1823.

The Frances and Eliza.

[Instance Court. Non-Intercourse Act.]

The Frances and Eliza. Coates, *Claimant.*

If a British ship come from a foreign port (not British) to a port of the United States, the continuity of the voyage is not broken, and the vessel is not liable to forfeiture, under the act of April 18th, 1818, c. 65. by touching at an intermediate British closed port, from necessity, and in order to procure provisions, without trading there.

APPEAL from the District Court of Louisiana. This was an allegation of forfeiture, against the British ship Frances and Eliza, in the Court below, for a breach of the act of Congress, of the 18th of April, 1818, c. 65. the first section of which is in these words: "That from and after the 30th day of September next, the ports of the United States shall be and remain closed against every vessel, owned wholly, or in part, by a subject or subjects of his Britannic Majesty, coming or arriving from any port or place in a colony or territory of his Britannic Majesty, that is or shall be, by the ordinary laws of navigation and trade, closed against vessels owned by citizens of the United States; and such vessel, that, in the course of the voyage, shall have touched at, or cleared out from, any port or place in a colony or territory of Great Britain, which shall or may be, by the ordinary laws of navigation and trade aforesaid, open to vessels owned by citizens of the

1823.

The Frances and Eliza.

United States, shall, nevertheless, be deemed to have come from the port or place in the colony or territory of Great Britain, closed, as aforesaid, against vessels owned by citizens of the United States, from which such vessel cleared out and sailed, before touching at and clearing out from an intermediate and open port or place as aforesaid; and every such vessel, so excluded from the ports of the United States, that shall enter, or attempt to enter the same, in violation of this act, shall, with her tackle, apparel, and furniture, together with the cargo on board such vessel, be forfeited to the United States."

The libel set forth, in the words of the act, that the Frances and Eliza was owned, wholly or in part, by subjects of his Britannic Majesty, and had come from the port of Falmouth, in the island of Jamaica, a colony of his Britannic Majesty, which port was closed against citizens of the United States, and that she *attempted* to enter the port of New-Orleans, in the United States, contrary to the provisions of the act before recited. To this libel, William Coates, master of the vessel, put in an answer, denying the allegations in the libel, and claiming her as the property of Messrs. Herring & Richardson, of London. The material facts appearing on record, are these:

The Frances and Eliza sailed from London, in the month of February, 1819, for South America, having on board about 170 men for the service of the patriots. They arrived at Margaritta, in April, where the troops were disembarked. The vessel remained on the coast of Margaritta until Novem-

1823.

The Frances and Eliza.

ber, when Captain Coates, by order of Mr. Gold, agent of the owners, took command of her. Captain Storm, who originally was the master, died on the passage, and was succeeded by the first mate, who died at Margaritta. Captain Coates was directed by the agent to proceed with the Frances and Eliza to New-Orleans, and there to procure freight to England, or the continent. The death of the agent, in the month of October, obliged him to remain some time at Margaritta, to arrange his affairs in the best manner he could. Having a scanty supply of salt provisions, and being without fresh provisions, which were not to be had at Margaritta, he did not sail from that port until the 8th of November. Proceeding on the voyage, he met an American schooner, off the west end of St. Domingo, the master of which supplied him with a cask of beef. He had at this time, 29 souls on board; and in the prosecution of the voyage, being off the coast of Falmouth, in the island of Jamaica, the Frances and Eliza hove to, within four or five miles of the shore, and the master went into Falmouth in his boat for provisions, of which they were much in want, having only three days' supply on board, and to get his name endorsed on the ship's register: on the day following, he returned with a small supply, which being insufficient, he went again the next morning, to endeavour to increase his stock, and succeeded in getting enough to enable him to proceed to New-Orleans. That he landed one passenger at Falmouth, and took two from thence to New-Orleans: the passenger landed, was a physician,

1823.

The Frances and Eliza.

who had sailed from London with the troops, but left the service in distress, and took his passage in the Frances and Eliza to New-Orleans. When at Falmouth, he found his professional prospects there favourable, and determined to remain; and George Glover, a mariner, had leave of the agent of the owners to work his passage from Margaritta to New-Orleans. Upon leaving Margaritta, the master took with him a letter of recommendation from the agent of the owners, to R. D. Shepherd & Co. of New-Orleans, which letter he presented on his arrival. When he had proceeded about half way up the Mississippi, the Frances and Eliza was hailed by an officer on board the revenue cutter, the answer was, that she was from Jamaica; the captain being asked "what he was doing off Jamaica," answered, that he "went in to get his name endorsed on the register, and to obtain a freight for England;" to which the officer replied, that he was under the necessity of seizing his vessel for a breach of the navigation act; he then said he went in to get provisions.

Upon this testimony the District Court condemned the vessel, as forfeited to the United States; and the claimant appealed to this Court.

Mr. *D. B. Ogden,* for the appellant, argued, that the vessel, on sailing from Margaritta, was really bound to New-Orleans, and not to Falmouth, in the island of Jamaica; that even supposing she was bound to Falmouth, it was a mere *alternative* destination, depending on her being able to procure freight there; and that, as she in

Feb. 24th.

1823.

The Frances and Eliza.

fact embraced the other branch of the alternative, and went to New-Orleans, this must be considered as her original destination. That the real object of touching at Falmouth was to obtain provisions, of which she was in want, and not to procure freight; and that even if touching there for the purpose of procuring freight, could bring her within the operation of the act, it was impossible to attribute that effect to a mere touching to get necessary provisions. That the act, according both to its policy, and its true legal construction, makes the clearing out, and sailing from a prohibited port, the criterion of illegality, and not the mere touching at it for whatever purpose; and that the touching at Falmouth, be its purpose what it might, did not make it the *terminus a quo* of the supposed illegal voyage, and, consequently, did not bring the vessel within the purview of the act. He also insisted on the defectiveness of the libel, in alleging an *attempt* to enter a port of the United States, when, in fact, the vessel did actually enter.

The *Attorney General*, contra, insisted, that the allegation was sufficient to support the sentence, in stating, that the vessel "*attempted* to enter the port of New-Orleans, contrary to the provisions of the act," &c. She did actually enter the river, and was attempting to get up to New-Orleans. But an attempt is included, necessarily, within the actual entry, and the prohibition is in the alternative, "shall enter, or attempt to enter." As to the British port, from which the vessel came or arrived, the statute does not require, that the

vessel should actually enter *infra fauces portus*, or that she should take a cargo on board in the closed port. To insist upon an actual entry of the harbour, or an actual trading, would make the law wholly ineffectual. The first destination of the vessel was evidently to Falmouth, there to seek for a cargo. Failing in that, her destination was changed to the United States. Such a course of navigation is manifestly against the policy of the law, which was intended to cut off all trade or intercommunication with the closed ports. The legislative intention must be regarded in the construction of laws of trade and revenue, and it is the habit of all maritime Courts to regard it.[a]

1823.

The Frances and Eliza.

Mr. *Harper*, for the appellant, in reply, insisted, that the object of the act being to counteract the exclusive system of Great Britain in favour of her colonial monopoly, and the carrying trade connected with it, the circumstance, that a vessel, in the course of a voyage not prohibited, touched at a prohibited port, was not sufficient to bring it within the mischief intended to be avoided. The language of the act is, "coming or arriving from a port," &c. This cannot apply to a port where she never entered. She never came to anchor, but stood on and off. The port of Falmouth could not, therefore, be regarded as the *terminus a quo* of the voyage. The prohibitions of this statute are not like the belligerent prohibitions to enter a blockaded port, and the intention of the

[a] The Eleanor, *Edw. Adm. Rep.* 158.

1823.

The Frances and Eliza.

master has nothing to do with it. Even supposing that he went to seek for a cargo, he would not have brought it to the United States, and, consequently, did not go for the purpose of violating the law. The criterion of a breach of the law is the clearing out and sailing from a closed port. The touching at an intermediate open port, will not, certainly, break the continuity of a voyage which has been commenced at an interdicted port. But then it must have been actually commenced there; and, in this case, the *terminus a quo* was an innocent port.

March 5th.

Mr. Justice DUVALL delivered the opinion of the Court, and, after stating the facts, proceeded as follows:

In the argument of this cause, it was contended by the Attorney General, that touching at Falmouth, with the intention to get freight there, and coming from that port to a port in the United States, brought the Frances and Eliza within the operation of the navigation act; it being the policy of the law to prevent all communication between vessels of the United States and British ports, which were closed against them. On behalf of the owners, it was contended, that if the Frances and Eliza was bound to Falmouth, it was a mere alternative destination, depending on her being able to get freight there; and that as she in fact embraced the other branch of the alternative, and went to New-Orleans, this must be considered as her original destination.

If the destination of the Frances and Eliza,

1823.

The Frances and Eliza.

from Margaritta to New-Orleans, was real, not colourable; and if the touching at Falmouth was for the purpose of procuring provisions, of which the ship's crew was really in want, there was not a violation of the navigation act. The evidence in the cause seems to justify the conclusion, that her real destination was to New-Orleans. The order of Mr. Gold, agent of the owners, to the master, to take command of the vessel and proceed to New-Orleans, and there to endeavour to procure a freight to England or the continent; the letter of recommendation from John Guya, merchant, to Messrs. R. D. Shepherd & Co. requesting their aid to the captain to accomplish that purpose, taken in connexion with the circumstance of Glover's taking his passage in the vessel, with the leave of the agent, from Margaritta to New-Orleans, establish the fact in a satisfactory manner. It appears to have been understood, by all who had any concern with the vessel, that her destination was to New-Orleans.

The Frances and Eliza did not enter the port of Falmouth, but stood off and on, four or five miles from the harbour, for a few days, during which time the master went on shore to get provisions, of which he was in want. Whether he endeavoured to procure freight there, is a fact not ascertained by the testimony. It is certain that he did not obtain it, because it is admitted that the vessel sailed in ballast to New-Orleans. His real object in going on shore at Falmouth, appears to have been to procure provisions, of which the ship's crew were much in want. And there is no

1823.

The Frances and Eliza.

evidence of any act done by him, which can be construed into a breach of the act concerning navigation. The policy of that act, without doubt, was to counteract the British colonial system of navigation; to prevent British vessels from bringing British goods from the islands, in exclusion of vessels of the United States, and to place the vessels of the United States on a footing of reciprocity with British vessels. The system of equality was what was aimed at. The landing a passenger there, who casually got employment, and for that reason chose to remain on the island; and the taking in two passengers there, one of which was a boy and a relative, and the other taken, passage free, to New-Orleans, are not deemed to be acts in contravention of the true construction of the navigation act.

The logbook was supposed to furnish some suspicious appearances, but, on examination, was found to contain no material fact which could govern in the decision.

It is the unanimous opinion of the Court, that the sentence of the District Court ought to be reversed, and that the property be restored to the claimant.

Decree reversed.