the Russian house, that he has made certain advances on account of the ship. But why request Bennet & Co., to do this, if he was himself in immediate connection and correspondence with the Russian house? The fact is, his correspondence with the Russian house was fictitious, and his object was, to inform Bennet & Co., in reality, whilst he feigned to address himself to M. & J. Krause, and thus the letter to the latter house, covering the invoice and bill of lading, although of the same date with that to Bennet & Co., omits this piece of information, which in a real correspondence, would be groundwork of a credit to himself; and contains nothing but the most general information, just enough, in fact, *to [*245 gloss over the transaction, and give it the aspect of reality(a).

not able to get more of the latter, and of a finer quality, being always the leading article of an assortment of linen. The prices of sugar are nearly the same, and the arrival of this convoy has brought them up $\frac{1}{8}$ to $\frac{1}{4}$ dollar higher. Coffee is lower, and I expect to buy and lay in good coffee, at 10 to 11 dollars. Messrs. Hubberts, Taylor & Simpson inform me, that I may not expect a convoy leaving Jamaica before the 30th of April. This same convoy can arrive here the 10th or 15th of May, and all possible exertion shall be made on my side to get the Robert Bruce laden, before this time. I have till now not received an answer of Messrs. Hibberts, respecting the bills on London. Your kind letter of the 18th of December, I have duly received. I am happy that the sugars are bought within your limits, and wish to be as fortunate with those wanted for the Robert Bruce's cargo. I have the honor, &c.

(Signed)

J. F. MUHLENBRUCK."

(a) (Translation.)

"Havana, 24th March 1814.

"Messrs. M. & J. Krause, Riga:

"With the present, I have the honor to send you the invoice and bill of lading of a cargo of sugars for your esteemed account, in the Fortuna, Captain H. Behrens. The ship could not take more than 1520 boxes white, and 600 brown, with Campeachy wood, which was necessary for stowing; together \$57,517.04, for which you will please give me credit. The sugars are of the new crop, bought at a moderate price, and of a very good quality. And I flatter myself you will be content with the fulfilment of your

Gelston v. Hoyt.

With regard to the vessel, it would be enough to observe, that if a neutral ship-owner will lend his name to cover a fraud with regard to the cargo, this circumstance alone will subject him to condemnation. But in this case, there are also many circumstances to maintain a suspicion that the vessel was British property, or, at least, not owned as claimed. Although this course, from extreme anxiety to avoid subjecting a neutral to condemnation, has relaxed its rules in allowing time for further proof, in a case where there was concealment of papers, yet nothing has been brought forward to support *246] the neutral character *of the ship. No charter-party, no original correspondence, nothing, in fact, but those formal papers which never fail to accompany a fictitious, as well as a real, transaction. On the contrary, we find the master, without any instructions from his supposed owners, submitting implicitly to the orders of Bennet & Co., in everything; and the latter assuming even a control over the contract which he exhibits with his supposed owner in Riga, and expressing a solicitude about his expenses, which could only have been suggested by a consciousness that the house of B. & Co. would have to pay those expenses.

Upon the whole, we are satisfied, that it is a case for condemnation both of ship and cargo.

Decree affirmed.

GELSTON *et al.* v. HOYT.

Error to state courts. — Jurisdiction. — Seizure. — Neutrality law. — Pleading.

Under the judiciary act of 1789, § 25, giving appellate jurisdiction to the supreme court of the United States, from the final judgment or decree of the highest court of law or equity of a state, in certain cases, the writ of error, may be directed to any court in which the record and judgment on which it is to act, may be found; and if the record has been remitted, by the highest court, &c., to another court of the state, it may be brought by the writ of error, from that court.¹

The courts of the United States have an exclusive cognisance of the questions of forfeiture, upon all seizures made under the laws of the *United States, and it is not competent for a state court to entertain or decide such question of forfeiture. If a sentence of condemnation be definitively pronounced by the proper court of the United States, it is conclusive that a forfeiture is incurred; if a sentence of acquittal, it is equally conclusive against the forfeiture; and in either case, the question cannot be again litigated in any common-law *forum*.

Where a seizure is made for a supposed forfeiture, under a law of the United States, no action of trespass lies in any common-law tribunal, until a final decree is pronounced upon the proceeding *in rem* to enforce such forfeiture; for it depends upon the final decree of the court proceeding *in rem*, whether such seizure is to be deemed rightful or tortious, and the action, if brought before such decree is made, is brought too soon.

kind commission. As there is a convoy leaving this place to-morrow, for Bermuda, I found it advisable for the *Fortuna* to join the same, and wish her a very quick and safe passage. Of the above documents, I shall send you duplicates, when I have the honor to write you again. The prices of Russian articles are at present—Raven's Duck, \$16, Canvas \$42. Iron can only be sold with a loss, and in small quantities, as the price has fallen, &c.

(Signed)

J. F. MUHLNBRUCK."

¹ Webster v. Reid, 11 How. 437; McGuire v. Massachusetts, 3 Wall. 382. The writ must be directed to the highest state court in which a decision can be had, though an inferior one.

Downham v. Alexandria, 9 Wall. 659; Miller v. Joseph, 17 Id. 655. And see Atherton v. Fowler, 91 U. S. 143.