

The London Packet.

could not have pledged himself for the fairness of the transaction, but without better evidence than was then presented to our view, gave the most liberal indulgence for procuring evidence to support the claim. We now express our satisfaction in having done so ; inasmuch as it has enabled an honest man, both to save his property, and vindicate his reputation. And we cannot omit this opportunity to remark, how much it becomes the interest, as well as principles of the fair neutral, to discountenance the conduct of him who indulges himself in fraudulent practices. The claimant in this case had nearly fallen a sacrifice to the bad faith of some of his countrymen. A great loss from it, he must unavoidably incur ; for this is one of those cases in which, by the course of the admiralty, we shall be obliged to throw the costs and expenses upon the claimant, although we decree restitution. It is altogether upon the evidence of Jones, and the test-affidavit of the claimant, introducing and verifying their original correspondence, that restitution is now decreed. Unsupported, and unexplained by the evidence introduced as further proof, the condemnation was unavoidable. It is, therefore, the claimant's misfortune, not that of the captors, that the agent Jones had furnished the vessel with the defective documents which accompanied her.

Decree reversed.

DECREE.—This cause came on to be heard, on the transcript of the record of the circuit court for the *district of Georgia, and on the further proof exhibited in this cause, and was argued by counsel : on [*132 consideration whereof, it is decreed and ordered, that the decree of the circuit court for the district of Georgia in this case, condemning the cargo of the ship Venus, be and the same is hereby reversed and annulled. And this court, proceeding to pass such decree as the said circuit court should have passed, it is further decreed and ordered, that the said cargo of the ship Venus be restored to the claimant ; and it is further decreed, that the said claimant pay to the libellants the costs and expenses incurred in the prosecution of this suit.

The LONDON PACKET : MERINO, Claimant.

Prize—Enemy's property.

A question of proprietary interest, on further proof. Restitution decreed, with costs and expenses to be paid by the claimant.

In general, the circumstance of goods being found on board an enemy's ship, raises a legal presumption that they are enemy's property.

The London Packet, 1 Mason 14, reversed.

APPEAL from the Circuit Court of Massachusetts. This was the claim of a Spanish subject, to a parcel of hides laden on board of the London Packet, a British ship, at the port of Buenos Ayres, in South America, in the month of June 1813.

The London Packet, on her voyage to London, was captured by the private armed brig, the Argus, and carried *into Boston for adjudication. On being libelled in the district court as prize of war, the consul of [*133 his Catholic Majesty filed a claim for the property in question, in favor of Don Jeronimo Merino, a Spanish subject. The district court condemned

the vessel and the whole of the cargo, except these hides, which were restored to the claimant, the court being satisfied, there was not such proof of enemy's property therein, as to authorize a decree of condemnation. For the ship and residue of the cargo, no claim was interposed. From this decree, as to the hides, there was an appeal by the captors to the circuit court, where the same was reversed. The court, although it reversed the sentence which had been pronounced below, expressed its entire satisfaction as to the national character and domicile of the claimant, and that the hides had been originally shipped by him; but condemned the property, because, on the order for further proof, no affidavit had been offered, either of the claimant, or his confidential agent or clerk, of his interest in the cargo, at the time of the shipment. It was considered, that the absence of such a document, so universally expected and required by prize tribunals, unavoidably threw a suspicion over the cause, and being wholly unaccounted for, it authorized a belief, that there had been a voluntary, if not a studied, omission on the claimant's part. At the same term in which the sentence of reversal was pronounced, but not until after such sentence was known, the affidavit of the claimant, which had been received, since the last adjournment of the *134] court, was produced by the Spanish consul, with a petition *that the decree might be rescinded, for the purpose of admitting it into the case, or that the same might be so far opened, for the consideration of the court, as to make the affidavit of Merino a part of the evidence therein, so as to accompany the other testimony in the appeal to this court. Upon this application, the circuit court ordered, that the affidavit should be received by the clerk, and sent up with the other papers *de bene esse*, subject to the directions of this court. The affidavit had been taken on an order below for further proof, but had not been received, as has been stated, when the decree of condemnation was pronounced. (a)

Webster and Pitman, for the captors, argued, that it was a well-settled principle in the prize court, that the *onus probandi* lies on the claimant. "In the prize court," says Sir WILLIAM SCOTT, "where special reasons for deception are perpetually occurring, and where the court exercises a much more unconfined jurisdiction on questions of property, than it exercises in its civil *forum*, proof of property lies generally on the claimant, and he may be called upon to support the *primâ facie* evidence of a good title which is already exhibited." *The Countess of Lauderdale*, 4 Rob. 234. This burden would have rested on the claimant in the present case, if the goods in question had been found on board of a neutral ship; but it is increased by the fact, that the property was found on board an enemy's ship, and an enemy's *135] *armed ship. The maxim as laid down by Grotius, is: "*Res hostium navibus presumuntur esse hostium, donec contrarium probetur.*" A presumption which, nevertheless, may be destroyed by strong proof to the contrary. (b) In this case, the property was not only found on board an enemy's armed ship, but was unaccompanied by the documentary evidence required to prove its neutrality. No papers were found at the time of cap-

(a) See 1 Mason 14; 2 Wheat. 371.

(b) De Jure Belli ac Pac., lib. 3, c. 6, § 6; Bynk. Q. J. Pub., lib. 1, c. 13; Loccenius, lib. 2, c. 4, n. 11.

The London Packet.

ture, relating to the cargo, except the bills of lading; and all the letters and invoices were sunk, by the order of the master of the London Packet, in the letter-bag, as sworn by two of the crew, upon their examination on the standing interrogatories. The spoliation of papers, is, therefore, superadded to the fact of the property being found on board a ship of the enemy, destined to an enemy's port; and the claimant is called upon to produce the strongest, and most satisfactory proof, to destroy the many presumptions arising from these facts, that, in truth, the property belongs to the enemy. The claimant has had abundant opportunity afforded him to produce this proof. The first order for further proof was made in the district court, the 26th of November 1813, and the claimant was indulged until nearly the close of the year 1815, in the courts below, to establish the verity of his claim. Having failed so to do, this court afforded him further time, and he has had from February 1816, until this term, a period of four years, to produce plenary proof in *reference to a claim so much indulged, and surrounded with so many circumstances of suspicion. If the claimant [*136 has failed to produce this proof, the presumption is irresistible, that his claim must be false. In such a suspicious case, too, something more is to be expected from the claimant himself, then a mere test-affidavit (*The Magnus*, 1 Rob. 31), which is all the evidence (coming from himself) which the claimant has yet furnished.

D. B. Ogden and Winder, contra, admitted the rule of the prize court, that property found on board an enemy's vessel is presumed to be enemy's property: but for this very reason, they insisted, such a vessel would seldom be made the vehicle of enemy's property, intended to be covered as neutral. The records of the court would show, that in a great majority of the cases, where attempts have been made to disguise enemy's property, such attempts have been made by lading the goods on board a neutral vessel, in order to avoid that suspicion on which the rule of law is founded. But in this case, the presumption itself can have but little weight; because it appears in evidence, that the claimant was compelled, by necessity, to lade his goods on board an enemy's vessel, there being, at that time, none but British ships, at Buenos Ayres, destined for Europe, for which market his goods were intended. Some indulgence is due to the subjects of neutral states, who not having sufficient shipping of their own to carry on their trade, are compelled to resort to the navigation of other countries, *which may happen to [*137 be belligerent. Nor can the circumstance of a spoliation of papers by the enemy master, have any unfavorable effect upon the claim of a neutral shipper conducting *bonâ fide*. *The Friendship*, 3 Wheat. 14, 48. Even the actual resistance of the enemy master will not preclude the neutral shipper from receiving restitution, unless he participates in such resistance, and thus forfeits the privileges of his neutral character. *The Nereide*, 3 Cranch 388, 423. The counsel on both sides also argued upon the facts, with great minuteness and ability.

February 20th, 1820. LIVINGSTON, Justice, delivered the opinion of the court.—In the argument of this cause, the counsel have not confined themselves to the effect which the affidavit of the claimant ought, of itself, to have upon the decision of it, but have animadverted on all the testimony

below. The court has, therefore, also extended its examination to all the proofs in the cause, and will now pronounce its judgment on them.

The captured vessel was confessedly British property, as well as a great part of its cargo, and its destination was to a port in the enemy's country, which raises a legal presumption, that the property claimed was not neutral. It is not denied, that a neutral may use the vessel of a belligerent, for the transportation of his goods, and whatever presumption may arise from the circumstance, that it is not, of itself, a cause of condemnation. In this case, it does not appear, nor was it probably the fact, that any neutral vessel *138] bound to London, was then at Buenos Ayres, and therefore, this presumption ought to have but little influence on the present decision. If the proprietary interest be satisfactorily made out, the claimant is entitled to restitution.

There was no letter found on board, from Merino to his correspondent in London, nor any invoice of this property. The only document relating to it was a bill of lading, in Spanish, dated the 19th of June 1813, purporting that 6276 hides had been shipped on board the London Packet, by Jeronimo Merino, on his account and risk, to be delivered to Antonio Daubana, or in his absence, to William Heiland, they paying the freight therein stipulated. This bill of lading was not signed by the master. To the omission of a signature to this bill of lading, much importance cannot be attached. It was found in possession of the master, and serving only as a memorandum for him of the cargo on board; and not being intended to pass into the hands of any other persons, it was a matter of indifference, whether he put his name to it, or not. Of seven bills of lading which were found on board, no less than three were without his signature. Those which were delivered to the shippers, were, no doubt, signed, which was all that was necessary for their security. If this bill of lading be compared with the one produced, and proved by Daubana, it is impossible not to be struck with the exact similarity between them. They correspond in all respects, excepting only that one has not the signature of the master, and appears most manifestly to *139] have been filled up with the same ink, and in the same handwriting, and at the same time; which is no small proof of their being contemporaneous acts, and of the authenticity of the one which is now produced by the consignee. But no letter from Merino to his correspondent, nor any invoice, nor any bill of lading for the consignee, being found on board, it is urged, that the proof of proprietary interest is defective, and that the sentence of condemnation ought, therefore, to be affirmed.

Had no further proof been introduced, relieving the case from this difficulty, the argument would be entitled to great consideration. But the absence of those papers is now accounted for. It appears by the testimony of Stephenson, a passenger on board the London Packet, who was examined by the captors, that a large bag, containing a great number of private letters, and other papers, was sunk by order of the master of the London Packet, about half an hour before his vessel was taken. It is then but a fair presumption, that the letter, invoice and bill of lading transmitted by Merino to his correspondent in London, were among the papers thus destroyed. The loss of these papers being thus accounted for, and the master of the captured ship not being brought in, as he ought to have been, there was a propriety, under the peculiar circumstances of this case, in affording, as the court below

The London Packet.

did, an opportunity to the Spanish owner, of offering subsidiary proof respecting the property mentioned in the bill of lading found on board, and which was claimed by him. This further proof, which consists of documents from the custom-house at Buenos Ayres, of the positive testimony *of [*140 Mr. Daubana, the consignee in London, and of the test-affidavit of Mr. Merino himself, is satisfactory, that the proprietary interest of these hides was, at the time of shipment and of capture, in the claimant. That they belonged to Smith, notwithstanding the mark of S. on some of them, as has been suggested, cannot be believed. On that supposition, his conduct is utterly inexplicable. If the adventure was on his account, the disguise of the shipment could have been intended for no other purpose than to impose, as to them, on the courts of the United States; for this contrivance or cover could not protect his vessel from capture and condemnation. Yet, if we believe some of the witnesses, Smith declared, that the whole of the cargo belonged to himself, and some merchants in London. These declarations of Smith, as he was set at liberty by the captain of the Argus, and of course, not examined on the standing interrogatories, ought not to militate against the integrity of the present claim; but if they were really made, they afford strong evidence, that if this bill of lading were designed as a cover for bel-ligent property, some other person, and not Smith, was to be benefited by it. For if he were the real owner, why, it may be asked, did he voluntarily abandon the property (for he was put on board of another vessel, at his own request), at the very moment when this fraud, if he ever intended to avail himself of it, was to be consummated? Why did he not remain in his vessel, until her arrival in the United States, and apply to a Spanish consul, or some other gentleman, to prefer a claim in favor of *the pretended Spanish [*141 owner? Why did he not support this claim with his own oath, as he must have intended to do, if he ever intended to derive any advantage from a contrivance which must have had its inception at Buenos Ayres, at his instigation, and for his emolument? There is no accounting for his conduct on any other hypothesis, than that he had no interest in this property, and was, therefore, willing to leave it to its fate.

The counsel for the captors, aware of the full and conclusive nature of the proof, so far as it establishes Merino's interest in the merchandise claimed by him, have endeavored to show that Merino was not at Buenos Ayres, when this shipment took place, and if he was, that it is impossible, that his letter, which bears date the 10th of July 1813, could have been put on board of the London Packet, which had sailed on the 24th of June, fourteen days before. If this be so, a gross attempt has been made to impose on the court, which ought to be followed with consequences fatal to the present claim. But the court is not of opinion, that either of these suppositions is supported by the evidence. Not a single witness, whose testimony is relied on to establish the fact of Merino's not being at Buenos Ayres, at the time of the shipment, speaks with any certainty, or tells us affirmatively where he then was. This negative testimony, which, if it stood alone and uncontradicted, might excite a strong suspicion, is rendered of very little consequence, by much proof of a contrary character. The custom-house document which has already been referred to, establishes the residence of *Merino at Buenos Ayres, at the date of the shipment; so does the [*142 affidavit of Merino himself, who is proved to be a gentleman of char-

The London Packet.

acter, of property and respectability. Daubana also swears to the same fact, with as much certainty as one correspondent can establish the domicile of another, residing at so great a distance from each other. He proves that Merino remained there until the 15th of August following, at least, that he received a letter from him, dated at Buenos Ayres, on that day. Another witness, who saw him at Rio Janeiro, in the year 1814, says, that he did not leave Buenos Ayres, until after the middle of the year 1813. The weight of testimony, therefore, may be considered as in favor of the claimant being at Buenos Ayres, when this shipment was made. Nor is it so certain, as seemed to be taken for granted at the bar, that the London Packet sailed on her voyage for Europe, on the 24th of June 1813. It is true, that the cook, and some others who were examined *in preparatorio*, fixed the time of her departure to that day; but the second mate, and only officer of the captured vessel who was examined, and who was most likely to know, says that she sailed in the month of July. Under this uncertainty respecting a fact which is deemed so material, and to which the claimant's attention has never been called, it cannot be expected, that the court should not only act upon it, as positively proved, but follow it up with the condemnation of property, so clearly proved to belong to a neutral. It would be more charitable, and not unreasonable, even if the fact were proved, to presume that witnesses *143] were speaking of the time *of the London Packet's first weighing anchor at Buenos Ayres, and that she may, for some reason or other, have been detained in the river, until the 10th of July, which is the date of Merino's first letter to his correspondent in London. It may be added, that it is not easy to believe, that if a fraud were intended, care would not have been taken to make the letter of advice, and all the other papers, correspond with the time of the departure of the vessel.

Upon the whole, a majority of the judges are of opinion, that upon the further proof, the sentence of the circuit court should be reversed, and the property restored to the claimant. But as the captors had been put to great expense, in consequence of the imperfect documents found on board, and the great delay which has attended the production of the further proof, they are of opinion, that their costs and expenses must be paid by the claimant.

Decree reversed.

DECREE.—This cause came on to be heard, on the transcript of the record of the circuit court of the United States for the district of Massachusetts, and the further proof exhibited in this cause, and was argued by counsel: on consideration whereof, it is ordered and decreed, that the decree of the circuit court for the district of Massachusetts in this case, condemning 6276 ox-hides, as good and lawful prize to the libellants, be and the same is hereby reversed and annulled. And this court, proceeding to *144] pass such *decree as the said circuit court should have passed, it is further ordered and decreed, that the said 6276 ox-hides be restored to the claimant: And it is further decreed, that the said claimant pay to the libellants the costs and expenses incurred in the prosecution of this suit.