CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1821.

The Amiable Isabella : Munos, Claimant.

Prize.—Spanish treaty.

Whether a capture is made by a duly commissoned captor, or not, is a question between the government and the captor, with which the claimant has nothing to do.

If the capture be made by a non-commissioned captor, the government may contest the right of the captor, after a decree of condemnation, and before a distribution of the prize proceeds ; and the condemnation must be to the government.

The 17th article of the Spanish treaty of 1795, so far as it purports to give any effect to passports, is imperfect and inoperative, in consequence of the omission to annex the form of passport to the treaty.[1]

Quære ? Whether, if the form had been annexed, and the passport were obtained by fraud and upon false suggestions, it would have the conclusive effect attributed to it by the treaty ?

Quære ? Whether sailing under enemy's convoy be a substantive cause of condemnation ?

By the Spanish treaty of 1795, free ships make free goods ; but the form of the passport, by which the freedom of the ship was to have been conclusively established, never having been duly annexed to the treaty, the proprietary interest of the ship is to *be proved according to the ordinary rules of the prize court, and if thus shown to be Spanish, will protect the cargo on board, to whomsoever the latter may belong. [*2

By the rules of the prize court, the *onus probandi* of a neutral interest rests on the claimant.

The evidence to acquit or condemn, must come, in the first instance, from the ship's papers, and the examination of the captured persons.

Where these are not satisfactory, further proof may be admitted, if the claimant has not forfeited his right to it, by a breach of good faith.

On the production of further proof, if the neutrality of the property is not established beyond reasonable doubt, condemnation follows.

The assertion of a false claim, in whole or in part, by an agent, or in connivance with the real owner, is a substantive cause of condemnation.

Appeal from the Circuit Court of North Carolina. This was the case of a ship and cargo, sailing under Spanish colors, and captured by the privateer Roger, Quarles, Master,(*a*) on an ostensible voyage *from [*3

(*a*) As the form of the commission issued to the privateer, in this case, is one of the points discussed in the argument, it is thought necessary to insert it.

[1] The Amistad, 15 Pet. 521.

Havana to Hamburg, but really destined for London, *or* with an alternative destination, and orders to touch in England, for information as to markets, and further instructions. The ship sailed from the Havana, on
*4] the 24th of November 1814, under *convoy of the British frigate Ister, with which she parted company on the 1st of December, the frigate having gone in chase of an American privateer; and on the 3d of December, was captured by the privateer Roger, and carried into Wilmington, North Carolina, for adjudication. The ship and cargo were condemned as prize of war, in the district court of North Carolina, and the sentence was, after the admission of further proof in the circuit court, affirmed by that court. An appeal was then allowed to this court, with permission to introduce new proof here, if this court should choose to receive it.

The original evidence consisted of the papers found on board the captured vessel, and delivered up to the captors, by the master, at the time of the capture; and of certain other documents afterwards found concealed on board, or in the possession of Rahlives, the supercargo, or of one Masuco, *alias* Burr, a passenger on board the Isabella. Some of the ship's papers were mutilated, and attempted to be destroyed, and others were thrown overboard, and spoliated.

The paper of which the following is a translation, was the only one delivered up by the master, at the time of the capture: "Don Jose Sedano,

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James Madison, President of the United States of America, to all who shall see these presents, greeting: Be it known, that in pursuance of an act of congress, passed on the 26th day of June 1812, I have commissioned, and by these presents do commission, the private armed schooner, called the Roger, of the burden of 184 tons, or thereabouts, owned by Thomas E. Gary, Hy. Gary, James B. Cogbill & Co., Brogg & Jones, Hannon & High, Robert Ritchie, Robert Birchett, John Wright, Wm. C. Boswell, Samuel Turner, John G. Heslop, Wm. & Charles Carling, Thomas Shoe, Richard B. Butte, Richard Drummond, Littlebury Estambuck, John Davis, Spencer Drummond, Peter Nestell and Roger Quarles, mounting fourteen carriage guns, and navigated by ninety men, hereby authorizing Captain ———, and John Davis, lieutenant of the said schooner Roger, and the other officers and crew thereof, to subdue, seize and take any armed or unarmed British vessel, public or private, which shall be found in the jurisdictional limits of the United States, or elsewhere, on the high seas, or within the waters of the British dominions; and such captured vessel, with her apparel, guns and appurtenances, and the goods or effects which shall be found on board the same, together with all the British persons and others, who shall be found acting on board, to bring within some port of the United States; and also to retake any vessels, goods and effects of the people of the United States, which may have been captured by any British armed vessels, in order that proceedings may be had concerning such capture or re-capture, in due form of law, and as to right and justice shall appertain. The said ——— is further authorized to detain, seize and take all vessels and effects, to whomsoever belonging, which shall be liable thereto, according to the law of nations, and the rights of the United States, as a power at war, and to bring the same within some port of the United States, in order that due proceedings may be had thereon—this commission to continue in force during the pleasure of the President of the United States, for the time being. Given under my hand, and the seal of the United States of America, at the city of Washington, the 24th day of April, in the year of our Lord 1813, and of the Independence of the said States the thirty-seventh.

(Signed) JAMES MADISON.

By the President,

(Signed) JAMES MONROE, Secretary of State.

administrator-general of the royal revenues of this port of Havana, in the island of Cuba, &c., certify, that by authority and knowledge of the general-administrator of the revenues under my charge, permission has been given to ship in the Spanish ship called the Isabel, Captain Don Francisco Cacho, with destination for Hamburg, viz :

*Don Alonzo Benigno Munos, registered on the day of this date, six hundred and seventy-six boxes brown sugar, two hundred and twenty-eight boxes white ditto, and two hundred quintals dye-wood, which he has shipped on his own account and risk, consigned to Don Juan Carlos Rahlives, and paid 6290 ; and that it may so appear, I sign the present. [*5

M 1 a 676
M + 201 a 228
... 1 a 40

(Signed) SEDANO."

Havana, 10th Nov. 1814.

Among the papers found on board, and brought into the registry, with an explanation of the circumstances under which they were discovered, were,

1. A passport or license granted by the governor and captain-general of the island of Cuba, of which the following is a translation :

Number 94. Province of the Havana.

Don Juan Ruiz de Apodaca y Eliza, president, governor, captain-general of the place of Havana, and island of Cuba, commandant-general of the naval forces of the Apostedero, &c. For want of royal passports, I dispatch this document in favor of Captain Don Francisco Cacho, inhabitant of the city of Havana, that with his Spanish *merchant ship called Amable Isabel, of the burden of 208½ tons, he may sail from this port, with cargo and register of free trade, and proceed to that of Hamburg, there to trade, and return to his port of departure, with the express condition of performing his voyage, outward and inward, directly to the fixed places of his destination, without deviating, or touching at any port, national or foreign, in the islands or continent of the Indies, unless compelled by inevitable accident. [*6

Gratis. (Signed) APODACA.

SEBASTIAN DE LA CADENA.(a)

(a) The original of this passport or license, is as follows :

Numero 94. Provincia de la Habana.

D. Juan Ruiz de Apodaca y Eliza, presidente, gobernador, capitan generál, de la plaza de la Habana, é Isla de Cuba, y comandante-generál de marina del Apostadero, &c. Á falta de reales pasaportes expido este documento á favor del Capitan Dn. Franc. Cacho Vecino de esta Ciudad de la Habana para que con su fragata mercantile Española nombada Amable Ysabel ——— de porte de 208½ toneladas, pueda salîr de este Puerto, con carga y registro del libre comercio, y transferirse al de Hamburgo ——— para comerciar en el, y restituirse al de su salida con expresâ condicion, de hacer su derrota de ida y vuelta directamente à los senalados parages de su destino sin extraviarse ni hacer arribada à puertos nacionales, ó extrangeros, en islas, ó tierra firme de Indias á menos de verse obligado de accidentes de otra suerte no remediables. Habana, diez de Novembre de mil ochocientoz catorze.

Gratis. (Signed) APODACA.

SEBASTIAN DE LA CADENA.

*2. A clearance granted by Don Pedro Acevido, captain of the port of Havana, permitting the said Cacho "to proceed with the Spanish ship La Amable Isabel, from this port to England," with a muster-roll of the officers and crew annexed.

3. A letter of intructions from Munos, the claimant, to Cacho, of which the following is a translation:

"Havana, 10th Nov. 1814.

"Don Francisco Cacho.

"SIR:—Instrusted as you are with my ship La Amable Isabel, which sails bound for Hamburg, or some other port of that continent, or for those of England, I hope that you will perform your duty with the exactness you have always used, and which was my motive of making choice of you. Consequently, I will omit all further advice, particularly as there goes in the vessel the supercargo, Don Juan Rahlives, with my full power and instructions. You will observe all his directions, as if they were dictated by myself. Wishing a prosperous voyage, &c.

(Signed) MUNOS."

4. Articles of agreement between Munos and the master and crew of the ship.

5. A general procuration from Munos to one Von Harten, of London, dated at Havana, May 29th, 1812, with a substitution by the latter to Rahlives, the supercargo, executed at London.

6. A letter from one Tieson, dated London, November 4th, 1813, to his brother F. Tieson, at Rio Janeiro, introducing Rahlives, *as the con-
*8] ductor of certain commercial operations, which he had concerted with several friends, referring his correspondent to Rahlives himself for the details.

7. A letter from one Rhodes, dated London, to Messrs. Glover & Co., at Rio Janeiro, introducing Rahlives, who the writer states "goes as supercargo in the ship Isis, and acts for Mr. John Gobel, of Havana, and Mr. Von Harten, of London," &c.

8. A letter from Hawkes & Malloret, dated Liverpool, October 28th, 1803, to Brown & Co., at Rio Janeiro, introducing Rahlives as "particularly connected with our intimate and respectable friend, Mr. George Von Harten, of London, and John Gobel, of Havana, on whose behalf he will probably visit you very shortly. It is probable, Mr. Rahlives may intrust to your management some transactions for account of said friends and others, and we beg to assure you, we feel convinced every satisfaction will result from such business as he may have to conduct."

9. The following circular: "Havana, 1st May 1812. On the 15th last May, we took the liberty of addressing our friends from London, requesting their countenance to an establishment we intended to form in this city, under the firm of Von Harten, Gobel & Co. We now have the satisfaction to inform you of our complete success in organizing and consolidating the same, and that we are in every respect enabled to procure to our correspondents all those advantages which may result from intelligence, activity and the most respectable connections in this island. Political considerations, however,
*9] induce us to carry on our affairs for the future, under the sole *name and firm of Mr. John Gobel, who is permanently to reside in this country," &c.

The Amiable Isabella.

10. An account of sales, dated Havana, November 16th, 1814, signed by J. Gobel, of the cargo of the English brig Portsea, received from Rio de Janeiro, on account of Messrs. Brown, Weston & Co., and of Rahlives, amounting to $20,313 net proceeds, leaving to the credit of Rahlives, in Gobel's hands, half of that sum.

11. A charter-party, executed at Rio de Janeiro, May 11th, 1814, between Weston and Gobel, letting to him the Portsea, and consigning the cargo to the charterer.

12. The following letter from Munos to Rahlives: "Havana, 10th Nov. 1814. Sir—I inclose you invoice and bill of lading, showing to have shipped in my ship called La Amable Isabel, Capt. Don Francisco Cacho, 1104 boxes of sugar, and 40 half-boxes of ditto, and 200 quintals of dye-wood, the principal amount of which and charges amounts to $60,642.03, which cargo, consigned to you, you will please to take charge of, on your arrival at Hamburg or at any other port you may find convenient to go, proceeding to sell it, on the most advantageous terms you can obtain, that, with the proceeds, you may make the returns, according to the instructions I have verbally communicated to you. In like manner, I recommend to you, and place under your care, my said vessel, in order that the adventure may have the most favorable termination, to which end, I have given orders to the captain, Don Francisco Cacho, that he may observe the instructions you may communicate to him in my name. As I am so well satisfied with *your care and diligence, and the friendship my house entertains for you, I shall omit any further advice, wishing you a prosperous voyage, and that you may duly advise me of your proceedings, and communicate such instructions as you may think fit. Yours, &c." [*10]

13. A bill of lading, signed by the master, Cacho, acknowledging the receipt of the cargo, and engaging to deliver it to Rahlives, at Hamburg, or at the port where his register might be verified.

14. A manifest, entitled "Manifest of the cargo of the Spanish ship La Amable Isabel, in its voyage from this port of Havana to that of London;" and signed by the master; being stated in the margin that he had signed bills of lading therefor "to Don Alonzo Benigno Munos, which he has registered on his own account and risk, and to the consignment of Horace Solly, of London."

Among the mutilated papers found on board were, 1. Various accounts between Rahlives and F. Thieson. 2. An invoice of jerked beef and tallow, shipped from Rio de Janeiro to Havana. 3. Another invoice of the same, "for account and risk of Mr. Alonzo Benigno Munos, at Havana," per brig Isis, Capt. Brenmer, amounting to $22,371. 4. Invoice of sugars, &c., shipped on board the Isis, at Havana, by order of Rahlives, signed by Gobel, and amounting to $50,671. 5. Another invoice of the same, shipped on board the Isis, "for Falmouth and a market, to the orders of G. Van Harten, Esq., in London," signed by Rahlives, and various accounts between the different parties.

*A claim was given in for the ship and cargo, as the property of Don Alonzo Benigno Munos, by Rahlives, the supercargo, as agent for the alleged owner; and the captured persons were examined on the standing interrogatories. [*11

Upon the order for further proof, the affidavits of the claimant and his

clerks, to the proprietary interest of the ship and cargo, in him, were produced, and the proceedings before the tribunal of the Consulado, at the Havana, under which, the ship, which had arrived at that port from New Providence, was sold under the bottomry bond alleged to be given for repairs, by one John Cook, to the claimant, and was naturalized as a Spanish vessel. A great mass of testimony was also produced, tending (among other things) to show that the claimant, who was father-in-law of Gobel, had not been actively engaged in trade, for many years before this shipment was made; and that Gobel, not being a Spanish subject, all his foreign business, and his transactions with the custom-house, had constantly been carried on in the name of Munos.

Gaston, for the appellant and claimant, argued: 1. That the prize allegation, in this case, ought to be dismissed, because the libellants had shown no lawful authority to make the capture in question, and therefore, condemnation could not be pronounced in favor of the captors; but even if the proprietary interest were proved to be enemy's, it must be condemned as a *droit* of admiralty to the use of the government. It is a well-established prin-
*12] ciple *of the law of prize, that the captors must show an authority to capture as prize, and exhibit their title deeds. *The Melomane*, 5 Rob. 43. Here, the commission is issued to the vessel itself, without naming the commander who is to direct her operations as a cruiser. The commander, by whom the seizure was actually made, had no commission or authority whatever, other than what was delegated to him by the owners of the vessel. The capture is, therefore, null, so far as respects the captors. On general principles, no persons can rightfully carry on war, but those who have a particular authority from the sovereign power of the state. With regard to private armed vessels, unless they have a public commission, their acts are absolutely unlawful, and all on board may be treated as pirates. Vattel, *Droit des Gens*, lib. 3, c. 15, § 226. At all events, they can derive no title under captures thus made, unless they have a commission. *In bello parta cedunt rœipublicæ;* and all the rights of prize are derived from the grant of the sovereign power. Nor can the commission be issued to the inanimate machine. It must be to the organized association of human beings who are to control and direct its force. Without a head to control and govern them, such an association would be nothing but a band of pirates. The interests of mankind will not tolerate the existence of such a monster, as a ship of war, without a lawful commander. Even when thus governed, they require to be watched with vigilance, and controlled by the government, lest they
*13] involve the nation with its allies, *or with neutrals. *The Thomas Gibbons*, 8 Cranch 421. For this purpose, it is necessary, that the government should designate and commission their officers. So strict is the doctrine of the court of admiralty on this subject, that a capture made by a public commissioned ship, the commander not being on board at the time, is regarded as if made without a commission. *The Charlotte*, 5 Rob. 251. So also, by our own law, the act declaring war, June 18th, 1812, c. 425, authorizes the president to isssue commissions or letters of marque and reprisal, in such form as he shall think proper to dictate: and in the form which he has actually prescribed, the names of the captain and lieutenant are required to be inserted. The prize act of June 26th, 1812, c. 430, imposes very strict

duties upon the commander, which he is to perform, personally, and cannot devolve upon another. He is, among other things, to give bond, and is made responsible for his own misconduct and that of the crew; is to receive and execute the president's instructions; is to keep a journal of the ship's transactions; and by his personal negligence or misconduct, may forfeit the commission, and the rights of prize derived under it. Most clearly, the government has a right to judge of the merits and qualifications of the person to be invested with a trust so high and important. But the government has not delegated it to the captors, in the present case, and therefore, they have no right to demand condemnation to their use. Nor has the government itself *interposed; nor, indeed, can it interpose, to require condemnation to its own use, until the preliminary question of prize or no prize is determined, and the court is about to distribute the proceeds. *The Thomas Gibbons*, 8 Cranch 421. No final decree of condemnation can, therefore, now be pronounced. [*14

2. The testimony furnished by the papers found on board the captured vessel, is such, as, according to the treaty between the United States and Spain of 1795, is conclusive on the question, and entitles the claimant to immediate restitution. This treaty forms a coventional law on the subject of neutral commerce, essentially different from the general law on the same subject.(*a*) By the 15th article, it is stipulated, that the ships of either nation may sail from any port, to those of a country which may be at war with either or both nations, and may go to neutral places, or to other enemy ports; and that every article on board, except contraband, to whomsoever belonging, shall be free. In order to carry into effect this stipulation for the unlimited liberty of commerce, and that free ships shall make free goods, it is provided by the 17th article, that the vessel shall be furnished with a passport, expressing her national character, and with certificates to show that the cargo is not contraband. To this passport, a conclusive effect is attributed. It establishes the national character of the ship; and that being proved, *renders it immaterial to inquire respecting the cargo, except so far as to ascertain by the certificate, that it is not contraband. The 18th article requires the cruisers of either party, meeting the merchant vessels of the other, upon the high seas, to remain out of cannon-shot, and only authorizes them to send on board two or three men, and if the passport be exhibited, the vessel is not to be molested; and by the 17th article, if the prescribed documents are not exhibited, she may be sent in for adjudication, and condemned as prize, unless testimony, entirely equivalent, shall be produced. The ship now in question, was furnished with such a passport and certificate as the treaty prescribes. [*15

It is true, that the form of passport, intended to have been annexed to the treaty, never was, in fact, annexed by the negotiators, owing to accident or negligence, or some other cause which we cannot now explain. We are not, however, without the means of ascertaining what will satisfy the requisitions of the treaty. A passport, or a sea-letter, is a well known document, in the usage of maritime commerce, and is defined to be a permission from a neutral state to the master of a ship, to proceed on his proposed voyage, usually containing his name and residence, and the name, property, tonnage

(*a*) For the provisions of this treaty, see Appendix, Note I.

and destination of the ship. Marsh. on Ins. 406. Although it evidences the permission of the state to navigate the seas, yet it does not, therefore, follow,
*16] that it must issue directly from the supreme power *of the state ; and some authority ought to be shown to support such a position. This erroneous notion, probably, arises from the practice of our own country, which is different from that of all other nations. Previous to the year 1793, no other documents were furnished to the merchant vessels of the United States but the certificate of registry and clearance ; but the depredations upon our commerce having commenced with the European war which broke out in that year, a form of sea-letter was devised, and to give it greater effect, was signed by the president. On the 28th of November 1795, a treaty was made with Algiers, by which a passport was to protect our vessels from capture by Algerine cruisers. By the act of the 1st of June 1796, c. 339, congress authorized the secretary of state to prepare a form, which, when approved by the president, should be the form of the passport. Neither the treaty nor the law required the president's signature, but the form prepared was signed by the president, as the sea-letter had been. But this, our peculiar practice, forms no rule of conduct obligatory on others ; and will not authorize us to give a more restricted meaning to the term used in a treaty, than the general usage of nations will warrant. The word passport,(*a*) thus used, is taken from the same word, signifying a permission
*17] given to individuals to remove from one *place to another, and the documents are analogous. Vattel states, that, "like every other act of supreme cognisance, all safe-conducts or passports flow from the sovereign authority ; but the prince may delegate to his officers the power of furnishing them, and with this they are invested, either by express commission, or in consequence of the nature of their functions. A general of an army, from the nature of his post, can grant them ; and as they are derived, though mediately, from the same prince, all his generals are bound to respect them." Vattel, *Droit des Gens*, lib. 3, c. 17, § 265, *et seq.* So also, Blackstone speaks of the offence of violating passports, or safe-conducts, granted by the king or his ambassadors." 4 Bl. Com. 68. It is, then, incidental to the commission of an admiral or general, or public minister, to issue these documents of protection for persons or property. Wheat. Capt. 59. By the usage of all commercial countries, they are issued by the superior officers superintending the marine affairs of the kingdom, province, city or colony, where granted, and as representing the sovereign in those places. In France, they have always been issued by the admiral of France, except during the revolution, when they were issued by the minister of marine.(*b*)
*18] *In the king of Prussia's ordinance of neutrality, passports and sea-letters are spoken of as issuing from admiralties, maritime colleges, or magistrates of cities.(*c*) And in the celebrated answer to the Prussian

(*a*) "*Passaporte.* Passport. Lettre ou brevet d'un prince ou d'un commandant pour donner la liberté de voyager, d'entrer et de sortir librement de ses terres. *Fides publica.*" Sobrino, Nouv. Dict. Espagnol, Français et Latin.

(*b*) "Passeport. C'est une permission de l'Amiral pour voyager en sureté et être reconnue par tout. C'est sur ce passeport que les bâtimens de commerce naviguent." Encyclop. Meth. art. Marine.

(*c*) 2 Azuni, App'x, No. 9, p. 401, Johnson's Transl.

Exposition des Motifs, it is said, that until the year 1746, the usual document was a certificate from the admiralty that the ship was Prussian. Afterwards, a pass under the royal seal of the regency of Pomerania, at Stettin, was used.(*a*) In our treaty with Holland, the form of a sea-letter is given, which is in the name of the burgomasters and regents of the city, acting under an ordinance of the States-General. In England, such documents are issued by the lords commissioners of the admiralty, as is shown by the papers in the case of *The Nereide*, in this court, 9 Cranch 388: and on foreign stations, they may be issued by the admirals commanding those stations. In the famous Black Book of the Admiralty, we find it laid down, that all intercourse with the enemy is prohibited, unless under a special license from the king or his admiral.(*b*) In the case of *The Ships taken at Genoa*, 4 Rob. 317, Sir W. Scott declares, that Lord Keith, as admiral commanding the expedition, had a right to grant passports to protect the ships sailing under them. And in this court, the licenses issued by Admiral Sawyer, and counter-signed by a *British consul, were determined to be passports, which would protect against British capture. *The Julia*, [*19 8 Cranch 181; *The Aurora*, Ibid. 203; *The Hiram*, Ibid. 444; *The Ariadne*, 2 Wheat. 143. At Gibraltar, these documents are issued in the name of, and signed by, the commissioners of the admiralty at that place. Reeves on Ship. app'x, No. 9, *in fin.* As to the usage of Spain, it appears, by a royal passport, found on board the Isabella, and issued for another ship called the Clara, to be usually issued at home by the secretary of marine, in the king's name; but it also appears by an indorsement on this very paper, that the Spanish commandants of foreign stations, or Apostaderos, may alter such passports, and grant liberty to change the course of the voyage. And they may also issue original passports, in their own name, where there is a deficiency of royal passports, and the vessel has not been previously documented. Such is the passport which was issued to the Isabella in the present case. The power to issue such documents of protection, is necessarily incident to the vast authorities conferred on the Spanish colonial governors; and the case of the British ship of war Eliza, which was compelled to enter the port of Havana in distress, in time of war, and to which the Captain-General, after relieving her wants, gave a passport to protect her from capture, is an example of the exercise of the power in question, highly honorable to the generosity of the Spanish character. Raynal's Hist. tom. 7, p. 455.

The treaty under which *protection is now claimed, was conceived [*20 in the spirit of that benevolent policy so long cherished by the United States, and which Spain has reciprocated. It has for its object to limit the range of warfare on the high seas, and to extend the immunities of the neutral flag. In this spirit, it ought to be construed. A comparison of its provisions with those of other conventions for the same object, will show the correctness of the interpretation for which we contend. In the French treaty of 1778,(*c*) which was the forerunner of the armed neutrality of 1780, a passport or sea-letter in a certain form is provided, to protect the

(*a*) Wheat. Capt. App'x, No. I., p. 334; Report of Sir George Lee, &c. See Appendix, Note II.

(*b*) Wheat. Capt. 159.

(*c*) For the provisions of this treaty, see Appendix, Note III.

ship. But there is nothing from which it can be inferred, that this document is to issue from the supreme executive of the respective nations. To show how subordinate a consideration was that of form, it is deserving of remark, that the form actually annexed to the treaty, omits a circumstance which the text of the treaty, expressly requires—"the place of residence of the master." So that a passport precisely corresponding with the form annexed, was adjudged by the court of K. B., in England, who had not seen the annexed form, to be substantially defective in this respect, and thus to falsify the warranty of neutrality in a policy of insurance. *Baring* v. *Christie*, 5 East 398. So, the treaty with Holland of 1782,(*a*) contains analogous stipulations with those of the Spanish treaty. It gives the form
*21] *of a passport, and of a sea-letter, which are afterwards spoken of as the same, or at least, as equipollent documents. The passport does not show by whom it is to be signed; but it shows, that it may be issued by individuals signing their own names, and affixing their own private seals, and that it was not thought necessary, that it should issue in the name of the chief magistrate; and the sea-letter is unequivocally to be issued by an authority less than the supreme power of the state. The treaty of 1783, with Sweden,(*b*) repeats the same stipulations of the unlimited liberty of commerce, and that free ships should make free goods; and to prevent disputes, a passport, or sea-letter is to be furnished, showing that the vessel belongs to a subject, which is to protect from all further inquiry, and is to be made out in "good form." Here, the form is avowedly left to the exercise of an honest discretion on each side. In the treaty with Prussia, of 1785,(*c*) the same conclusive effect is attributed to the sea-letter or passport, the form of which was to be subsequently concerted by the contracting parties. From these, the treaty with Spain was copied, whose government gloried in being the first among the southern powers of Europe that acceded to the principles of the armed neutrality.(*d*) One of the leading principles
*22] asserted by that confederacy, went to exclude *from the jurisdiction of the belligerent prize courts, whatever was done under the neutral flag, and to render it matter of negotiation between state and state. A national contract made to carry into effect this principle, is to be construed according to its intention and spirit, which meant to rely upon the justice and honor of both nations, that neither would impart to enemy vessels the immunities which were intended to be confined to neutral property. Enlightened views of interest would induce the neutral state not to permit any but its own subjects to avail themselves of the concession; and though every possible abuse might not be prevented, yet cases of fraud would rarely occur, and the evils produced would be far outweighed by the immense importance of the general security of commerce, and the consequent mitigation of the evils of war. The authority of the Spanish government to issue a passport certifying the proprietary interest in the vessels of its own subjects is unquestionable, and the local law and usage must determine its form, and the authority by which it is to be issued.

3. But supposing the passport produced not to be precisely such as the

(*a*) For the provisions of this treaty, see Appendix, Note III.
(*b*) For the provisions of this treaty, see Appendix, Note III.
(*c*) For its provisions, see Appendix, Ibid.
(*d*) 2 Azuni, Appendix, No. 31.

treaty intended, yet it is insisted, that, with the other documents, it furnishes testimony "entirely equivalent," according to the expression used in the 17th article. It is important, to fix the precise meaning of the last clause of that article. The preceding clauses stipulated, that the ship shall have a passport to show that she belongs to the neutral state, and a certificate to show that her cargo *(to whomsoever belonging) is not contraband. [*23
By the 18th article, if she is furnished with these documents, she is to be exempt from all detention or molestation. If not furnished with them, she may be carried in for adjudication, and then must account for the omission, and furnish other testimony, which, considering all the circumstances, shall be of equal value with that omitted. Suppose, the omission satisfactorily accounted for, what is the equivalent testimony required by the treaty? Most certainly, it is that which completely proves the same facts which the omitted documents would have proved. Even a passport, in due form, does not prove that the ship is, in fact, neutral. With whatever formal solemnities it may be clothed, it must issue from the custom-house of the power by whom it is granted. It may be issued improperly; the officers authorized to issue it, may be deceived by fraud and perjury. The possession of the document only proves the fact, that the property of the ship has been decided to be neutral, by the competent authorities, by those to whom the sovereign power of the state has intrusted the examination of the question. Their determinations are made conclusive by the treaty, and import absolute verity, in the same manner as the solemn judgments of the courts of justice. If, then, this document cannot be had, but its absence is accounted for, and other papers are produced, which however inferior in formal solemnity, unequivocally prove such a decision by the competent authority of the neutral state, then, this secondary evidence is completely equivalent to the passport and certificate *provided for in the treaty. [*24
This exposition is the only one consistent with the spirit of the treaty, and is in furtherance of its avowed object, which was, that the flag should protect the property sailing under it, if used by authority of the neutral nation. This exposition is conformable to the English version of the treaty, but is absolutely required by the Spanish; and even if there were any difference of meaning, we are bound, in honor and good faith, to adopt the latter, since Spain has always acted upon it, and has seldom or never thought it necessary to document her ships, according to the literal requisitions of the treaty. Unless this exposition is admitted, the whole of the clause in question is nugatory. By the universal law and usage of nations, every captured vessel is at liberty to account for the want of formal documents. *The Pizarro*, 2 Wheat. 244. It would, therefore, have been superfluous, to insert a provision in the treaty of this effect. Something more must have been intended by the use of terms, which are to be found in no other treaty. In the case now before the court, the omission of the required document is fully accounted for, by the actual state of the mother country at the time, and by the declaration of the colonial governor, when he granted the substituted document. This ought to be considered as equivalent proof, because it is next in dignity, and approaches very nearly to a level with the royal passport itself. It is issued by an officer who is only not king; who would have been charged with the delivery and control of royal passports; who expressly declares, that it was issued in *lieu of such; and certifies every [*25

fact which would have been stated in a royal passport. The other documents are superadded to that which would alone have been required, had the formal requisitions of the treaty been complied with, and are abundantly sufficient to establish the proprietary interest in the ship. They are supported by the depositions of the captured crew, who are required, by the navigation laws of Spain, to be Spanish subjects, and whose national character conforms to this requisition.

4. Again, if there be no passport, such as is required by the treaty, and no such equivalent testimony as the treaty provides, still, the claim to the ship is established by evidence such as the law of nations require to establish it; and if the property of the ship is shown to be Spanish, that is sufficient to protect the cargo to whomsoever belonging. *The Pizarro*, 2 Wheat. 227. She is furnished with all the usual documents, and none are of a suspicious or irregular character. They are supported by the testimony of all the witnesses, except one; and he was improperly examined, not being produced in his regular order, but kept back, until other witnesses had been examined, contrary to the well-known rule of the prize court, which requires the captors to introduce all the witnesses in succession. *The Speculation*, 2 Rob. 242; *The William & Mary*, 4 Ibid. 312. Even if the proprietary interest in the cargo should be thought doubtful, that being included in the same claim with the ship, will not necessarily involve both in condemnation; for an attempt *to conceal enemy's property only affects the right to further proof. *The Madonna del Burso*, 4 Rob. 138. But we insist, that further proof is not required in this case; and if the national character of the ship be established by the original evidence, the conventional law entitles us to restitution of the cargo, as a matter of course. *The Pizarro*, 2 Wheat. 227.

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5. Lastly, supposing the original evidence in the cause insufficient to entitle the claimant to restitution, either according to the provisions of the traaty, or by the general law of nations, it is insisted, that all the difficulties of the case are removed by the further proof produced, which establishes the proprietary interest of both ship and cargo as claimed.

Wheaton, for the captors and respondents.—1. Answered the objection taken by the claimant's counsel to the validity of the commission under which the capture was made. This is exclusively a question between the captors and the United States. The claimant has no *persona standi in judicio*, to assert the rights of the United States, and is it not until after the determination of the principal question of prize or no prize, that the claim of the government can be interposed. *The Dos Hermanos*, 2 Wheat. 94. This is not only our own practice, but is the prize law of France and England, and of the whole maritime world. 2 Bro. Civ. & Adm. Law 524; 2 Wooddes. 432; 3 Bulst. 27; 4 Inst. 152, 154; Zouch. Adm. Juris. c. 4, p. 101; Comyn's Dig., tit. Admiralty, E, 3; *The Georgiana*, 1 Dodson 397; *The Diligentia*, Ibid. 403; Valin, Com. lib. 3, tit. 9, *des Prises*, art. 1; Pothier, *de Propriété*, No. 93; Casaregis, Disc. 24; Consolato del Mare, c. 287. Even, *if the present capture be a *droit* of admiralty, as taken by non-commissioned captors, that will not invalidate the capture, if it be of enemy's property. This is to be determined, after a general decree of condemnation is entered, and before a final distribution of the prize pro-

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ceeds. If the government shall interpose a claim, at that stage of the proceedings, it will then be time enough to consider a question in which the foreign claimant has no interest or right to interfere.

2. The vessel and cargo in this case are liable to condemnation as prize of war, having left the Havana with a false destination. The claim sets up an alternative destination, to an enemy's or a neutral port; but it is contradicted by the documentary evidence and the depositions of the captured persons. This false destination is not excusable, on the ground of the necessity of deceiving an enemy, by clearing out for a neutral port. Spain was at that time at peace with all the world, except her revolted colonies; and both London and Hamburg were equally neutral ports, in respect to the South American cruisers. A false destination, under such circumstances, is damnatory, if the case be so infirm as to require further proof; because it could only be intended to conceal enemy interests, and if alternative, it ought to appear to be such on the face of the papers, in order that captors may not be misled. *The Juffrouw Anna*, 1 Rob. 125; *The Welvaart*, Ibid. 122; *The Nancy*, 3 Rob. 125; *The Mars*, 6 Ibid. 79, 86; *The Vrouw Hermina*, 1 Ibid. 164.

*3. The proofs of proprietary interest, upon the original evidence, are not such as to entitle the claimant to restitution, without further proof. As to the ship, there is no doubt, that if *bonâ fide* Spanish property, and documented according to the treaty, she must not only be restored, but the cargo also must be included in the restitution, even if proved to be enemy's property. But it is insisted, that the treaty does not extend to a fraudulent use of the Spanish flag, to cover enemy's property in the ship as well as the cargo. *The Minerva*, 1 Marriott 235; *The Citade de Lisboa*, 6 Rob. 358; *The Eendraught*, Ibid. note *a*; *The Erstern*, 2 Dall. 36. The passport, even supposing it to be such as the treaty requires, is falsified by the muster-roll and other documents; and it was not produced, as the treaty requires, to the captors, but found on board, after the capture. Fraud will vitiate even a judgment, and the most solemn instruments and assurances. This is a principle of universal law, and it would be indecent, to suppose that Spain countenances such an improper use of her flag and pass. Is there, then, that equivalent testimony which the treaty substitutes for the formal passports? The law very properly requires the bill of sale to be on board, where the vessel is transferred from the original proprietor. *The Welvaart*, 1 Rob. 122. Even Hubner, the great champion of neutral rights, admits this to be the rule. De la Sais. des Battim. Neutr. part 1, c. 3, § 10. But here, the vessel is not Spanish built; yet no bill of sale is found on *board, and the circumstances strongly point to the previous existence of enemy interests in the vessel, which, it appears, came from New Providence. The purchase of enemy's vessels by neutrals is entirely prohibited by the ordinances of some countries; and our law regards it as suspicious. *The Bernon*, 1 Rob. 102; *The Sechs Gedchwistern*, Ibid. 100; *The Argo*, Ibid. 153. If still continued to be employed in the enemy's trade, or under the control of an enemy, this is deemed a badge of fraud, and conclusive evidence that there has been no *bonâ fide* transfer. *The Jemmy*, 4 Rob. 31; *The Omnibus*, 6 Ibid. 71. The ship then is not documented *bonâ fide*, as the treaty requires, nor is the substituted proof equivalent to that for which it is substituted. The ship, therefore, will not protect the

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cargo, nor is the latter so documented as to protect itself, or avoid being involved in the same fate with the vessel. To be sure, there are the usual formal documents, and so there are in every case. But they contradict each other; and being fraudulently blended in the same false claim with the ship, they must be included in the same condemnation. Both being alleged to belong to the same claimant, and he having attempted to assert a false claim to the ship, the entire claim must be rejected as a penalty for his fraudulent conduct. *The St. Nicholas*, 1 Wheat. 417; *The Fortuna*, 3 Ibid. 236.

4. But the passport in this case, even supposing it not to have been fraudulently obtained and used, is not such as the treaty requires, being issued by an authority incompetent to grant such a document of *protection. *30] It is insisted, that nothing less than the solemnly pledged faith of the supreme power of the neutral state, to the verity of the facts stated in the passport, can possibly satisfy the belligerent. The terms used in the treaty are "sea-letters *or* passports." One of the contracting parties might understand it as intending a document in the nature of a permanent muniment of the title to the ship. Our laws recognise no other such document, than one signed by the president. The presumption, therefore, is, that our vessels were to be furnished with a sea-letter thus signed, and the Spanish vessels, with a royal passport, signed by the king. The cases cited on the other side, to show that such a document of protection may be granted by an authority inferior to the supreme power of the state, are not in point. In the British license cases, although this court condemned our vessels sailing under them, yet the British prize courts denied the authority of their admirals and consuls to issue them, and condemned the vessels taken by British cruisers, although sailing under these licenses. *The Hope*, 1 Dods. 226; Ibid. app'x, D. All the other cases cited are of passports issued by the lord high admirals of England or France, acting as the immediate delegates of the royal prerogative, and as the ministers of the crown. There is no doubt, that admirals and generals, commanding fleets or armies, have the power of issuing passports for the temporary protection of persons or property, within the limits of their command. But this arises from the necessity of the case, and is incidental to the performance of *their *31] official duties. But it is not incidental to any official duty of the governer and captain-general of the Island of Cuba, that he should have the power of naturalizing foreign ships, giving them all the privileges of Spanish-built vessels, and grant passports to protect them against belligerent scrutiny: *non ei rei præponitur*. It is highly improbable, that the government of this country would have agreed to a stipulation so improvident, under which the whole navigation of our enemy might be screened from capture, by a mere fictitious adoption, fraudulently or corruptly obtained for this purpose. The *form* of this important document being omitted, either from accident or design, there is the more necessity of looking to the *substance* of the contract; since, if the form had been annexed, there is no doubt, that it would have required the highest authority of the state to grant a document so conclusive. The passport or sea-letter provided by this treaty is not a mere ordinary license or safe-conduct, given by a general or admiral, for a temporary purpose, and within the limits of his command. It is the supreme power of the neutral state, solemnly pledging itself to the belliger-

ent, that the property of the ship is truly and *bonâ fide* neutral. The doctrine contended for on the part of the claimant, would go the length of entirely abolishing maritime captures; since the passport may be issued by any authority, however inferior, and however remote his functions may be from such a duty. The treaty provides, that the certificates which are required relative to the cargo, shall be issued by the officer of the place *whence the vessel sails, and the same proviso would have been made as to the [*32 *passport*, had it been intended to intrust the local magistrates with the power of granting it. Neither does an examination of the forms of similar documents, annexed to other treaties, containing the same stipulation, that free ships shall make free goods, justify the inference, that they may be issued by any authority less than the highest. So also, the celebrated convention of 1801, between Great Britian and Russia, though it does not contain such a stipulation, but on the contrary, snbjects enemy's property in neutral vessels to capture, yet it provides for similar documents of protection, and in the *formula* annexed, it is stated, that they are "to be delivered in the respective admiralties of the two high contracting parties."(*a*) But the question has already been determined in this court, in the case of *The Pizarro*, 2 Wheat. 244. In that case, the court say, "it is certainly true, that the vessel was not furnished with such a sea-letter, &c., as are described in the 17th article." But she had on board the proceedings under which she was naturalized in East Florida, and a certificate from the Spanish consul at Liverpool, certifying, that "Captain Don Antonio Martinez, commanding the Spanish ship called the Pizarro, of the burden of 273 tons, registered at the port of St. Augustine de la Florida, which came to this port, from the Island of Amelia, with a cargo, now sails for the port of Corunna, in *Spain." Here, then, was a certificate, stating the name, burden and property of the [*33 ship, and the name of the master, and issued by an authority as competent as the governor of Cuba. Yet the court held it not to be a compliance with the terms of the treaty, and required further proof of the proprietary interest.

5. Supposing, however, this vessel and cargo to be documented as the treaty requires, it is insisted, that they are liable to condemnation for sailing under the protection of enemy's convoy. It is true, that the Isabella parted company with the convoying ship, before the capture; but it was a mere temporary separation, the latter having gone in pursuit of one of our privateers. Although the court has determined, in the cases of *The Nereide*, 9 Cranch 388, and *The Atalanta*, 3 Wheat. 409, that a neutral may lawfully put his goods on board an armed enemy's vessel, yet it has not determined that he may put his vessel and goods under convoy of the enemy's fleet. The distinction between the two classes of cases is stated by one of the learned judges of this court, in delivering his opinion in *The Atalanta*:(*b*) and the Lords of Appeal, in England, have held the offence of sailing under the protection of enemy's convoy, to be a conclusive cause of condemnation. *The Sampson*, cited by STORY, J., in note to *The Nereide*, 9 Cranch 442. So also, where certain merchant ships, belonging to the Hanse towns, had [*34 put themselves under *the protection of Swedish convoy, the latter

(*a*) For the provisions of this treaty, see Appendix, Note IV.
(*b*) *Per* Mr. Justice Johnson, 3 Wheat. 423.

having assumed a hostile character, for the purpose of resisting the right of search, they were equally held liable to confiscation. *The Elsebe*, 5 Rob. 173. Such also is the law of Denmark, a state that has always professed to maintain the mildest principles of prize law. 4 Hall's L. J. 267, Ord. of 1810. In his correspondence with the Danish government, Mr. Erving, our minister, admits the extreme difficulty of upholding the contrary doctrine ; and only seeks to escape from it, by contending that the rule could not extend to vessels forced into the convoy, or accidently involved in the enemy's fleet : and this may readily be admitted, without at all weakening the force of the general rule.

6. This is an aggravated case of spoliation and concealment of papers. Were this Spaniard to be tried by his own law, he would be instantly condemned. By the law of the whole world, except that of the United States and Great Britain, spoliation of papers is *per se* a cause of confiscation : and by our law, it is all but damnatory. If the spoliation is unexplained, or the explanation is unsatisfactory ; if the cause labors under heavy suspicions or gross prevarications, further proof is denied, and condemnation inevitably follows. *The Pizarro*, 2 Wheat. 241 ; *The Rising Sun*, 2 Rob. 106 ; *The Hunter*, 1 Dods. 486. And it is a relaxation of the rules of the prize court, to allow further proof, even where there has been a mere concealment of
*35] *papers. *The Fortuna*, 3 Wheat. 245. But here are both suppression and spoliation ; and a case which escapes from this imputation (to use the emphatic language of Sir W. Scott), "is saved as by fire." *The Hunter*, 1 Dods. 4. In the present case, the spoliation and concealment are not only unexplained, but inflame the other circumstances of suspicion. The acts of the supercargo, in this respect, bind the owners, because he is their confidential agent ; and the ship-owner is always bound by the misconduct of the master in all respects. *The Rising Sun*, 2 Rob. 108 ; *The Vrow Judith*, 1 Ibid. 150 ; *The Adonis*, 5 Ibid. 256 ; *The Imina*, 3 Ibid. 176 ; *The Mars*, 6 Ibid. 792 ; Valin, Com. 253 ; 1 Emerigon, *des Assur.* 449 ; So also, the act of the master binds the owner of the cargo, if he is also the owner of the ship (*The Rosalie and Betty*, 2 Rob. 243 ; *The Alexander*, 4 Ibid. 93 ; *The Elsebe*, 5 Ibid. 173) ; and according to a decision of the Lords of Appeal, whether he is owner of the ship or not. *The Franklin*, 2 Acton 106. The act of the agent or consignee of the cargo is conclusive upon the owner of the cargo. *The St. Nicholas*, 1 Wheat. 417 ; *The Vrow Judith*, 1 Rob. 150 ; *The Baltic*, 1 Acton 14 ; 2 Binn. 308 ; 15 East 78. And if the case be such as to require further proof, it is to be granted or denied, under the Spanish treaty, precisely in the same circumstances in which it would be granted or denied by the pre-existing law of nations. *The Pizarro*, 2
*36] Wheat. 242. But by the general law, this is a case in *which it would be refused, and therefore, it is an exception to the immunity secured by the treaty.

7. Finally, even if further proof were admissible, the further proof produced does not establish the proprietary interest in a satisfactory manner. It is not incumbent on the captors to show to whom the property really belongs. It is sufficient, that it does not belong as claimed. *The Odin*, 1 Rob. 227 ; *The Neptunus*, 4 Ibid. 68.

The *Attorney-General*, on the same side, insisted, that the case was not

within the protection of the treaty, because the vessel was not documented according to its provisions, and the only paper which could possibly answer to the description of the sea-letter or passport, required by the 17th article, was concealed, and not shown by the master to the captors, as provided by the 18th; so that they had a right to detain and send in the vessel for adjudication. Being thus subjected to the ordinary jurisdiction of the prize court, she is to be tried by the ordinary rules of the prize law, independent of the treaty. This court has already determined, in another case, that the equivalent testimony, required by the 17th article, is to be such as the prize court would require, independent of the stipulations of the treaty. *The Pizarro*, 2 Wheat. 242. No other testimony could give the "legal satisfaction" which the treaty demands. In a case requiring further proof, the equivalent testimony is that further proof: and the grant or denial of this *must rest upon the ordinary rules of the court. Ibid. But here the [*37
claimant has forfeited his right to further proof, by his own aggravated misconduct, in concealing the destination, and spoliating and suppressing the ship's papers, which it was his duty, both by the treaty and the general law of nations, to exhibit to the captors, voluntarily and fairly. But supposing the passport to have been delivered to the captors, at the time of the seizure, as it ought to have been, and suppose the usage of Spain to supply the omission of the form being annexed to the treaty, still, the document produced is not such a passport as that usage requires. This is shown by the very terms of the document produced, which state it to have been issued "for want of royal passports." It is said, that this is justified by the local usages of the colony; but we are not bound to know those usages, nor to admit that this governor had the authority to substitute his passport for one signed by the king. The document required by the treaty, then, not being found on board, the parties are to give "legal satisfaction of their property, by testimony entirely equivalent." This testimony is to be, according to the course of the prize court, the papers found on board, and the examinations *in præparatorio*. But these papers and depositions, so far from satisfying the conscience of the court, increase the suspicions excited by the want of the documents required by the treaty; documents so easily procured, where the property is really Spanish, and the vessel *fairly [*38
entitled to the privileges of a Spanish ship, that it is incredible, any such vessel should want them. The *onus probandi* is on the claimant, in such a case, under the treaty, precisely as it would be by the general law of nations, independent of the special provisions of the treaty; and the question of proprietary interest is to be determined, just as that question would be in any other case of prize. The investigation in the prize court is substituted in lieu of the investigation by the captors at sea, which last was to be entirely concluded by the treaty documents, if the ship was furnished with them; if not, she was liable to be brought in to ascertain the character of the ship, which, if adjudged to be Spanish, the same consequence of protection to the cargo will follow, as if the ship had been regularly documented according to the treaty. It is not the possession of papers equivalent, in formal effect, to those required by the treaty, which will protect her from further inquiry, but she must have papers which will produce the effect of giving satisfactory evidence of the proprietary interest, according to the ordinary rules of the prize court. If the substituted documents were fraud-

ulently obtained and used, would that be satisfactory evidence? The spirit and intention of a treaty is always to be regarded in its interpretation. Vattel, *Droit des Gens*, lib. 2, c. 17, §§ 268–70, 274–82. Every object of such a treaty would be entirely defeated, by permitting an enemy to avail himself of provisions contained in it, and intended for the exclusive benefit
*39] of a friend; and even if a *Spanish subject, by perpetrating a fraud upon his own government, lends the protection of its flag to a foreigner, that Spaniard becomes himself an enemy, and cannot justly complain, if he suffers the fate of an enemy. It is no disrespect to Spain, or disregard of her national rights, to refuse the benefit of her flag and pass, where they have been obtained by practising an imposition upon her officers. She can claim no greater respect for their acts, than is conceded to the judgments of the highest courts of justice. But even these are vitiated by fraud, according to the law of every country. Great Britain so understands the effect of a similar treaty stipulation. In the case of *The Citade de Lisboa*, 6 Rob. 358, which was determined under the British treaty with Portugal, containing the principle of free ships, free goods, though the vessel had the Portuguese flag and pass, she was condemned, because a box of papers was found on board, falsifying the claim, and showing the property to be enemy's; and to give more solemnity to the judgment of the court, the Portuguese consul was called in to witness it, and admonished to advise his government, to be more vigilant over the conduct of its officers in this respect. So also, our own court of appeals in prize causes, during the war of the revolution, held the general maxim of free ships, free goods, which had been temporarily recognised in an ordinance of congress, not to extend to a case of fraudulent combination between the enemy and neutrals, to defeat the belligerent rights of the United States and her ally. *Darby* v.
*40] *The Erstern*, 2 Dall. 35. In that case, the court observed, *that congress had not said, that a violated neutrality should protect; and the mention of some exceptions to the general immunity (such as contraband, &c.) does not exclude others, equally flagrant, though not mentioned. So, in this case, the exceptions of blockade and contraband, do not exclude other cases of unneutral conduct; and some implied exceptions there must be, or how could the court engraft the exceptions of the property of citizens of the United States, trading with the enemy, or of Spanish subjects, not actually domiciled within the dominions of Spain, both of which cases are excluded from the general operation of the treaty, according to the opinion of this court in *The Pizarro*, 2 Wheat. 24–56.

If, then, the case is not within the protection of the treaty, does either the original evidence, or the further proof, satisfy the court of the property of the ship and cargo being as claimed? This inquiry cannot be limited to the ship, because if that was really Spanish, it would be sufficient to protect the cargo also: but both are included in the same claim, which is given for the same person; and if the claim for the cargo be false, that will also affect the claim to the ship. If the ship was Spanish property, why seek to show that the cargo was Spanish also? The proprietary interest in the ship is supposed to have been acquired, under a judicial sale upon a bottomry-bond. But the previous history of the ship is not satisfactorily explained, and so far
*41] as it is given, points to an enemy origin: and the proceedings under which the *sale was had, are manifestly collusive and fraudulent.

The claim to the cargo is also supported by mere formal documents, unsupported by the oaths of witnesses, and contradicted by the *evidentia rei.* The spoliation and concealment of the papers are not satisfactorily explained. Such explanation could only proceed upon the ground of the papers being innocent in themselves, and that they were destroyed from a necessity unconnected with an attempt to evade the right of search. But as to the papers thrown overboard, all that we know of their character is, that they came from the counting-house of the claimant, who ordered them to be thrown overboard, in case of capture; and as to the supposed necessity of destroying them, the only reason alleged is the fear of South American cruisers. This could not be the true reason, since the papers retained on board would equally show the Spanish ownership of the ship and cargo, which it is now insisted they are sufficient to establish. And as to the papers mutilated and concealed, a careful inspection of them will satisfy the court, that they point to the English origin of the adventure, and to English interests in its results. The learned counsel concluded by a very minute and able analysis of the proofs of proprietary interest.

Harper, for the claimant and appellant, in reply.—1. Insisted, that the destination of the vessel, in this case, was not a false destination; and that even a false destination is not a substantive cause of condemnation. *A false destination is an unlawful destination concealed: but here the alternative destination did, in fact, appear on the face of the papers, and both London and Hamburg were equally lawful ports for Spanish vessels to trade with. In the cases of *The Juffrouw Anna*, 1 Rob. 125, and *The Welvaart*, Ibid. 122, the false destination was combined with other circumstances of illegal conduct or suspicion, and the condemnation did not proceed upon that ground alone. In the case of *The Nancy*, 3 Rob. 125, it was also connected with the offence of carrying contraband goods on the outward voyage. So, the case of *The Mars*, 6 Rob. 79, was that of engaging in the colonial trade of the enemy, attempted to be concealed by a false destination; and further proof being necessary, it was refused, on account of those circumstances of fraud and illegality. [*42

2. Nor ought the present case to be affected by the fact of the vessel having set sail from the Havana, under convoy of a British frigate. This protection was necessary against South American cruisers, to whom Spanish property would have been good prize. But the Isabella intended to leave her convoy, off the coast of Florida, and such an intention admits of a *locus pœnitentiæ* which was availed of: for she had, in fact, left the fleet, before the capture. The case of the Hanse vessels, taken under Swedish convoy, was very different from this (*The Esebe*, 5 Rob. 173). The Swedish *armed vessels prepared to resist, and only yielded to the terror of a superior force; and the Hanse vessels were affected by what was considered as an actual resistance of the convoy, having associated themselves under its protection. [*43

3. As to the spoliation and concealment of papers, the facts do not warrant the inference of its having been done for unlawful purposes. There is no evidence whatever, that the papers thrown overboard were connected with this transaction. The concealed papers were innocent; and were even essential to show the Spanish interest in the cargo: and as to the mutilation, if

practised at all, it must have been by the captors themselves, as they alone had an interest in defacing papers which were material to the claimant's proofs of property. The fact as to the papers thrown overboard was frankly and freely disclosed by the parties who alone had any knowledge of it, and a satisfactory reason for their conduct assigned by them, on their first examination. Even supposing, however, that the fact of the spoliation and suppression of papers would, under other circumstances, exclude the claimant from the benefit of further proof, it is now too late for the captors to object, an order for further proof having been granted in the court below, without any objection on their part. *The Pizarro*, 2 Wheat. 227, 240.

4. The passport in this case is sufficient to establish the national character of the ship, so as to protect both her and the cargo under the treaty with
*44] *Spain. It is one of a series of passports issued by the governor of the island of Cuba; is numbered 94, showing that many more of the same kind had been issued; and the words "for want of royal passports," are printed, which circumstance shows that it was an established *formula.* The circumstances of the Spanish nation, at that period, when Ferdinand had been just restored to the throne, sufficiently explain the cause of the defect of passports, with the king's sign-manual. The very act of exercising such an authority on the part of the colonial governor, is strong *primâ facie* evidence of his possessing the power; and until rebutted by some contrary proof, must be considered as conclusive, that such is the usage of Spain. There is no substantial difference between such a document and royal passports; since the latter must be issued in blank, and sent to the different ports throughout the extent of the Spanish dominions, and the distribution of them intrusted to subordinate officers, so that the same frauds may be perpetrated as are imagined in the present instance. What better security have we, that the royal passport itself will not be employed to protect the trade of our enemy? It may be safely admitted, that you may inquire so far as to ascertain that the passport is not forged, or obtained by criminal means, or fraudulently applied to a vessel, for which it was not issued: but if none of these circumstances occur, and the passport regularly issues, from an authority which is competent to grant it, according to the local usages of the neutral country, the treaty makes it conclusive, on the ques-
*45] tion of *property. In this case, the passport was granted, under a judicial decree of the Consulado, at the Havana, proceeding according to the course of the court of admiralty, to enforce a bottomry-bond, given for repairs to the ship. The sentences of foreign tribunals, having jurisdiction of the subject-matter, and proceeding *in rem*, are considered as conclusive, by the law of this, and every other country, wherever the title to the thing comes incidentally or directly in controversy. Here, it is the very question in issue before the court; and the decision of the Spanish tribunal not only warranted the governor of Cuba in granting the passport, but even if he had not issued it, would bind this court to consider the property as Spanish. Therefore, admitting that the captors had a right to bring in this vessel for adjudication, because she had not the passport required by the treaty, or because it was not exhibited to them, at the time of the capture, still, the equivalent proof is more than sufficient to supply the want of a passport, in any form that can be conceived; because, it shows, that the ship was entitled to every document which would prove her to be a Spanish

ship, the tribunal of the Consulado having adjudged her to be Spanish property. The captors may possibly be exempt from costs and damages; but it does not, therefore, follow, that the case is taken entirely out of the special provisions of the treaty, and left at large, to be determined under the law of nations. The object of the treaty was to provide, that neutral vessels should protect goods, to whomsoever belonging, with the exception of contraband only. The *passport was to be conclusive of the neutrality [*46
of the ship, and the certificate was to show, that the cargo was not contraband. If these documents are wanting, then the property of the ship is to be established by equivalent testimony; and that being shown to be neutral, will protect the cargo, even if enemy's property, unless, indeed, it consist of contraband articles. The "equivalent testimony" required, must mean, that other documents shall be produced which will prove precisely the same facts that were intended to be proved by the passport and certificate; and not that sort of evidence which the technical rules of the prize court demand, in a case requiring further proof. Doubtless, the intention of ths contracting parties is to be regarded, in construing treaties, as it is in the interpretation of all other instruments; but that intention is to be gathered from the words they use. Although there are many treaties consecrating the maxim, that free ships shall make free goods, there is no other example of a treaty, stipulating what should be conclusive evidence of the freedom of the ship. The parties to this treaty intended to exclude the jurisdiction of the prize courts of the belligerent, as far as possible, by forbidding the detention of vessels having the required documents, and where they were carried in for adjudication, for want of these documents, limiting the inquiry of the prize courts to such testimony as should be equivalent. All the cases cited on the other side, of the supposed exception to the general immunity, are cases arising under treaties or ordinances, merely recognising the principle, that free *ships should make free goods, without [*47
providing any rule of evidence to establish the national character of the ship, and leaving that question to be determined by the general law of nations. But here, the conventional law adopts a new rule of evidence, from which the court is not at liberty to depart.

The learned counsel also argued the question of proprietary interest, with great minuteness and ability.

March 4th, 1820. THE COURT directed the cause to be re-argued, upon the point as to the form and effect of the passport.

The *Attorney-General*, for the captors and respondents, insisted, that the form of passport to which an effect so important was attributed, not having been annexed to the original treaty, by the contracting parties, could not now be supplied by the judicial tribunals of either. Such an attempt would be an encroachment on the treaty-making power, which, in our government, is exclusively confided to the president and senate. The office of this court is to construe, not to make or amend treaties. The treaty (art. 17) provides, that "the ships and vessels belonging to the subjects or people of the other party, must be furnished with sea-letters or passports, expressing the name, property and bulk of the ship, as also the name and place of habitation of the master of the said ship, that it may appear thereby that the ship really

and truly belongs to the subjects of one of the parties, which passport shall be made out and granted according to the form annexed to this treaty." *48] These particulars were required to be inserted, for *the purpose of identifying the vessel to which the passport was intended to apply, and to satisfy the other contracting party, that she is really entitled to the immunities stipulated in the treaty. The passport, in the present case, was either intended to certify that the ship was Captain Cacho's, or not. The words are, "Captain ——— Cacho, with his Spanish ship called," &c. If Cacho was meant to be certified to be the owner, the claim does not conform to it. He expressly swears that it is not his, but that it belongs exclusively to Munos, who claims. Nobody else can have restitution but the actual claimant, and he is not certified in the passport to be the owner. But the term "his Spanish ship," is evidently a mere figurative expression, and means nothing more than the ship of which he is master. What then is the import of the term "Spanish ship?" A certificate that a ship of a certain name and bulk, and master, is a Spanish ship, is not a certificate that it is Spanish property, or in other words, the property of Spanish subjects, which is alone intended to be protected by the express terms of the article. A vessel may be a Spanish ship, by adoption, by having a license to trade with the Indies, without ceasing to be the property of foreigners, or becoming the property of Spanish subjects. It is not sufficient, to certify the national character of the ship merely. There must be a certificate, that it is the individual property of particular subjects of Spain, for to such alone does the protection of the treaty extend. The treaty being left imperfect, in omitting to annex *49] the form of *passport, it is very questionable, whether the stipulation, as to its effect as evidence, is not wholly void. But admitting that the court can supply the form, how is it to be done? Two modes may be selected. First, to take the literal words of the treaty; and then, the passport should have stated the ship to be the property of Munos, the claimant: or secondly, the form may be supplied, by referring to other treaties similar in their nature. In the form of passport annexed to the French treaties of 1778 and 1801, the master is required to swear, that "the ship belongs to one or more of the subjects of ———. The act whereof shall be put at the end of these presents," &c. No form of the oath which is to be thus appended is given; but the Dutch treaty of 1782 shows what the form of the oath would probably be: "C. D. of ———, personally appeared before us, and declared by solemn oath, that the ship or vessel called, &c., does rightfully and properly belong to him or them only," &c. The terms of these treaties are the same with the Spanish treaty, and require "the name, the *property*, and the burden of the vessel," to be expressed. It is not property in the abstract, the national character merely, acquired by a fictitious adoption into the navigation of Spain; but the individual proprietary interest of some Spanish domiciled subject, that is to be protected.

Harper, contra, contended, that the treaty merely required the nationa character of the property, and not its individual ownership, to be expressed *50] in the passport. There can be no doubt, that this passport *must be according to the regular Spanish form, because both this and the royal passport for the Clara, which was also found on board, have the same expression, viz., "his Spanish ship." This is precisely equivalent to a certifi-

cate, that the ship belongs to Spanish subjects. A warranty, in a policy of insurance, that a ship is an American ship, is a warranty that she is the property of citizens of the United States. The form of passport which was intended to have been annexed, having been omitted, good faith requires that it should be supplied by construction, since it must be concluded that the parties intended to waive it. A construction has been given to the stipulation, by the usage of the two countries, which is sufficient for all practical purposes. What good purpose would be answered, by inserting the name of the owner? The court could not inquire even whether such a person existed, much less as to his national character or domicil. The conclusive effect attributed to the passport, would prevent any such extrinsic investigation, and therefore, a fictitious name might be inserted, which would satisfy all the requisites of the treaty. So that a general certificate of the national character of the property is as efficacious, as would be a certificate that it was the property of some particular person.

March 15th, 1820. The cause was again argued, upon the application of the executive government, to the court, on the question of the construction of the Spanish treaty, and the form and effect of the Spanish passports.

**Pinkney*, for the captors and respondents, stated four points for the consideration of the court. [*51

1st. That the passport produced in this case, was not within the terms of the treaty, because it was obtained by fraud.

2d. That it was not within the treaty, because not issued by the Spanish sovereign, or his known authorized substitute.

3d. That it was not within the same, because the only article which professes to provide for it, is incomplete and inofficious, the form never having been annexed, according to the terms of the article.

4th. Because the passport issued for this ship, is not conformable either with the terms or the substance of the article; since it does not state that the ship is the property of a Spanish subject, nor name any Spanish subject as the owner.

This treaty is, unquestionably, to be interpreted by a just regard to the public faith, but only so far as the public faith is actually pledged by it. The spirit which animated the parties to the armed neutrality is to be regarded; but it must be remembered, that the celebrated confederacy which has received that name, was intended to introduce new rules, to the disparagement and repeal of those which then existed, and in derogation of the ancient law of nations. The intention of the parties to the Spanish treaty, is also to be taken into view. But this intention is to be collected from the language they have used; if that be clear and plain, there is no room for interpretation; but if ambiguous in itself, then the intention may be fairly collected from the *object and circumstances of the stipulation in question. In a word, the treaty is to be executed as it is, and no new treaty to be made by the labor of exposition. [*52

1. The object of the stipulation is expressed in the article to be "the ships and vessels belonging to the subjects or people of the other party," &c. This, necessarily, excludes all other ships or vessels. Consequently, it cannot be applied to vessels, which are not really those of Spanish sub-

jects, but only fraudulently represented to be such. It is a principle, not only of the common law, but of universal jurisprudence, that fraud vitiates every act, whether public or private, contracts, deeds and judgments, are all affected by it, even as to *bonâ fide* purchasers. No record, however solemn, estops an allegation of fraud. Judgments of courts of competent jurisdiction import absolute verity, wherever they are brought in question, but if obtained by fraud, they are set aside, either in the same or any other tribunal; and a person affected by the fraud may show it and avoid the judgment though not a party to the suit. Thus, a stranger may avoid a recovery in a real action, if covinous or fraudulent, and he is prejudiced by it. These analogies of the municipal law are applicable to similar cases arising under the law of nations. The comity which is due to foreign states does not require us to respect the acts of their administrative or judicial officers, when they are contaminated with fraud, and still less, where this fraud has deceived those very officers, and induced them to issue Spanish papers to a
*53] British *ship. In such a case, even if a royal passport had been issued, we should have a right to say, in the language of the common law, "the king has been deceived in his grant." A repetition of such transactions as the present case discloses, would bring the entire treaty into jeopardy. The honor and interest of both nations equally require that they should be repressed. The only mode of preserving the amicable relations between the two powers, is by judicial interposition, preventing the effect of such violations of the spirit of the treaty, before they grow too mighty to be controlled by diplomatic remonstrance. Make these frauds successful, and encourage them by your decisions, and such violations will be frequent. On the other hand, by arresting them *in limine*, the presumed and declared purposes of the contracting parties will be fulfilled, and dissensions and hostilities prevented.

That there must be some implied exceptions to the conclusive effect attributed to the passport, by the letter of the treaty, is manifest. Such would be the case of a royal passport, signed in blank, obtained by corruption of the officer in whose custody it was, and filled up fraudlently, applied to a vessel not entitled to the privilege. Here is a passport *de facto*, with all the solemnities upon its face, yet certainly examinable in this particular; and if shown by extrinsic evidence to be thus fraudulently obtained and used, not only would the captors be excused from costs and damages for detaining the vessel, but she must be condemned, under the ordinary rules of prize law.
*54] So that all the mischiefs of stopping vessels at sea may arise, *notwithstanding this stipulation; and, indeed, all such attempts to limit the range of maritime warfare will be found, in practice, to be quite illusory, unless, indeed, the capture of private property be entirely prohibited; and even then, contraband and breach of blockade must be excepted. A passport, as in the present case, actually filled up by the proper authority, and intended for the ship for which it is actually used, if issued upon false suggestions, is no more a legal passport than the one just proposed. The will of the grantor does not concur. The fraud makes it no passport.

But it is objected, that by the 18th article, the passport, if in due form, is to be conclusive, when shown at sea, and the belligerent cannot detain the vessel, after this document is exhibited. If the precise letter of the treaty be adhered to, this objection will be found to be groundless. "If the ships

of the said subjects, &c., shall be met with," &c., "the master or commander of such ship shall exhibit his passports concerning the property of the ship, made out according to the form inserted in this present treaty," &c. Suppose, a ship exhibiting such a passport, should be proved by other evidence found on board, not to be a "ship of the said subjects;" then the letter of the treaty does not apply to her. If not a "ship of the said subjects," her passport is no absolute and conclusive protection. On the other hand, if the spirit of the treaty be regarded, the result is precisely the same. The intention of the contracting parties was, to protect Spanish ships, and not enemy ships; to give effect to the *maxim of free ships, free goods; not to [*55 make enemy ships protect enemy goods. Even admitting, that the contracting parties meant to confide in the good faith of each other, that they would grant their respective passports only to their own vessels; still, it is not to be supposed, that they meant to confide in the good faith of their enemies, that these last would not attempt to deceive their officers. It would, indeed, be an imputation on their good faith, to suppose, that they wished such frauds to be successful. Every such national stipulation must receive a fair and reasonable construction. One which subverts its object, which encourages fraud and perjury, and makes the stipulation destructive to the rights of both parties, and benefits their enemies only, cannot be just. So pernicious a construction destroys all the advantages of the treaty. Look at its consequences to our belligerent rights. The passport, however obtained, and attended with whatever concomitant proof of fraud and falsehood, is supposed to be incontrovertible. However clumsy and barefaced the imposition may be, still it must prevail; and while our enemy is warring upon us in all directions, and by every means, we must suffer his trade to pass unmolested, in his own ships, wearing a Spanish veil, which disguises nothing, and only compels us to affect blindness. On the other side, the evils flowing from the interpretation we insist upon, amount to nothing. The passport is still protecting evidence to all reasonable and honest purposes. The captor who disregards it, does so at the *peril of exemplary costs and [*56 damages, to be inflicted in the discretion of the court, according to the peculiar circumstances of every case. There is, then, the moral restraint of a great responsibility. It is sufficient to give protection, where it is due, and was intended to be given. It provides for the consequences of slavish submission to the letter of the instrument, on the one hand, and guards against vexatious interruptions of neutral commerce, on the other.

2. But if the document can be issued by any inferior functionary, the argument on the first point is entitled to still more weight. It is impossible to conceive, that any nation would be so unwise, as to consent that subordinate officers, at a distance from the sovereign authority, of great facility, surrounded by corrupt agents, or, perhaps, themselves corrupt, should grant such an omnipotent document, sacred, infallible and conclusive, even against the manifest fact and truth. Where is the authority of this court to countenance the issuing of such a document, by an authority less than the highest? The treaty is here silent. If the form had been annexed, it would probably have made provision on this subject also. If this omission is to be supplied by construction, the court will remember the high dignity and vast power of the document, and will not too easily confide in the responsibility of subordinate agents, remote from the control of the sovereign. The pass-

port now in question, professes to be issued "for want of royal passports." But why want them? Their absence proves a want of confidence in the
*57] *officer who has here assumed the authority to substitute his own, for the passport of his prince. In the absence of any evidence of a right to exercise an authority so high, or of the fact that any royal passports had ever been intrusted to his distribution, the court cannot recognise the validity of a document thus issued.

3. The 17th and 18th articles of the treaty, so far as they provide for the form and effect of passports, are inofficious and incomplete, for want of the annexation of the form intended. The 17th provides, that the "passport shall be made out, and granted, according to the form annexed to this treaty." The ships of the two nations are to be "provided with passports, as above mentioned," &c., "without which requisites they may be sent to one of the ports," &c. The 18th stipulates that the master "shall exhibit his passports, concerning the property of the ship, made out according to the form inserted in this present treaty, and the ship, when she shall have showed such passport, shall be free, and at liberty to pursue her voyage," &c. So that there is nothing in these articles which gives a conclusive effect to any other passport than one, which it is impossible to have uuder the treaty, as the parties have left it. The first part of the 17th article does, indeed, give some of the qualities of the passport; but it must have others, and they are unattainable, by reason of the omission of the form. The court then must either strike out the reference to a form, or imagine a form and annex it. To
*58] do either, would be a high act of legislation, to which the court is *incompetent.

But let us try to discover the form; and taking the 17th article for a guide, it must express the name, property and bulk of the ship, and the name and habitation of the master. Still, there are several things more to be ascertained. Who is authorized to grant the passport? This is an essential circumstance; is ascertained by the forms of passport annexed to several treaties; and would probably have been expressed in this form, had it been annexed. How is the proprietary interest to be stated: as the general property of the subjects of the state, or as the special property of some individual named? Is the national character of the ship, as a part of the navigation of the country under whose flag she sails, sufficient; or must it appear to be the property of subjects in general, or of some individual owner? Under what sanctions and solemnities, and accompanied by what proofs, is the document to issue? These, too, are regulated by the forms annexed to several treaties, which were brought to the notice of the court, at the former argument. The court may supply these requisites, conjecturally, but it can have no assurance that it will not err, and defeat, instead of promoting the intention of the parties. The stipulations of the treaty are nothing, and profess to be nothing, without the form of passport. The contracting parties have made no effectual contract on this matter, without the form. The court cannot finish, what they have left imperfect, any more than it could frame new articles, and insert them in the treaty. The con-
*59] tracting parties give conclusiveness to no passport *but one according to a form to be annexed. The court knows not what that form would have been. It might have explained, varied or added to the requisites of the passport contained in the body of the treaty.

Can the court give conclusive effect to any other passport than the one intended to be provided by the treaty? If it can, the treaty would, to a certain extent, be made by the court. But the judiciary has no portion of the treaty-making power under our constitution; and cannot exercise it, under the pretext of interpreting treaties made by the president and senate. Here is no room for interpretation. The language of the treaty is express and intelligible, so far as it goes. It creates but one *casus fœderis*. The court cannot vary it, or superadd another.

The 14th article of the Prussian treaty of 1785, contains a similar stipulation with that of the Spanish treaty. The passport is to express the "name, property and burden of the vessel, as also the name and habitation of the master, which passports shall be made out in good and due forms (to be settled by conventions between the parties, whenever occasion shall require."), &c. Suppose, that no such conventions were ever concluded (and in fact they never were), could the court supply the form, or give effect to the stipulation in the treaty with Prussia? Yet the two cases are the same: for the omission of a convention settling the form, or, of the annexation of the form, equally fail to complete the stipulation. If one can be judicially supplied, why cannot the other? It is a gratuitous assumption to say, that by the non-annexation, the *parties intended to refer the form to each other's good faith and discretion. If they had changed their [*60 minds in this respect, when they executed their treaty, a supplemental article would have been added: and the only fair inference from their silence is, that they meant to leave the stipulation of free ships, free goods, to support itself by the ordinary rules of evidence as to the property of the ship. The court cannot alter the treaty by mere implication, and that too, not a necessary implication, for the non-annexation might have been the result of inadvertence. It might, also, have been the result of an intention to abandon the scheme of conclusive passports, or of passports more than usually efficacious, by omitting to perfect the treaty in that respect. If the defect proceeded from accident, the parties might have supplied it, by a subsequent convention: and if they have not thought fit to do it, the proper inference is, that they did not wish to do it; and if wishing it, they have neglected it, they have no reason to complain, that the court acts upon the treaty as it finds it. The inadvertence, therefore, was remediable in a regular manner, by the treaty-making power on both sides; and the court has no right to say, that it was not an inadvertence; or if by design, that it was not intended to leave the stipulation abortive as to the effect of passports.

And where is the mighty mischief of leaving it unaccomplished? The great object of the treaty was the principle of free ships, free goods. Take away the conclusiveness of the passport, and that principle remains in full force. It stands in many a treaty, without it. The passport would still *have its proper effect. It would be entitled to respect, as *primâ facie* evidence, but it would not be conclusive against further exam- [*61 ination. No doubt, the public faith is to be preserved, but the care of it is dsvolved upon this court to a limited extent only; the executive government is answerable for the rest. The jurisdiction of the court to carry the treaty into effect, arises out of the constitution, which declares it to be the supreme law of the land, and it is only as a law that the court can deal with it. Where a treaty gives a legal rule, the court may enforce it directly, in the

exercise of its ordinary and regular jurisdiction. But where it fails to give such a rule, the court is without power. As a court of the law of nations, it cannot, by analogy to its equitable jurisdiction, supply the defective execution of a treaty, as chancery supplies the defective execution of a power, or a trust. A court of equity supplies a remedy, where there is a right merely equitable. It has a control over the parties, to compel them to do justice, although there be no legal obligation. But this court cannot deal with treaties in this manner. It must execute them as it finds them, since it acts upon them as written laws merely, and has no control over the parties, to make them conform their conventions to their actual intentions. Suppose, the United States had refused to make a convention providing the form of passports under the Prussian treaty, could this court compel the government to do it, or consider it to be done, because in equity it ought to be done? An equitable jurisdiction over treaties, implies a control over parties. But the *power of the court over treaties is incidental merely; *62] it makes the treaty act, where it professes to act, and does not supply rules of conduct which the treaty does not give. Its province is interpretative, as in the case of other laws: and it can no more assume the treaty-making power, than any other legislative power.

4. But putting the last objection out of the question, the passport produced does not conform to the 17th article of the Spanish treaty. The requisition of the treaty is, that the passport shall state "the name, property and bulk of the ship," &c., "that it may appear thereby, that the ship really and truly belongs to the subjects of one of the parties," &c. But this passport merely licenses the master, by name, "to proceed in his Spanish ship," &c. How does it appear by this, that the ship is the property of any subject of Spain? The words of the treaty, or absolute synonyms, are essential, and cannot be dispensed with, without frustrating the object of the stipulation. Unless, therefore, the substituted words, necessarily, and under all circumstances, mean the same thing, and give the same security to the belligerent, the departure is fatal. The pronoun "his," as here used, does not relate to property, but to the official character of the master; nor is it pretended that he is owner. The words "Spanish ship," do not necessarily denote Spanish property. Spain may adopt or naturalize foreign vessels, for temporary or permanent purposes, without making their owners her subjects. Even a Spanish passport, given to a vessel, documented in other respects as a foreign vessel, may be held to communicate *the Spanish national character. *63] It depends on Spain to make any vessels Spanish vessels, and thus to give the protection of her flag and pass to the whole navigation of our enemy. The words here substituted, do not then necessarily import the same with the words of the treaty; they are susceptible of evasion; they may be true, and yet the requisitions of the treaty remain unsatisfied.

Harper, contrà, referred to the former argument on the part of the claimant and appellant on all the points, except that relative to the omission of the form of passport provided by the treaty, which, he insisted, did not defeat the conclusive effect meant to be attributed to the passport by the treaty. The construction contended for on the part of the captors, would destroy the benevolent object of the contracting parties. It is highly improbable, that the two nations would have suffered so important an alteration

to be worked in their original intentions, either by an accidental or designed omission of the form of passport. The annexation could hardly have been omitted from negligence; and if the entire effect of the stipulation was meant to have been waived, the parties would have distinctly expressed this change in their views. The fair inference, therefore, is that they meant to refer the form to each other's good faith, and to be satisfied, if it contained a compliance with the substantial requisitions of the treaty. Under this confidence, our vessels have been furnished with the sea-letter, and the vessels of Spain with a royal passport, or a passport substituted *for it by the Spanish authorities, to whom the issuing of royal passports is [*64 intrusted, and containing the same particulars as to the property of the ship, &c., which the royal passport contains. It is not contended, that the passport may be issued by any Spanish authority, however inferior, or however alien his functions to the matter in question; but only by such officers as the Spanish government authorizes to grant them. If, notwithstanding a vessel has such a passport or sea-letter on board, she is liable to be interrupted in her voyage, and carried in for adjudication, under the ordinary rules of the prize court, independent of the conventional law, the object of the contracting parties will be entirely defeated. It is true, that free ships will still make free goods; but if the freedom of the ship must be established by the tedious process of judicial investigation, notwithstanding the provisions of the treaty intended to exclude such investigation, very little will be gained for the security of neutral commerce. The terms used in the passport with which this ship was furnished, are precisely synonymous with those of the treaty. The treaty does not say, that the passport shall express the individual proprietary interest of any particular Spanish subject, but that it shall express the property of the ship. How can a ship be a "Spanish ship," without being Spanish property? And how can it be Spanish property, without being the property of the subjects of Spain? This is the effect of the terms, as used in a policy of insurance, and other commercial transactions. A mere license to a foreign ship, *documented as a foreign ship, conferring on her the privileges of Spanish trade, by fictitious adoption similar to that which gave rise to the British rule of 1756, relative to the colonial trade, would not make her a Spanish ship. And even if Spain should abuse the immunity conferred by the treaty, it is no reason why this court should dispense with its obligations. It is for the legislative authority to determine when political considerations will justify this country in suspending any of the provisions of a foreign treaty. The court must take the law from the treaty-making power, or from the higher legislative power dispensing with the obligations of a treaty. [*65

The cause was continued to the next term for advisement.

February 22d, 1821. At the present term, the opinion of the court was delivered by Story, Justice.—This cause was heard upon the whole evidence, introduced by both parties, at the last term; and as it embraced several points of great importance and difficulty, the court, *ex mero motû*, directed one of those points to be re-argued; and another, including a final construction of the Spanish treaty, in matters of deep and universal interest, was re-argued, upon the application of the government itself. The last argument was heard at so late a period of the session, that it was found

impracticable for all of us to prepare deliberate opinions, and the cause was
*66] ordered by the court to be *continued for advisement. The court has now come to a result, which I am directed to pronounce.

A preliminary question was raised, at the original argument, that the libel ought to be dismissed, because the capture was made without public authority, and by a non-commissioned vessel. Whether this be so or not, we do not think it material now to inquire. It is a question between the government and the captors, with which the claimant has nothing to do. If the ship and cargo be enemy's property, it cannot be restored to the claimant. If the captors made the capture, without any legal commission, and it is decreed good prize, the condemnation must, under such circumstances, be to the government itself. If, with a commission, then it may be to the captors. But in any view, the question is matter of subsequent inquiry, after the principal question of prize is disposed of; and the government may, if it chooses, contest the right of the captors, by an interlocutory application, after a decree of condemnation has passed, and before distribution is decreed. The claimant can have no just interest in that question, and cannot be permitted to moot it before this court.

Having disposed of this point, which, indeed, has been long recognised as a settled principle of the law of prize, the path is open for the consideration of the other points of the cause.

The captors contend, that the whole evidence establishes, that the ship and cargo are enemies' property, the property of British subjects, disguised
*67] under Spanish documents, and bound to a British port. *That the voyage had its origin in London, and was to terminate there; and that the usual frauds of false papers, false destination, and suppression of evidence, have been resorted to, for the purpose of giving a neutral character to hostile interests. The counsel for the claimant deny the matter of fact, and assert, that the proprietary interest of ship and cargo is *bonâ fide* Spanish; and endeavor, with great ingenuity and force, to explain away the difficulties with which it is admitted, on all sides, this part of the cause is surrounded. If this ground should be thought not to be entirely and satisfactorily made out, the counsel for the claimant further contend, that the ship was duly documented as a Spanish ship, according to the stipulations of the Spanish treaty of 1795; and that the effect of those stipulations is, to preclude all inquiry into the proprietary interest of ship and cargo. Of the former, because the passport is conclusive evidence of the national character and ownership of the ship, which all persons are estopped to deny; of the latter, because, by the treaty, free ships make free goods, and the national character of the cargo becomes wholly immaterial. To this point, which, if settled one way, is decisive of the cause, the counsel for the captors have given several answers. 1. That the passport of this ship was obtained by fraud, and this is always inquirable into, and vitiates all, even the most sacred, instruments and records. 2. That the passport is not conformable to the treaty, not having been issued by royal authority, or authenticated by the
*68] royal government, *but issued by a mere colonial governor; and that, such as it is, it does not state the ship to be owned by Spanish subjects, which is indispensable under the treaty. 3. That the substituted proof required by the 17th article of the treaty, where the passport is not regular, must be such as is subject to the thorough examination of the prize court.

4. That the form of the passport, referred to in the 17th article of the treaty, never having been annexed to it by the contracting parties, that article, so far as it purports to give any effect to passports, is inoperative and imperfect, and the imperfection cannot be supplied by any judicial tribunal.

Such are the leading propositions, pressed with great ability and earnestness into the discussion of this cause, by the respective parties. They embrace principles of international law of vast importance; they embrace private interests of no inconsiderable magnitude; and they embrace the interpretation of a treaty which we are bound to observe with the most scrupulous good faith, and which our government could not violate, without disgrace, and which this court could not disregard, without betraying its duty. It need not be said, therefore, that we feel the responsibility of our stations on this occasion, and that in delivering our opinion to the world, we have pondered on it, with great solicitude and deliberation, and have looked to consequences no further than the sound principles of interpretation and international justice required us to look.

The point to which the court will first direct its attention, is that last made, viz., whether the 17th *article of the treaty of 1795, so far as it respects passports, is inoperative and imperfect, in consequence of the [*69 omission to annex the form of the passport to the treaty. This is a very delicate and interesting question. The 17th article provides, "that in case either of the parties hereto shall be engaged in a war, the ships and vessels belonging to the subjects or people of the other party, must be furnished with sea-letters or passports (*patentes de mar o pasaportes*), expressing the name, property (*propiedad*) and bulk of the ship; as also, the name and place of habitation of the master or commander of the said ship, that it may appear thereby, that the ship really and truly belongs to the subjects of one of the parties, which passports (*dichos pasaportes*) shall be made out and granted, according to the form annexed to this treaty." The article proceeds to declare, "that such ships, being laden, are to be provided not only with passports, as above mentioned, but also with certificates containing the several particulars of the cargo, the place whence the ship sailed, that so it may be known, whether any forbidden or contraband goods be on board the same; which certificates shall be made out by the officers of the place whence the ship sailed, in the accustomed form; and if any one shall think it fit or advisable to express in the said certificate, the person to whom the goods on board belong, he may freely do so; without which requisites, they may be sent to one of the ports of the other contracting party, and adjudged *by the competent tribunal, according to what is above set forth, that all the circumstances of the above omission, having been well [*70 examined, they shall be adjudged to be legal prizes, unless they shall give legal satisfaction of their property, by testimony entirely equivalent." In point of fact, no form of a passport was made out and annexed to the treaty. The case, then, now before us, is not within the letter of the treaty, for as no form is prescribed, the documents found on board cannot be compared with any form; and until that comparison is made, it is impossible to say, whether the stipulations originally intended by the treaty have been exactly and literally complied with or not. There is no room here left for interpretation, on account of the ambiguous language of parties. They have

expressed themselves in the clearest manner, and it is to the passport, whose form is to be annexed to the treaty, and to none other, that the effect intended by the treaty, whatever that may be, either as conclusive or *primâ facie* evidence of proprietary interest, is attributed. Into the reasons why this form was omitted to be annexed to the treaty, we are not permitted judicially to inquire. It may have been by accident, or by design, from difference of opinion as to what should be the solemnities accompanying it, or from a willingness to leave it to future negotiation. Can this court annex a form to the treaty? Can it supply the deficiency of the treaty, and give effect to it, in the same manner, as if no form were referred to? Can it look to the stipulations, and decide for itself, what the parties regarded as substance, and what as mere form? *Can it say, that the stipulations *71] in the text would have been agreed to, without the auxiliary form of the passport? Can it decide judicially, that under no circumstances, the form of the passport could be of the essence of the stipulations? These are grave questions, and are not to be lightly answered. They deserve and require deliberate consideration. We have given it; and our opinion will now be delivered.

In the first place, this court does not possess any treaty-making power. That power belongs by the constitution to another department of the government; and to alter, amend or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be, on our part, an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties, by just rules of interpretation, applied to the subject-matter; and having found that, our duty is to follow it, so far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind. The parties who formed this treaty, and they alone, have a right to annex the form of the passport. It a high act of sovereignty, as high as the formation of any other stipulation of the treaty. It is a matter of negotiation between the governments. The treaty does not leave it to the discretion of either party, to annex the form of the passport; it requires it to be the joint act of both; and that act *is to be expressed *72] by both parties, in the only manner known between independent nations—by a solemn compact through agents specially delegated, and by a formal ratification.

Nor is there anything strange or singular in leaving matters of this sort to be settled by future negotiations. In our treaty with Prussia of 1785, the 14th article contains a provision as to passports, in substance like that of the 17th article of our treaty with Spain, except that it declares that these "passports shall be made out, in good and due form, to be settled by conventions between the parties, whenever occasion shall require." This stipulation manifestly contemplates that the form of the passport is to be a solemn act of the treaty-making power of both governments, and that neither government has authority, in its discretion, to use a form which shall be binding, without its consent, upon the other contracting party.

In the next place, this court is bound to give effect to the stipulations of the treaty, in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the con-

ditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the modal *parts of the treaty, equally give the rule to judicial tribunals. The same powers which have contracted, are alone competent to change [*73 or dispense with any formality. The doctrine of a performance *cy pres*, so just and appropriate in the civil concerns of private persons, belongs not to the solemn compacts of nations, so far as judicial tribunals are called upon to interpret or enforce them. We can as little dispense with forms, as with substance.

In the next place, we cannot admit, that the annexation of the form of the passport was, in itself (supposing we had a right to inquire into it), a matter of small moment or importance, so that the omission could be dispensed with, as not belonging to the substance of the treaty. It was competent to the parties, by the particularity of the form, to have qualified the general expressions of the article, and to have made that determinate, which, upon the face of the article, stands indeterminate. It is, for instance, indeterminate upon the face of the article, whether there is to be a specification of the names of the owners of the ship, or only a general declaration that the owners are Americans or Spaniards. It has also been contended here, and is certainly susceptible of doubt, whether the passport was to express the individual ownership, or the national character of the ship. So, the solemnities to be observed in granting the passport, the oaths to be made by the parties, the persons by whom they were to be verified, are all left indeterminate by the treaty. These might have been, and looking to the requisitions of other treaties, must have been, explained and settled by the form annexed *to this treaty. The 25th article of the Dutch treaty of [*74 1782, is substantially the same as the 17th article of the Spanish treaty; and the form of the passport, certificate and sea-letter annexed to that treaty, reduce to a perfect certainty, every circumstance which has been already mentioned. Other qualifications and limitations might have been added, in the pleasure of the parties. It is impossible, therefore, for this court, judicially, to say, what such passport might or would have contained. We may, indeed, conjecture, but in this conjecture, we may err; and to assert what it would be, *in literis*, would be to exercise a sovereign control over the compact itself.

Nor are the circumstances already stated, mere form or diplomatic ceremony. They might well have entered into the very substance of the stipulation. The counsel for the claimant alleges, that the passport, intended by the treaty, was to import perfect, unimpeachable verity; that it was to have a sanctity beyond that which is granted to any other solemn instrument. Fraud would not vitiate it, nor the most direct, unequivocal breach of good faith, or abuse of the passport, bring its protecting virtue into question. Assuming, for the purpose of argument, that this is true, the form of the passport, and the solemnities accompanying it, were of the deepest interest and importance to both nations. It was vital to the treaty; vital to the acknowledged rights derived under the law of nations. The immunity

intended by the treaty, in this view of it, was a derogation from the general belligerent rights of both parties. They might be willing to confide the *75] issuing *of such passports to the Spanish high officers of state, with the royal approbation and signature, or with the corresponding signatures of our own secretary of state and president. They might have full faith and confidence, that under such guards, the danger of abuses would be very much diminished, if not entirely checked. But they might not be willing to trust to the integrity, discretion and watchfulness of subordinate agents; to officers of the customs; to colonial governors, or commanders in distant provinces. In point of fact, our own passports have issued under the authority and signatures of our highest executive officers. What reason has this court to presume, that our government would accept of a verification by inferior officers of Spain? What reason has this court to presume, that our government would have been satisfied with a passport signed by a colonial governor, for want of royal passports? It has not been so stipulated in the treaty. It has not, in terms, dispensed with the annexation of the form of the passport to the treaty. Even if one government had been willing to dispense with it, it remains to be shown, that the other was also willing. And if both were willing, it would still remain to be shown, that the act of dispensation was consummated by a solemn renunciation; for the obligations of the treaty could not be changed or varied, but by the same formalities with which they were introduced; or, at least, by some act of as high an import, and of as unequivocal an authority. All that can be said, in the present case, is, that the subject of the annexation of the passport was *76] taken *ad referendam*, by the parties. They had competent authority so to do; and this court is bound to presume, that they had good reasons for their conduct. It is far more consistent with every fair interpretation of the acts of the government, to suppose, that the form of the passport was postponed, with a view to the suspension of the article, until the subject was more deliberately considered, or could be more conveniently attended to, than to suppose that words of reference were used without meaning, and forms, carrying with them such important and interesting solemnities, and such obligatory force and dignity, were hastily abandoned, at the very moment they were studiously sealed to the text. Unless this court is prepared to say, that all forms and solemnities were useless and immaterial; that neither government had a right to insist upon a form, after having assented to the terms of the article; that a judicial tribunal may dispense with what its own notions of equity may deem unimportant in a treaty, though the parties have chosen to require it; it cannot consider the 17th article of this treaty as complete or operative, until the form of the passport is incorporated into it by the joint act of both governments.

Upon the whole, it is the opinion of the court, in which opinion six judges agree, that the form of the passport, not having been annexed to the 17th article of the treaty, the immunity, whatever it was, intended by that article, never took effect; and therefore, in examining and deciding on the case before us, we must be governed by the general law of prize. *77] *This view of the case renders it unnecessary to consider the other points made by the counsel for the captors, as to the effect of the treaty; and we therefore give no opinion upon them.

It remains then to consider, whether the ship and cargo, now in judg-

ment, are, in fact, neutral or hostile property. The facts are extremely complicated, and the evidence, in many instances, clashes, so as to forbid all hopes of reconciling it. It cannot be disguised, too, that the claim is involved in much perplexity, and is shaded by some circumstances that have not been entirely cleared away. If it were not a task from which we could derive no general instruction, the whole evidence might be minutely examined, as to the questions of false destination, suppression of papers and use of false papers. But the labor would be very great, and after all, would conduce to no important purpose. We shall content ourselves, therefore, with a brief statement of the result of our opinion.

It is to be recollected, that by the settled rule of prize courts, the *onus probandi* of a neutral interest rests on the claimant. This rule is tempered by another, whose liberality will not be denied, that the evidence to acquit or condemn, shall, in the first instance, come from the ship's papers, and persons on board; and where these are not satisfactory, if the claimant has not violated good faith, he shall be admitted to maintain his claim by further proof. But if, in the event, after full time and opportunity to adduce proofs, the claim is still left in uncertainty, and the neutrality of the property is not established, *beyond reasonable doubt, it is the invariable rule of prize courts to reject the claim, and to decree condemnation of [*78 the property. There is another rule, too, founded in the most salutary and benign principles of justice, that the assertion of a false claim, in whole, or in part, by an agent of, or in connivance with, the real owners, is a substantive cause of forfeiture, leading to condemnation of the property. These principles are not alluded to in this case, for the purpose of founding our present judgment upon them; for we do not rely upon it, as a case merely of reasonable doubt; but to show that a case less strong might justly have supported the decree, we feel ourselves bound to pronounce, of condemnation.

We cannot resist the conclusion, looking to the whole evidence, that this is a case where the whole mercantile adventure had its origin, in the house of trade of Messrs. Von Harten & Gobel, a house domiciled in London. The ship was, beyond all question, a foreign ship; but of what nation, and in whose ownership, at the time when she acquired her ostensible Spanish character, is studiously concealed. She came, just before her naturalization, from New Providence; and that naturalization was procured, as we feel ourselves constrained to believe, by an imposition practised upon the Spanish judicial authorities, by means of a pretended lien under a bottomry-bond, supposed to be given for repairs. The holder of the bond procured a judicial sale of the vessel, became himself the purchaser, and afterwards obtained the Spanish character, by a negotiation with the Spanish colonial government, *making awkward apologies for his asserted [*79 ignorance of the former ownership, and endeavoring to allay the well-founded distrust of that government. To this very hour, the claimant has observed a profound silence on this point, a source of just and pregnant suspicion, although he has loaded the cause with documentary proofs and affidavits on other points. He has not chosen to give any information as to the origin of the bottomry-bond, or former ownership of the vessel, or of the circumstances under which the supposed lien was acquired. Yet these facts would seem to have lain immediately within his reach. On board, too,

of the vessel, at the time of the capture, was the special and confidential agent of Messrs. Von Harten & Gobel, and also the brother-in-law of Mr. Von Harten. Some papers were thrown overboard, others were concealed, and others spoliated. The testimony of the witnesses upon the standing interrogatories, was far from satisfactory; and it is extremely difficult to exempt the agents on board the vessel, from the imputation of designed suppression of facts and prevarication. The claimant, Mr. Munos, is the father-in-law of Mr. Gobel, and claims this very valuable shipment as his own property, asserting himself to be a merchant, now engaged in business. And yet it is proved by a weight of testimony that seems difficult to resist, that Mr. Munos has not been known to be engaged in commercial business, on his own account, for at least fifteen years before the time of this shipment. And it is established in the most satisfactory manner, and is, indeed,
*80] admitted by the claimant himself, *that on account of the foreign character of Mr. Gobel (the son-in-law of Mr. Munos), all the foreign business of Mr. Gobel has been constantly carried on, for several years, under the cover of Mr. Munos. These are a few of the extraordinary facts of this case, and combining them with the indications of the papers found on board, and the suppressed documents which have reached the light; the vehement presumption, and almost written proof, that Mr. Gobel, the admitted partner of the English house of Von Harten & Gobel, was the stationed agent of the house, at the Havana; and the fact, that the destination was alternative, or double, to London or Hamburg, or both; the conclusion is difficult to overcome, that the cargo was the property of Messrs. Von Harten & Gobel, or some other unknown enemy proprietor, and covered by the Spanish character of Mr. Munos. And the court is constrained to consider the proceeding at the Havana, as mere machinery to naturalize an enemy's ship, and that the ship, either previously belonged to Messrs. Von Harten & Gobel, or some other enemy proprietor, or was purchased at New Providence, on his or their account. It is perfectly immaterial, whether Mr. Munos had any subordinate interest in the ship and cargo or not. If his claim be substantially false, in the manner in which it is framed, having been adopted by him, he has justly incurred a forfeiture of any such interest, by attempting an imposition upon the prize court.

It is the judgment of the court, that the decree of the circuit court,
*81] condemning the ship and cargo, *be affirmed, with costs. From so much of this opinion as respects the question of proprietary interest of vessel and cargo, three judges dissent.

Johnson, Justice. (*Dissenting.*)—This is an appeal from the sentence of the circuit court of North Carolina, condemning this vessel and cargo as prize of war to the Roger privateer.

The condemnation below appears to have proceeded on evidence of an hostile interest existing in the ship. For, as to the cargo, it is not denied, that the proprietary interest is immaterial; since, if the ship be Spanish, the existence of an enemy interest in the cargo, does not affect it. Yet, much of the evidence and argument have been introduced, to prove the existence of an hostile interest in the cargo; but it has been with a view to maintain two positions: 1st. That it is a strong circumstance to prove the vessel to be British property: and 2d. That, though it be not enemy owned,

yet, as both vessel and cargo, are claimed by the neutral, if it be proved that he has attempted a fraud, the penal consequence is the forfeiture of his own interest.

It cannot be denied, that there are many circumstances in the case, going strongly to prove too intimate a connection between this adventure, and the mercantile transactions of the house of Gobel, consisting of Gobel and Von Harten, a British merchant. Nor is it entirely clear, that Rahlives, who appears in the machinery as supercargo, is not himself a participator in interest. If I felt myself now called upon to decide this case, on the ordinary principles *which govern the decisions of prize courts, on neutral claims, it must be acknowledged, that there is a good deal of evidence, which must be rejected, in order to clear it from the tissue of difficulties in which the circumstances involve it. Yet there is one important consideration, which rides over all the unaccountable combinations of interest which present themselves to the view of the court. Why should British property, on board a Spanish vessel, have been disguised as Spanish? There are obvious reasons, why Spanish property should have been disguised as British; for, it would have afforded protection against the only enemy a Spaniard had to fear—the patriot privateer. But as England was at peace with all the world, except America, and enemy property secure from American capture in a Spanish vessel, it is difficult to conceive a reason, why this disguise should have been thrown over a British cargo. The course, however, which I will pursue in coming to a conclusion, precludes the necessity of disentangling the web, in which the interests of the claimant are wound up, by the various circumstances of the destruction, mutilation and concealment of papers, and the questionable shape in which several of the actors in the drama present themselves to the view of this court. [*82

The claimant founds his right to restitution, on his Spanish character and the sufficiency of his Spanish documents under the treaty. The captor contends, that the documents found on board, were not of the first order under the treaty, and that when let in to *the production of substitutes, a plenary inquiry is opened into proprietary interest [*83

Before entering upon these more general questions, it is necessary to take notice of a preliminary ground of condemnation, which, if it can be sustained, anticipates every other inquiry. It appears, that the vessel left the Havana, under convoy of a British frigate, and it is contended, that this circumstance is, *per se*, a ground of condemnation. This is, at least, a new ground in this court; and it cannot be expected, that it will meet with a very favorable admission from a court which has manifested no disposition to multiply causes of condemnation. Without being supposed to express any inclination to adopt the principle, I deem it sufficient to remark, that if it could be admitted, it ought not to be applied to a nation which needed that protection against an existing and enterprising enemy; and which ought, therefore, to be considered, as having sought it for that purpose, and not against a neutral, whose principles of conduct it had then no reason to distrust. The Gulf of Florida, at that time, swarmed with patriot privateers; and the convoying ship had, moreover, parted from the fleet, before this capture was made. The conduct of this vessel was perfectly pacific, when overhauled by the American cruiser. The utmost to which the courts of Great Britain have gone, has been to affect the merchant ves-

sel, actually taken under convoy, with the resistance or character of the convoying ship; and when such a case shall occur, it will be time enough
*84] for this court to determine on the course it *will adopt. At present, I feel no inclination to go so much beyond those decisions as has been here contended for.

On the principal question, it appears, that this vessel was provided, at the time of her sailing, both with a passport and certificate of her cargo. That these papers were on board, at the time of the capture, cannot be doubted; they were both delivered by the captain to the registrar of the district court, the former marked A, No. 7; the latter B, No. 1. Some doubt arises, whether they were both exhibited prior to the capture; but this is wholly immaterial, on the question of condemnation.

In behalf of the claimant, it is contended, that on the production of the passport and certificate, or bill of lading of the cargo, he is entitled to restitution. To this, the captor objects, that the 17th article of the treaty with Spain, contemplated a form of passport, intended to be attached to that treaty; that as no such form was settled by the two nations, the claim must rest altogether upon the provisions of the 15th article, and the proprietary interest is to be inquired into, as in ordinary cases. But if the contracting parties are to be permitted to devise forms of passports for themselves, severally, then that this is not a passport in the language of the treaty, but a substitute for one, and is defective in not expressing unequivocally that the ship was Spanish property.

On this part of the case, it is proper to remark, that it is not always easy for the criticising eye of the common law, to expand to the enlarged views
*85] and *remote perceptions which should govern the mind in the construction of treaties. Yet nothing could be more inconsistent with international law, than to apply to such instruments those scrutinising principles, which enter into the construction of a special plea or a criminal statute. From history, analogy and policy, as well as language, are to be gathered the views of the contracting parties; and however either may be pressed, by the application of conventional stipulations to particular cases, or under particular circumstances, not less is the obligation to execute them, in a spirit, not only of good faith, but of liberality. Where no coercive power exists, for compelling the observance of contracts, but the force of arms, honor and liberality are the only bonds of union between the contracting parties, and all minor considerations are to be sacrificed to the great interests of mankind.

In the case before us, I see no reason for nullifying the operation of the 17th article, for want of the form which was in contemplation to be drawn up and attached to the treaty. The substance of the passport, intended to be prescribed, is so copiously exhibited, as to render it a matter of the simplest effort to throw it into form. This, no doubt, was the cause why the contracting parties manifested so much indifference about carrying their intention into effect. I am, therefore, content to give the same effect to any instrument complying substantially with this article, as ought to have been given to a passport in a prescribed form. What is that effect?

*86] *This is easily ascertained, by compairing the provisions, of the 15th, 17th and 18th articles. By the 15th, the principle is established, that free ships shall make free goods, and that several branches of commerce,

which the modern law of nations has prohibited to neutrals, shall, notwithstanding, be freely prosecuted. But, knowing the endless litigation which questions of proprietary interest give rise to, and the sad depravity of morals exhibited by witnesses in prize courts, the enlightened statesmen who formed that treaty resolved, by the 17th and 18th articles, to make the freedom of the ship to rest upon documentary evidence, in the first instance, and evidence of property, in those cases only, in which the vessel was unprovided with the necessary documents; that each nation should be sovereign to judge for itself, in conferring upon its own vessels the immunity secured by the treaty, and that the acknowledged right of adjudication in the courts of the capturing power, should be superseded, when a vessel was found on the ocean, provided with the documentary evidence stipulated for by treaty; and only revert, when the vessel, being unprovided with such documents, was obliged to resort to evidence of property of a less solemn nature.

It is contended, that this is yielding an important national right. What if it is? It is a mutual relinquishment, and one made by the government, not by this court. And although it operate against us now, the time may come, when the comity of Spain, or her colonies, may extend the benefits of it to the commerce of this country. But be that as it may, *if the [*87
relinquishment has been made, it is incumbent on us to observe it. And although it may not be so sensibly felt at present, the time is scarce gone by, when it was thought a highly beneficial stipulation to this country. Spain was, at the date of that treaty, a respectable naval power; her relations with Europe and the Barbary powers, often involved her in wars. America abounded with ships and seamen, and her prospects were favorable for the enjoyment of peace. To carry on the commerce of the West Indies and Mediterranean, as the favorite carriers of belligerent cargoes, was therefore, to us, a highly flattering object. And though occasional impositions might be practised, it was, comparatively, a trivial consideration, and the chances mutual. When abuses should become flagrant and intolerable, it would have presented a just cause for dissolving the treaty; but it does not rest with courts of justice to dissolve a treaty.

As to considerations drawn from the impolicy of discouraging the spirit of cruising, I attach to them very little importance. The most serious doubts may well be entertained, of the policy of giving encouragement to that species of enterprise. Certain it is, that no nation can pursue it long, without feeling its demoralizing influence. It draws together a race of men, from every quarter, who want for nothing but a legal pretext, for indulging their appetite for blood and violence; and while their habits and examples become popular, the rapid fortunes which are occasionally acquired, render the most valuable classes of a community dissatisfied with seeking [*88
*competence by the slow progress of useful labor. It will not, perhaps, be too much to say, that this country is, at this time, experiencing something of the baneful effects which flow to the world, from letting loose the passions of men to gratify themselves with plunder. But be this as it may, it is the direct object of these articles, of this treaty, to cover commerce from capture; and if a treaty is to be construed, with a view to effectuate its intent, that construction which will afford the most ample protection to commerce, will be most consistent with the views which dictated this treaty.

Could the language of the treaty leave a doubt on this subject, it is historically known, that the policy of the United States, at the time of its date, was, if possible, to annihilate the right of cruising against commerce. With many ships, and a most flourishing trade, she had not a vessel of war; and while every other nation was likely to be embroiled in wars, her policy was peace, and her prospects favorable to the enjoyment of it. To become the carriers of the world, was the object to which her negotiations were directed; and could she have obtained the same stipulation from all the rest of the European nations, she must have succeeded greatly.

The example of other nations in the construction of treaties, is brought to the notice of this court. But, besides that the analogy in the cases referred to is very remote, I cannot admit the force of any example that contravenes general principles. It is a melancholy truth, that nations and
*89] their courts are too often inclined to restrict or enlarge construction, *under a temporizing policy, suggested by the pressure or allurement of present circumstances. I will endeavor to give this treaty the same construction against an American captor, as ought to be given it in the courts of the opposite contracting party. And the day may arrive, when American commerce will have no cause to regret that our courts have pursued liberal and enlarged views in adopting this construction.

On the exceptions taken to the form of the passport, it is to be observed, that on the face of the instrument, it is declared to be issued in default of royal passports. From this circumstance, a doubt arose, whether it was an instrument of the highest authority. This led to an inquiry, at the highest sources of information, relative to the powers of the governor of Cuba to issue such passports. From the information thus obtained, I am satisfied, that his powers are amply sufficient to support the authority of that document. Some very serious doubts also have been raised, relative to the form of the instrument, particularly, that passage of it, which has relation to the national character of the ship. The treaty requires that it should set forth the name, property and bulk of the ship; also the name and habitation of the master or commander. These requisites are all minutely complied with, unless we except that part which relates to the property of the vessel. The words used with that view are simply *fregata mercante Espanola;* and a doubt has existed, whether this be a sufficient affirmance of the property or
*90] national character of the vessel. Nor has this doubt *been removed, without a careful reference to the passports of various nations. The result is, that in all of them, the affirmance is general, withot specifying the individual proprietor. It is also in evidence, that this is the form known and used in Spain and her colonies, as the passport of regularly documented and acknowledged Spanish vessels; and I feel myself bound to receive and acknowledge it, as sufficient in form and substance.

Thus far the opinion was written, and prepared to be delivered, prior to the argument ordered at the instance of the executive. I have seen no reason to change a word of it, from anything since heard. On the contrary, the last argument has fully confirmed me in its correctness. Thousands of imaginary cases of fraud and collusion have been suggested, to alarm the court; and it may be, that our government, having now a prospect of becoming a respectable naval power, and having experienced the activity and enterprise of our privateers in the late war, may feel less disposed to promote

the principles of the armed neutrality, than they did formerly. This conviction of former error has generally grown out of the same change of circumstances, in other states. But it is not through the medium of courts of justice, that this change of sentiment is to develop itself. If this treaty was ever binding, it is equally binding now; and in adjudicating between individuals, the same rules which would ever have been applicable, ought to be religiously adhered to, under all possible changes of interest or policy.

But the interests and apprehensions so eloquently *pressed upon the notice of this court are not real. They are factitious; and may [*91 have their effect on a client's cause, but they are not the well-understood interest, or the well-founded apprehensions of the government. The execution of one treaty, in a spirit of liberality and good faith, is a higher interest than all the predatory claims of a fleet of privateers.

What has this country to fear? A practical answer is always most satisfactory on such a question; with similar treaties existing with various other powers, what real injury was sustained in the late war? The truth is, and every one conversant in national policy well knows, that there is always less danger of imposition in reality, than a limited view of the operation of such a stipulation would suggest. It is not the interest of the belligerent to foster the carrying trade of a commercial rival; hence, Great Britain would rather, in time of war, compel her own vessels to sail under convoy, than permit her merchants to use a neutral bottom. Nations are generally jealous of permitting foreigners to hold domestic tonnage, or use domestic names. There are, commonly, privileges of trade attached to the ship's character, and severe laws enacted against a practice which is always viewed as a fraud upon the government whose flag is thus acquired. Witness the severity of our own laws in such cases.

If there is any nation in the world, more interested than all others, in the liberal support of the doctrine contended for by this claimant, it is the United States. Our chances of enjoying peace are much greater than any other; and if there be a tendency *to war, it is with a nation which [*92 will not be driven to the necessity of making use of neutral bottoms. I cannot therefore, really see why our administration should have been so seriously alarmed at the prospect of our deciding in favour of this Spaniard, as has been urged upon this court. But considerations of policy, or the views of the administration, are wholly out of the question in this court. What is the just construction of the treaty, is the only question here. And whether it chime in with the views of the government or not, this individual is entitled to the benefit of that construction.

The more I have examined this subject, the more thoroughly I have been convinced, that my view of the construction of the treaty is the correct one, viz., that national protection was to depend upon authentic documents, and not proprietary interest; or more correctly, that each nation should be restricted from looking beyond those documents. There is one provision contained in all these treaties, which sets this points, in my opinion, beyond all doubt. Which is, that in the case of convoy, the word of the commander of the convoying ship is to be taken conclusively, for the neutral character of every vessel in the fleet. This is the substitute in the case of a fleet, for the passport of a single vessel. I speak of authentic documents; for the

absurdity never was imagined, that a passport, stolen or seized by violence, was to have the force of one regularly issued.

But it is contended, that it is due to Spain, to pursue these inquiries into proprietary interest, and due to the peace of both nations, that such questions *should be examined in courts of justice, rather than leave them to be the subjects of diplomatic remonstrance. This is a specious, but very unsound argument. Have not the vexations of courts of vice-admiralty, and the violence of armed cruisers, been the pregnant sources of half the commercial altercations of the last century? This was the evil intended to be remedied, and whatever impositions might flow from the remedy, it was well understood, that the benefits of a commerce, uninterrupted by the cupidity of cruising vessels, would more than compensate. There is one consideration, which, on this subject, is conclusive. No sovereign can appear in courts of justice to defend his subjects, and it was therefore that a method was devised for taking such questions from courts of justice, if possible, and referring them to another tribunal. Every stipulation in the treaties of that day, teems with the object of ridding commerce of vexatious capture, and more vexatious litigation. A better practical illustration of the wisdom of such a measure cannot be imagined, than that which the present case presents.

*93]

But it has been earnestly and successfully contended, that if such was the intention of the treaty, it must fail altogether for want of the form of a passport, contemplated in the 17th article. Yet, if there is any one question more clear of doubt than all others, I think, it is this. For the fallacy of the position admits almost of mathematical demonstration. This omission must have been the result of either accident or design. It may have *proceeded from accident, between the negotiators in Europe; but after the receipt of the treaty, and its submission to the cabinet and the senate here, the omission could not have been the result of accident, when it received the sanction of our government. It must then have been designedly omitted by our constituted authorities. And for what purpose? Will any one presume to suggest, that it was a deliberate fraud upon the other government? calculated to leave our courts at liberty, on some subsequent day, to declare the 17th and 18th articles, in effect, void? Did we hold out to them the idea of having adopted the provisions of those articles into our national code, when we were conscious, that they contained an innate vice, calculated to defeat every beneficial effect? If the argument on this point could meet the sanction of our government, I would blush for it. From the advocate of a captor, it might have been expected; but cannot lay claim to the sanction or countenance of the American government. I am sensible, that the cabinet would disavow such a doctrine.

*94]

But it is urged, with much emphasis, that we have no right to annex a form, or to add a clause to the treaty. It is not contended, that we have. No member of this bench entertains such a thought. But why may not the contracting parties supply one? All the requisites being prescribed in language, the form and the substance are the same thing. If the contract is complied with, what matters form? Whether it is substantially complied with or not, must be a question for the courts of the contracting parties. But how ridiculous would it be, to be trying *form, and shape and size, like the ignorant Arab, where the treaty is substan-

*95]

tially complied with. Had it merely stipulated, that a passport, in a form prescribed, should be given mutually, there would have been something in the argument; but in expressing with precision the substance of the instrument to be given, it renders the devising of a form, a mere work of supererogation. If no other conclusion is to be drawn from its omission, certainly, this may, that it was too trival to be remembered.

In order to support the argument, that the absence of the form nullifies the 17th and 18th articles of this treaty, the attention of this court has been drawn to the provisions of the 14th article of the treaty with Prussia. And it has been contended, that until a form of a passport be adjusted between the two nations, that article is also a dead letter. The construction is one which could not be supported, even on a common-law instrument. The words are, "which passports shall be made out in good and due forms (to be settled by conventions between the parties whenever occasion shall require)." If the Spanish treaty is to be construed by analogy to this, the argument is directly on the other side. For these words, obviously leave "the good and due forms" of these instruments to be devised by the parties severally, and only stipulate for settling a form by convention, "whenever occasion shall require;" that is, whenever either shall be dissatisfied with the form used by the other. The nations which, in the very same article, could repose such implicit faith in each other's candor, as to leave the neutrality of *whole fleets to be determined on the word of the convoying officer, merit more the confidence of each other, than to have imputed [*96 to them an evasion so obvious.

As it became indispensable to assign some reason for retaining these two articles in the treaty, if they were to be held a dead letter, for want of the form, it has been suggested, that the only operation intended by them was to prescribe a law to the caprice or violence of cruisers, and subject them to more exemplary punishment than in ordinary cases. No one who reads and compares these four articles, the 15th, 16th, 17th and 18th, and considers the historical events in which they originated, can for a moment suppose, that this was the object which led to the insertion of the two latter of those articles. The intention was to engraft into the law of nations, a great and a new principle. And although power and cupidity may affect to sneer at it, and melancholy experience cannot dismiss the apprehension, that it is too ethereal to subsist in this nether atmosphere, yet it is one which philanthropy will ever cling to, and justice cherish. To engraft into this treaty the principles of the armed neutrality was the object, and for this purpose, the 15th article declares those principles in detail. The 16th furnishes the exceptions to them; the 17th prescribes the evidence on which those privileges shall be conceded; and the 18th, after regulating the conduct of cruisers towards vessels so protected, proceeds to declare, that "the ship, when she shall have showed such passport, shall be free, and at liberty *to pursue her [*97 voyage, so as it shall not be lawful to molest or give her chase in any manner, or force her to quit her intended course." It is impossible for language to be stronger. That the violation of these stipulated privileges, would aggravate the punishment to be inflicted on cruisers, is a consequence of the thing provided for, not the thing itself,

Upon the whole, I am decidedly of opinion, that the claimant is entitled to restitution. Nor should I find much difficulty in supporting his right, on

the ground of proprietary interest. But entertaining the opinion that I do, on this preliminary point, there is no necessity to examine into this part of the case.

Sentence affirmed.

March 6th, *Harper*, for the claimant and appellant, moved to vacate the decree of condemnation entered in this cause, and that it should be again continued to the next term, in order to enable the claimant to procure further proof as to the annexation of forms of passports to the original Spanish treaty, and read an affidavit annexed to a printed copy of the treaty, published at the royal printing-office in Madrid, which contained two forms of passport, which will be found in the margin.(*a*)

*98] *The motion was opposed by the *Attorney-General* and *Wheaton*, for the captors and respondents.

(*a*) Modelo del pasaporte, ó patente de mar que se concede á los buques para navegaen América, citado en el articulo XVII.

Don Carlos, por la Gracia de Dios, Rey di'Castilla, de Leon, de Aragon, de las dos Sicilias, de Jerusalem, de Navarra, de Granada, de Toledo, de Valencia, de Galicia, de Mallorca, de Sevilla, de Cerdeña, de Córcoba, de Córcega, de Murcia, de Jaen, de los Algarbes, de Algezira, de Gibraltar, de las Islas de Canarias, de las Indias orientales y occidentales, Islas y Tierra-firme del Mar Océano; Archiduque de Austria, Duque de Borgoña, de Brabante, y Milan, Conde de Abspurg, Flandes, Tiroly, Barcelona, Señor de Vizcaya, y de Molina, &c.

Por quanto he concedido permiso á ——— para que con su ——— nombrado ——— de porte de ——— toneladas, pueda salir del puerto de ——— con carga, y registro de efectos de comercio, y transferirse al ——— y restituirse á Españaal Puerto de ——— con expresa condicion de hacer su derrota de ida y vuelta directamente á los señalados parages de su destino, sin extraviarse, ni hacer arribada á puertos nacionales ó extrangeros, en islas, ó tierra-firme de Europa, ó América, á ménos de verse obligado de accidentes de otra suerte no remediables: Por tanto quiero, que el presidente de la contratacion á —— Indias ó el ministro encargado del despacho de navios á aquellos dominios, y el intendente, ó ministro de marina del puerto en que se equipare, concurran á facilitarle quanto fuere regular ó este fin, cada uno en la parte que le tocare: el primero en lo respectivo á su habilitacion y carga; y el de marina en lo que mira á tripulacion, que deberá componerse de gente matriculada, y constar que lo sea per lista certificada, que ha de entregarle, obligàndose á cuidar de su conserracion, y responder de sus faltas, segun previenen las ordenanzas de marina.

Y mando á los officiales generales, ó particulares comandantes de mis esquadras y baxeles, al presidente, y ministros de la contratacion á Indias, á los comandantes, y intendentes de los departamentos de marina, ministros de sus provincias, sub-delegados, capitanes de puerto, y otros qualesquiera oficiales, ministros, y dependientes de la armada, á los vireyes, capitanes, ó comandantes generales de reynos y provincias, á los gobernadores, corregidores y justicias de los pueblos de la costa de mar de mis dominios de Europa y América, á los officiales reales, ó jueces de arribadas en ellos establecidos, y á todos los demas vasallos mios, á quienes pertenece, ó pertenecer puidere, no le pongan embarazo, causen molestia, ó detencion; ántes le auxîlien, y faciliten lo que hubiere menester para su regular navegacion, y legitimo comercio: Y á los vassallos y subditos de reyes, principes y repbùlicas amigas y aliadas mias á los comandantes, gobernadores ó cabos de sus provincias, plazas, esquadras, y baxeles, requiero, que asimismo no le impidan su libre navegacion, entrada, salida ó detencion en lospuertos, á los quales por algun accidente se conduxere; permitiéndole que en ellos se bastimente, y provea de todo lo que necesitare: A cuyo fin he mandado despachar este pasaporter refrendado de mi secretario de estado, y de la negociacion de marina, et qual valdrá por

The Amiable Isabella.

*Story, Justice.—Without giving any opinion upon the sufficiency of the evidence, to establish the *probability, that the forms of passport now offered to the inspection of the court were ever authoritatively *annexed to the original treaty, in the possession of the Spanish government, the court is of opinion, that the motion for a continuance must be denied. The passport found on board the Isabella, is materially variant, both in form and substance, from the forms of passport now produced; and to the form of the passport actually annexed to the treaty, and to no other, was the effect intended by the treaty, whatever that effect may be, meant to be attributed. The possession of that form, and not of any other passport which might be substituted for it, was of the very essence of the treaty. It is clear, therefore, that even if the case were as the claim- [*100 [*101

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el tiempo que durare su viage de ida y vuelta; y concluido que sea, le recogerá el ministro que entendiere en su descarga: Y para su validacion y uso pondrá á continuacion la nota que corresponde, el que concurriere á su despacho. Dado en ——— á ——— de mil setecientos. Yo el Rey.

Pedro Varela.

Modelo del pasaporte, o patente de mar que se concede a los buques para navegar en Europa, citado en el articulo XVII.

Don Carlos, por la Gracia de Dios, Rey de Castilla de Leon, de Aragon, de las dos Sicilias, de Jerusalem, de Navarra, de Granada, de Toledo, de Valencia, de Galicia, de Mallorca, de Sevilla, de Cerdeña, de Cordoba, de Corcega de Murcia, de Jaen, de los Algarbes, de Algezira, de Gibraltar, de las Islas de Canarias, de las Indias orientales y occidentales, Islas y tierra-firme del mar oceano; Archiduque de Austria; Duque de Borgoña, de Brabante y Milan; Conde de Abspurg, Flandes, Tirol, Barcelona, Señor de Vizcaya y de Molina, &c.

Por quarto he concedido permiso á ——— vecino de ——— para que con su ——— nombrado ——— de porte de ——— toneladas pueda navegar, y comerciar en los mares y puertos de Europa, tanto de mis dominios, como de extrangeros; y singularmente en los ——— con absoluta prohibicion de pasar á los de Islas, ó tierra-firme de América: Por tanto quiero, que constando la pertenencia de la embarcacion al referido ——— ó aotro vasallo mio de quienatenga poder, se le permita equiparla con gente ———de su misma provincia, ó de otra de mis dominios, habil á este efecto, segun lo prevenido en las ordenanzas de marina, para salir á navegar, y comerciar en ella, baxo las reglas establecidas.

Y mando a los officiales generales, o particulares comandantes de mis esquadras y baxeles; á los comandantes y intendentes de los departementos de marina: á los ministros de sus provincias, sub-delegados, capitanes de puerto, y otros qualesquier oficiales y ministros de mi armada: á los capitanes, ó comandantes generales de provincias: á los gobernadores, corregidores, jueces y justicias de los puertos de is dominios y a todos los demas vasallos mios, á quienes pertenece, ó pertenecer pudiere, no le pongan embarazo, causen molestia, ó detencion alguna; ántes le auxilien, y faciliten lo que hubiere menester para su regular navegacion y legitimo comercio: Y á los vasallos y subditos de reyes, principes y republicas amigas y aliadas mias: á los comandantes, gobernadores, ó cabos de sus provincias, plazas, esquadras y baxeles, requiero, que asimismo no le pongan embarazo en su libre navegacion, entrada, salida ó detencion en los Puertos, á los quales deliberadamente, ó par accidente se conduxere, y le permitan exercer en ellos su legitimo comercio, bastimentarse, y proveerse de lo oneecesario para continuarle; á cuyo fin he mandado despachar este pasaporte, refrendado de mio secretario de estado, y de la negociacion de marina, el qual valdra, y tendrá fuerza por termino de ——— contado desde el dia en que usare de él, segun conste por la Nota que á su continuacion se pusiere. Dado en ——— á ——— de ——— de mil setecientos noventa. Yo el Rey.

Pedro Varela.

ant's counsel supposes, he could derive no benefit whatever from it, because the treaty passport was not on board; and the case must, therefore, in this respect, be judged by the rules of the prize court, independent of the conventional law.

Motion denied.

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*102] *Bussard *v.* Levering.

Bills of exchange.—Notice of non-payment.

Where the second day of grace falls on Saturday, it is the last day of grace;[1] and notice of non-payment given to the drawer of a bill on that day, after a demand upon the acceptor, on the same day, is sufficient to charge the drawer.[2]

Notice to the drawer, by putting the same into the post-office, where the persons live in different places, is good.[3]

Error to the Circuit Court for the District of Columbia. *Assumpsit* against the defendant below (Bussard), as drawer of an inland bill of exchange, drawn at Baltimore, on the 3d of October 1816, upon and Martin Gillet, for $1244.79, payable six months after date, and accepted by Gillet. Plea, *non assumpsit.*

On the trial of the cause, the plaintiff produced and read in evidence to the jury, the bill, acceptance and protest; the handwriting of the respective parties being admitted; and gave evidence to prove that after bank hours, on Saturday, the 5th of April 1817, being the second day of grace after the said bill became due, the same was presented by a notary, to the acceptor, for payment, and not being paid, was duly protested. And on the same day, written notice was sent by the mail to the defendant, residing at Georgetown, District of Columbia, notifying him of the non-payment and protest of the bill. And gave evidence that such protest and notice, on the second
*103] day of grace, under those circumstances, was conformable *to the general usage in Baltimore. And no other evidence of demand or notice was offered. Whereupon, the counsel for the defendant prayed the opinion and instruction of the court to the jury, that the defendant, under the circumstances so given in evidence, was not liable in this action, the drawer of the said bill not having received due notice of the dishonor of the same; but that the notice given upon the same day, that the payment of the draft was demanded, to wit, on Saturday, the 5th of April 1817, was not regular and sufficient to charge the defendant in this action: which instruction the court refused, and the defendant's counsel excepted. A verdict and judgment thereon was rendered for the plaintiff, and the cause was brought by writ of error to this court.

February 7th, 1821. This cause was argued by *Jones*, for the plaintiff in error, and by *Key*, for the defendant.

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[1] Jackson *v.* Richards, 2 Caines 343; Ontario Bank *v.* Petrie, 3 Wend. 456; Mechanics' & Farmers' Bank *v.* Gibson, 7 Id. 460.

[2] Corp *v.* McComb, 1 Johns. Cas. 328; Coleman *v.* Carpenter, 9 Penn. St. 178.

[3] It is sufficient to deposit a notice of non-payment in the letter-box at the post-office. Bank of New Berlin *v.* Church, 3 T. & C. 10; s. c. 60 N. Y. 634; or in a postal letter-box; Greenwich Bank *v.* De Groot, 7 Hun 210; Mechanics' & Traders' Bank *v.* Crow, 5 Daly 191; s. c. 60 N. Y. 85.