

CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1826.

The MARIANNA FLORA : The Vice-Consul of Portugal, Claimant.

Admiralty practice.—Amendments.—Piratical aggression.—Right of search.

In admiralty proceedings, amendments are made in the appellate court, not only as to form, but as to matter of substance, as, by the filing a new count to the libel; the parties being permitted, whenever public justice and the substantial merits require it, to introduce new allegations and new proofs; *non allegata allegare, et non probata probare*.

If the amendment be made in the circuit court, the cause is heard and adjudicated by that court and (upon appeal) by this court, on the new allegation; but if the amendment be allowed by this court, the cause is remanded to the circuit court, with directions to permit the amendment to be made.

An attack made upon a vessel of the United States, by an armed vessel, with the avowed intention of repelling the approach of the former, or of crippling or destroying her, upon a mistaken supposition that she was a piratical cruiser, and without a piratical or felonious intent, or for the purpose of wanton plunder, or malicious destruction of property, is not a piratical aggression, under the act of the 3d of March 1819, c. 75.

Nor is an armed vessel, captured under such circumstances, liable to confiscation, as for a hostile aggression, under the general law of nations.

*The act extends to foreign vessels committing a piratical aggression; and whatever responsibility the nation may incur towards foreign states, by executing its provisions, the tribunals of the United States are bound to carry them into effect. [*2

Pirates may be lawfully captured by the public or private ships of any nation, in peace or in war; for they are *hostes humani generis*.

American ships, offending against our own laws, may be seized upon the ocean, and foreign ships, thus offending within our territorial jurisdiction may be pursued and seized upon the ocean, and brought into our ports for adjudication.

But in such cases, the party seizes at his peril, and is liable to costs and damages, if he fail to establish the forfeiture.

Ships of war sailing, under the authority of their government, in time of peace, have a right to approach other vessels at sea, for the purpose of ascertaining their real characters, so far as the same can be done, without the exercise of the right of visitation and search, which does not exist in time of peace.

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No vessel is bound to await the approach of armed ships, under such circumstances; but such vessel cannot lawfully prevent their approach, by the use of force, upon the mere suspicion of danger.

Where an aggression was committed by a foreign armed merchant vessel, on a public armed ship of the United States, under these circumstances, and a combat ensued, upon mutual misapprehension and mistake, the commander of the public ship was held exempt from costs and damages, for subduing, seizing and bringing into a port of this country for adjudication, the offending vessel.¹

The *Marianna Flora*, 3 Mason 116, affirmed.

APPEAL from the Circuit Court of Massachusetts. The original libel filed in the district court against the Portuguese ship *Marianna Flora*, and cargo, was for an alleged piratical aggression attempted or committed by the ship on the United States armed schooner *Alligator*, Lieutenant Stockton, commander, against the act of congress of the 3d of March 1819, c. 75, entitled, "an act to protect the commerce of the United States, and punish the crime of piracy." (a)

*3] Upon the hearing of the cause in the district court, the judge pronounced an interlocutory sentence of restitution, and subsequently pronounced a further decree for damages, amounting to \$19,675, for the act of sending in the ship for adjudication, and the consequent detention. An appeal was taken by the libellants from both decrees to the circuit court; and afterwards, before the hearing of the appeal, by request of the government of the United States, and with the consent of the libellants, the ship and cargo were restored to the claimants, and further *pro-
*4] ceedings respecting the same were abandoned. The only question, therefore, litigated in the circuit court, was upon the point of damages, and ultimately, a decree was there pronounced reversing the decree for damages; and this constituted the matter of the present appeal.

Pending the proceedings in the circuit court, leave was granted to the libellants to file a new count or allegation, in which the aggression was

(a) Which provides (§ 1.), that the president of the United States be authorized and requested to employ so many of the public armed vessels as in his judgment the service may require, with suitable instructions to the commanders thereof, in protecting the merchant vessels of the United States, and their crews, from piratical aggressions and depredations. (§ 2.) The president of the United States is authorized to instruct the commanders of the public armed vessels of the United States, to subdue, seize, take and send into any port of the United States, any armed vessel or boat, or any vessel or boat, the crew whereof shall be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation or seizure, upon any vessel of the United States, or of the citizens thereof, or upon any other vessel; and also to retake any vessel of the United States, or its citizens, which may have been unlawfully captured upon the high seas. (§ 3.) Authorizes the merchant vessels of the United States to defend themselves against any piratical aggressions, &c., and to capture the assailant. (§ 4.) Whenever any vessel or boat, from which any piratical aggression, search, restraint, depredation or seizure, shall have been first attempted or made, shall be captured and brought into any port of the United States, the same shall and may be adjudged and condemned to their use, and that of the captors, after due process and trial, in any court having admiralty jurisdiction, and which shall be holden for the district into which such captured vessel shall be brought; and the same court shall thereupon order a sale and distribution thereof accordingly, and at their discretion.

¹ The *Palmyra*, 12 Wheat. 18.

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stated to be hostile, and with intent to sink and destroy the Alligator, and in violation of the law of nations.

The facts which were given in evidence, and relied on to support the allegations in the libel, were substantially as follows: On the morning of the 5th of November 1821, the Alligator and the Marianna Flora, were mutually descried by each other, on the ocean, at the distance of about nine miles, the Alligator being on a cruise against pirates and slave-traders, under the instructions of the president, and the Portuguese vessel being bound on a voyage from Bahia to Lisbon, with a valuable cargo on board. The two vessels were then steering on courses nearly at right angles with each other, the Marianna Flora being under the lee bow of the Alligator. A squall soon afterwards came on, which occasioned an obscuration for some time. Upon the clearing up of the weather, it appeared, that the Marianna Flora had crossed the point of intersection of the courses of the two vessels, and was about four miles distant, on the weather bow of the Alligator. Soon afterwards, she shortened sail and *hove to, having at this time [*5 a vane or flag on her mast, somewhat below the head, which, together with her other manœuvres, induced Lieutenant Stockton to suppose she was in distress, or wished for information. Accordingly, he deemed it his duty, upon this apparent invitation, to approach her, and immediately changed his course towards her. When the Alligator was within long shot of the Portuguese ship, the latter fired a cannon shot ahead of the Alligator, and exhibited the appearance and equipments of an armed vessel. Lieutenant Stockton immediately hoisted the United States flag and pendant. The Marianna Flora then fired two more guns, one loaded with grape, which fell short, the other loaded with round shot, which passed over and beyond the Alligator. This conduct induced Lieutenant Stockton to believe the ship to be a piratical or a slave-vessel, and he directed his own guns to be fired in return; but as they were only carronades, they did not reach her. The Alligator continued to approach, and the Marianna Flora continued firing at times, until she came within musket shot, and then a broadside from the Alligator produced such intimidation, that the Portuguese ship almost immediately ceased firing. At that time, and not before, the Portuguese ship hoisted her national flag. Lieutenant Stockton ordered the ship to surrender, and send her boat on board, which was accordingly done. He demanded an explanation; and the statement made to him by the Portuguese master and other officers, was, that they did not *know him to be an American ship of war, but took him to be a piratical cruiser. [*6 Under these circumstances, without much examination of the papers, or the voyage of the ship, Lieutenant Stockton determined to send her into the United States, on account of this, which he deemed a piratical aggression. She was, accordingly, manned, and sent, with her officers and crew, under the orders of Lieutenant Abbot, into Boston.

February 20th. *J. Knapp*, for the appellents, argued: 1. Upon the facts, to show that the visitation of the Marianna Flora, and her detention for examination and search, were unlawful and unjustifiable. He insisted, that the Portuguese master was deceived by the omission of the Alligator to affirm her flag with a gun, according to the law and usage of the nations on the European continent. 2 Azuni 203; 2 Wheat. app'x, 10; 1 Code des

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Prises, par Le Beau, 223. He had a lawful right to resist the approach of the other vessel, until assured, beyond all reasonable doubt, of her true notional character. Puffend. lib. 2, c. 3, § 8; 2 Ruth. 493; 2 Azuni 207. A remark of Lord ELLENBOROUGH, in an analogous case, recognises such manœuvres as were used by the Marianna Flora, as coming within the legitimate acts of defensive resistance. He says, "defence might happen in various ways, as by making a show of confidence in the face of an enemy, with a view to deter him from an attack. 6 East 202." Upon the topics of

*7] the nature or *character of unblamable defence, and the time when forcible resistance may lawfully begin, and the extent to which it may be carried, particularly between persons belonging to different civil societies or between vessels of different nations, on the ocean, authorities were cited from various text-writers, as applicable to the situation of the Portuguese master, and justifying his conduct. 1 Ruth. 372-7, 398, 180; Puffend. lib. 2, c. 5, § 6, 8. It was asked, if it be lawful for private ships to arm, in time of peace, for the purposes of self-protection, whether that liberty did not comprehend the right to do with force whatever, under existing circumstances of apparent peril, human instinct and natural prudence would dictate? Could the maxim that we must so use what belongs to us as not to infringe the rights of others, be inconsistent with this principle? Could it be the duty of the master of a merchant vessel, armed for such a purpose, when his nation was at peace with all the world, and when the seas were infested with pirates, to suffer another armed vessel to approach him, without first being satisfied of her pacific intentions? Still less was it his duty to submit to the exercise of the right of visitation and search (a right which has no existence in time of peace), in the unlawful manner in which it was attempted to be exercised. 2 Azuni 205; *The George*, 1 Mason 24.

2. It was insisted, that if the search and examination had been made in a lawful and deliberate manner, it must have resulted in a conviction *of

*8] the innocence of the Portuguese ship, and her consequent immediate liberation. As, in this case, simple reparation only was sought, and not vindictive damages, it was considered sufficient to refer to the case of *The Appollon*, where it was laid down by this court, that, except in cases of captures *jure belli*, or on exemption expressly created by statute, even probable cause will not excuse from simple reparation. 9 Wheat. 374. But there must, in every case, be probable cause to justify the seizure. 2 Cranch 64, 170; 3 Ibid. 458.

3. But it was further contended, that the subsequent detention and sending in of the ship for adjudication, was wholly unjustifiable, and subjected the seizer to damages. Even the harsh and unbending rules of prize law render the captors liable to costs and damages, whenever the evidence of the neutrality of the ship and cargo exists on board, unless it is afterwards shown to be enemy's property, or to have been guilty of some unneutral conduct, rendering it liable to confiscation. Wheat. on Capt. 312, app'x, Croke's Reply to Schlegel, 62; 2 Azuni 212; 1 Dall. 183; *The Anna Maria*, 2 Wheat. 333. But yet there was a distinction between a right to seize and examine, and a right to capture. The right to detain and send in for adjudication, did not necessarily follow from a seizure and examination, which might have

*9] been warranted by the circumstances, but which had not resulted in showing that there was any reason *to doubt the true character of the

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Portuguese vessel, and the innocence of her conduct. But at all events, the misconduct of the master, supposing it to be ever so aggravated, could not affect the owners of the ship and cargo, whose agent he was, for ordinary civil purposes, but not so as to subject their property to loss or injury by his unlawful acts. And for the losses accruing by the detention of the ship and cargo in port, after it was satisfactorily ascertained that they could not be proceeding against by the seizers, there was still less reason to doubt the right of the claimants to recover damages. 2 Bro. Civ. & Adm. Law 210 ; *The St. Juan Baptista*, 5 Rob. 40 ; *The Zee Star*, 4 Ibid. 58 ; 3 Dall. 333 ; 2 Wheat. app'x, 12.

4. The charge that the Portuguese ship had attempted, or committed, a piratical aggression or restraint, within the act of congress, was considered as negatived by the restitution, with the consent of the captors, in the court below. Whatever might be the nature or degree of the offence meant to be defined by the act, it must be piratical ; and all the authorities define piracy to be a robbery, or forcible depredation on the high seas ; and they all concur, that a bare assault, without taking or pillaging something, does not constitute this crime. 2 Wooddes. 140 ; 2 Azuni 351 ; Bynk. Q. J. Pub., Du Ponceau's Transl. 127, note ; 2 Bro. Civ. & Adm. Law, 462 ; 1 Sir L. Jenkins' Life 91 ; 5 Wheat. 161 ; 3 Ibid. 641. If the act of congress goes beyond this definition, it is not warranted *by the law of nations, and cannot give jurisdiction to the tribunals of this country over the persons and property of foreigners. [*10]

Blake, for the respondents, made three points : 1. The captors were justifiable, under all the circumstances of the case, in subduing and taking possession of the Portuguese ship. 2. They were justifiable in sending her in for adjudication. 3. There was probable cause of seizure and sending in for adjudication.

1. Even the sentence of the district court admits that Captain Stockton was not liable to damages for the mere act of subduing and seizing the ship. She had committed a hostile and piratical aggression on a public vessel of the United States, in time of peace. The learned counsel here entered into an able and elaborate argument upon the evidence, to show that the first aggression was committed by the Portuguese ship, and that it was not justified or excused by the conduct of the Alligator. It was a predetermined, deliberate and wanton attack ; not an accidental rencontre, nor the result of any mistake. It was an act of private war, and the *onus probandi* is on the claimant to show that it was authorized by the law of nations. Admitting even that the Alligator pursued the Portuguese vessel, she had an unquestionable right to approach her in time of peace ; and an attempt to exercise the right, could not be construed into *an act of hostility, or warrant the use of force to prevent it. As the ocean is the common [*11] property of all nations, every nation has a right to its free use, and no one can claim the exclusive control of a larger portion than is sufficient for the purposes of its own movements. The regulations as to keeping out of cannon-shot, and sending a boat on board, are applicable only to a state of war, and to the exercise of the belligerent right of search, which, it is admitted, does not exist in time of peace. Indeed, these regulations are the creatures of conventional law, and bind those nations only between whom they are

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established by special treaty. But the Alligator was a public armed ship, belonging to the navy of the United States, and sent out to cruise against pirates and slave-traders, under the different acts of congress passed for the suppression of these offenders. Captain Stockton was authorized by these laws, and his instructions under them, to seize and subdue all vessels and persons offending against them, wherever they might be found. If every vessel on the ocean has a right to draw around her a magic circle, and to prevent by force the approach of all others, it is obvious, that the acts of congress must remain a dead letter, since they could not be executed, without approaching sufficiently near to ascertain the probable character of the vessel. The act of heaving to, on the part of the Marianna Flora, indicated either a desire to speak the Alligator, or to get the weather-gage for the purposes of annoyance ; and in either case, it was the duty *of Cap-
 *12] tain Stockton to change his course, and overhaul the Portuguese ship. But the circumstance of the hostile guns which were soon afterwards fired from the Marianna Flora, without hoisting any national flag, made it still more imperatively his duty to approach her ; and had he avoided the rencontre, he could not have justified his conduct to his government and his country. He had a right, then, to pursue and capture, founded upon the act of congress, and his instructions. He was justified in considering the ship as having not only attempted, but as having actually committed, a piratical restraint and aggression, within the meaning of the act.

But independent of the authority derived from this statute, he was justified in pursuing and subduing the aggressor, upon the more general grounds of natural and public law. The right of freely navigating the ocean, and of self-defence, or repelling force by force, was common to both vessels. The Alligator was not bound to decline the combat by flight. In the expressive words of Baron Puffendorf, lib. 2, c. 13, § 14, "in a state of nature, the aggressor hath no right, by which the other party is bound to decline his violence, rather than oppose it ; and the reason why a man, under his natural condition, sometimes chooses rather to fly than fight, is not out of any favor to him who sets upon him, but because he thinks it more convenient for his own affairs to fly, like hares, whose armor is in their feet."

*This doctrine has reference to the condition of man in a state of
 *13] nature ; and such was the condition of the parties now before the court, when upon the ocean, and waging war with each other. The *vindices injuriarum* were not there, and each party became, of necessity, his own avenger and judge. As to the Alligator not firing a gun in affirmance of her flag, it cannot surely be pretended, that such an idle ceremony could give any additional assurance that she was what she pretended to be, or that the general law of maritime states requires any such ceremony. It may be the particular usage of Spain and Portugal, and it may have been adopted between some other nations, as a part of the conventional law ; but it has reference exclusively to a state of war, and is a mere regulation of the exercise of the belligerent right of visitation and search.

Still less can it be maintained, that the Portuguese had reasonable grounds to suspect that the Alligator was a pirate, and had hostile designs upon his ship, and therefore, he had a right to attack and destroy her. The analogies of the municipal law may assist to illustrate this branch of the inquiry. What degree, or what grounds of fear or bodily harm, will justify

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an act that may result in the destruction of human life, is, in some cases, a question of great delicacy and difficulty. By the rules of the common law, the rights of the party assailed are confined within very narrow limits. The danger must be manifest, impending and almost unavoidable. But the writers on natural law may, perhaps, on this *occasion, be more properly cited; and the following passage from Puffendorf affords the [*14 fullest illustration of the principles applicable to this subject. "Sometimes," says he, "a doubt has arisen, whether, if one assault me, by mistake without any evil design, but with intent to employ his force against another, I may kill him, in my own defence. Grotius makes this clear in the affirmative. (*De Jure Belli ac Pacis*, lib. 11, c. 1, § 2.) Inasmuch as nature obliges us to maintain peace with others, it may, and ought to be presumed, that every one will fulfil this obligation, unless he give manifest evidence of contrary designs." "But now (speaking of timely preparations for self-defence), though my providing thus far for my security can be injurious to none, yet, before I can actually assault another, under color of my own defence, I must have tokens and arguments amounting to a moral certainty that he entertains a grudge against me, and has a full design of doing me a mischief, so that, unless I prevent him, I shall immediately feel his stroke. Among these tokens and signs giving me a right to make a violent assault upon another man, I must by no means reckon his bare superiority to me in strength and power. 'Tis a very gross way of philosophizing which some men have got, when they tell us, by way of advice, 'He that is able to hurt you, undoubtedly is willing, and therefore, without further warning, down with him.' This kind of doctrine is manifestly destructive of all social commerce among men, and the authors commonly cited in *defence of it, either are such whose character prevents their authority, or else, in [*15 the passages alleged from them, they speak only of precaution in our dealing with those who have given us sufficient tokens of the resolution to hurt us." Puffend. lib. 2, c. 5, § 6. The applications of these principles to the case now in judgment, is too plain to require illustration, and seems to leave no doubt, that the respondents are fully justified as to the act of subduing and capturing the appellant's ship.

The counsel also commented upon a passage from Albericus Gentilis, which had been relied on by the learned judge of the district court as supporting his decree, but which, it was contended, had been misunderstood; and, at all events, was but the opinion of a private individual against the solemn judgment of a court of justice in a case analogous to that now in discussion. Albericus Gentilis, *Hispanicæ Advocacionis*, c. 27.(a)

(a) Albericus Gentilis is justly regarded as one of the founders of the modern law of nations. He was born in the March of Ancona, in the year 1550, and left Italy, with his father, an eminent physician, who was obliged to fly from that country on account of his religious opinions. The son afterwards established himself in England, where he obtained a chair of professor of the civil law at Oxford, in 1582, and died at London, in 1608. His works are, *De Jure Belli*, in three books; *De Crimina Lesæ Majestatis*; *De Nuptiis*; *Comment. ad L. 3*; *Cod. de Professoribus et Medicis*; and the work above referred to, *Hispanicæ Advocacionis*, which is a collection of opinions given by him as the counsel of Spanish claimants in the English courts of prize, and may be considered as the earliest reports of adjudged cases of maritime law. (Moret, Dict.) "Albericus Gentilis," says Sir James Mackintosh, "was certainly the

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- *2. The captors were equally justifiable in sending her in for adjudication. It was the exercise *both of a right and a duty. Taking it
 *17] for granted, that there was a right to subdue, and to capture,

forerunner of Grotius. The opinion entertained, at the time, of the difference between them, will be seen in the following words of Zouch, the pupil and successor of Gentilis, at Oxford. 'He chiefly followed Albericus Gentilis, and Hugo Grotius, of whom the former justifies all his positions by authorities of law, the latter tried his doctrines by the test of reason.'" Edinb. Rev. vol. 27, No. 53, art. 9. Singular mutability of human opinions! Nearly all the writers cited by Gentilis are now forgotten; he himself is hardly known except by name; even Grotius is little read, and however extensive the effects of his great work, on his own age, it is now considered as resting more on the authority of the innumerable writers of every age and nation cited by him, than on original principles, or the deductions of reason. The editor has supposed, that the following translation of the passage from Gentilis, above referred to, would not be unacceptable to the reader.

"Concerning an English vessel which fought with a Tuscan, and was taken. An English ship was captured by a Tuscan, after an engagement, and confiscated. The Florentine judges state, as the ground of this decree, that the English ship was the aggressor, and that the Florentine acted only in necessary defence. With submission, your honors, I will reply, that your premises are void of probability, your conclusion of truth. For instance, he is presumed the aggressor, who supposed himself injured; in such a case, where it is a question of intention, opinion is sufficient. The Tuscan may have supposed himself injured by the commerce of the English with the Turks. (Therefore, the Tuscan, not the Englishman, was the aggressor.) Again, he is presumed the aggressor, who lies in wait, in arms. Such was the case of the Tuscan, who (as appears from what he had done to other vessels of ours) was cruising for our merchantmen in that trade. Again, he is presumed the aggressor, who is superior in strength. And who does not see the Tuscan vessel of war was stronger than our merchantman? Again, he is presumed the aggressor, who, being armed, is accustomed to conflicts. Does this character also suit the merchantman, or rather, the cruiser? Finally, he is presumed the aggressor, who, under the circumstances already stated, conquers. And which is he? Why do we ask? the decree of condemnation declares that the Tuscan first fired twice on the Englishman. Again, did not the Tuscan begin the battle? He is considered as beginning, who has provoked to the battle to hostility; and he is considered principal in the crime, with whom the malice began, and to him, as the aggressor, are justly imputed the consequences. And will those judges tell me, that it is a practice and sign of amity to fire once and again? It is the custom of a ship of war hailing another vessel, and assuming this authority. The Tuscan vessels practised this at that time, and in other cases. Then, the defence of the English was against a claim of authority, against threats. The object of the Tuscans was to search our ship, as appears from their transactions with others; they came, therefore, to interrupt our navigation, to intercept our commerce, as appears from what they did with others. Deeds declare the intention. The deed of the Tuscans was unlawful, if a huntsman cannot lawfully enter another man's farm, without the owner's permission; if it is unlawful to injure an enemy, in a neutral territory, and if territory in this respect differ not from jurisdiction, neither shall the custom above alluded to (if ever anywhere so received) be now obtruded upon me as a law of the sea, relative to the power of ships of war; for, although the custom may be admitted on the shores of the prince to whom the vessel belongs, it cannot in other seas. Nor let us regard the opinion of those customary jurists, but adhere to those who proceed on general principles. (*They teach that*) the defence of the English was just, fearing an attack. And the bare preparation of another against one, giving me a right to assault and slay him. In fact, I am not obliged to wait till I am assailed. I have a right to commence. This is the opinion more favorable to humanity, and

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*the right to send in for adjudication follows as a corollary. The right to seize depended upon *the fact of the offence committed by the captured vessel. The captors had no authority to apply the law to the [*19 fact, to sit in judgment upon the case, and to inflict summary justice on the offender. Still less could the commander of a public ship be expected to assume the responsibility of suffering the offender to escape. It was apparently a piratical, or, at least, a hostile aggression against the law of nations, which had been committed upon a public vessel of the United States. It is not essential to constitute the piratical restraint and depredation, which is meant to be punished by the act of congress, that there should be an intent to rob or plunder. Any wanton attack on a vessel, on the high seas, and especially, an attack with an intent to sink the vessel, and destroy the lives of the officers and crew, is clearly within the letter and the spirit of the act. If a homicide had been occasioned by this aggression, it could not be considered as justifiable or excusable, upon the principles of the criminal code of this, or any other civilized country; and not being justifiable or excusa-

proved from facts on trial, and is also confirmed by all the writers. 'We must go to meet the assault (say they), not only that which actually exists, but that which may take place.'

"The defence of the English was justifiable, even on the behalf of the Turks, who were to suffer injury from the Tuscans, in our ship. For an injury is done to us, which is done to another in our house; and a ship is compared to a house. So, an injury done to a fellow-traveller, is done to us. It was, therefore, commendable for us to defend those whom we had undertaken to carry. Nay, we ourselves were entitled to be spared, although carriers (of enemy's property, simple as such) should not be so entitled. It was still necessary for us to defend ourselves, through fear lest we should suffer, by being confounded with the Turks, and by a wish to save our own property. Thus, in a case still harder to defend, Cravetta held, when a city shut its gates on its lord, through fear of being ravaged, and for the sake of preserving its property, and in order that, with a few guilty, the remaining innocent might not be confounded. If, then, it was a defence of ourselves, and a just defence, the attack of the Tuscans must have been unjust. But grant that their attack was just. Certainly, in the doubtful conflict of just attack, and just defence, every one will think the defence entitled to favor. There are all degrees of just, equitable and favored, and that which is more just, is to be preferred to that which is less so. But grant that the assault was on our side, and that it was unjust. Shall a stipulated surrender avail us nothing? They are not regarded as captured, who have surrendered, even from extreme necessity. But grant that they were captured, are persons and property captured, the perquisites of the captor? On this supposition, there is a kind of war between us and the Tuscans, and this a battle between enemies, which, therefore, must be adjudged by the public rules of war, and not those of pirates and murderers. The most learned Alciati is to the contrary, and the plainest law teaches that neither captured persons nor goods accrue to the captor. But grant that captured goods do accrue to the captor; the goods, in this case, did not belong to the combatants; and the deed of these mariners must not prejudice the owners. The mariners are not to be understood to have done wrong by the order of the owners; nor the latter to have given orders otherwise than according to mercantile usage. 'The owners must not suffer, although the mariners should say they had acted according to orders.'

"See how, even in the liberal concessions I have made in the defence, the mariners would hardly be responsible, the owners not at all. But since the defence of the mariners was on every principle just, what follows, but that the Tuscans should restore to us, as to persons plundered, everything taken away, with damages, costs, interest, profits, &c., to the last farthing."

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ble, it would be a *case of murder, and if a case of murder, of piratical murder. Now, if the act attempted to be done would have been piratical, the attempt also was piratical. It may, indeed, be said, that the act of congress is broader than the rule of international law on this subject; that, by the law of nations, an attempt to commit a piracy is not a piracy; and therefore, the detention and sending in for adjudication was unlawful. Supposing this to be so, *argumenti gratia*, still, the judicial tribunals of this country are bound to protect the officer who acts under it, and in obedience to it. This very question of an apparent collision between the law of nations and a municipal ordinance, was presented to the mind of that great man who presides in the British high court of admiralty, in the memorable case of the orders in council, and disposed of, without hesitation or difficulty, upon the plain and intelligible ground, that he could not presume the prize ordinances of his own country to be repugnant to the law of nations. *The Fox*, Edw. 311.

But supposing it not to be a piratical aggression, or an attempt to commit one, still, it was an act of deliberate, wanton, flagrant hostility, committed against the law of nations, and the rights of this country as one of the community of nations. For such an offence there must be some punishment, and the appropriate penalty inflicted in analogous cases, is that of confiscation. Thus, in the case of *The Anne*, 3 Wheat. 435, this court condemned,

*as prize of war, enemy's property taken within neutral jurisdiction, *21] upon the ground, that the captured vessel had made the first attack upon the captor, and by this act of aggression on the other belligerent, had disturbed the state of peace which is always supposed to exist in a neutral port.

3. There was probable cause, such as will exempt the captors from damages. Probable cause is, where a seizure is made under circumstances which warrant suspicion, and upon evidence less than that which would justify condemnation. *Locke v. United States*, 7 Cranch 348. No case can be shown, where a court of the law of nations has decreed damages, merely for bringing in for adjudication, if the original seizure was justifiable, unless under peculiar circumstances not affecting the principle, or its application to the present case. The learned counsel here cited and classified all the cases to be found in the English books, where damages had been given or refused; and deduced from them the general inference, that wherever there is probable cause for the original seizure, the captors are only liable, to make simple restitution, even if, upon adjudication, it turns out that their suspicions were groundless. (a)

(a) The three classes of cases affecting this question, are, 1. Where damages have been given or refused, on restitution. 2. Where compensation has been given, or refused, the prize being lost in the hands of the captors. 3. Where, although restitution was decreed, the captors have been allowed their costs and expenses.

1. In *The Corier Maritimo*, 1 Rob. 287, demurrage was given for unnecessary detention, and unjustifiable delay in proceeding to adjudication. In *The Zee Star*, 4 Ibid. 71, demurrage was given to the claimants, and costs and expenses refused to the captors (which are usually allowed, even on restitution), for improper delay in proceeding to adjudication. In *The Triton*, Ibid. 78, costs and damages were given to the claimant of the goods, and demurrage for the ship, for seizure on an insufficient ground. In *The Madonna del Burso*, Ibid. 169, all the circumstances concurred of a

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*As to the decision of this court in *Murray v. The Charming Betsey*, 2 Cranch 116, 122, it is affirmed by Mr. *Dallas, *arguendo*, as a general principle of maritime law, that probable cause will justify a marine seizure, is not denied by the opposite counsel, and is impliedly conceded by the court in its judgment, the whole scope of which goes upon *an inference of fact from the evidence, that there was not probable cause of seizure, showing, that if there had been, damages would not have been given. In *Little v. Barreme*, 2 Cranch 170, the court did not deem it necessary to determine whether the probable cause afforded by the

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seizure originally unjustifiable, protracted detention, and improper delay in proceeding to adjudication: costs and damages were given. The *Peacock*, Ibid. 185, was the case of an unjustifiable detention of the prize-vessel, carried into Lisbon, and delay in bringing her home to England for adjudication. In *The Wilhelmsburg*, 5 Ibid. 143, demurrage allowed, and the expenses of the application given against the captors, for loss arising from his not bringing the captured vessel to the most convenient port for adjudication, within the meaning of the prize act. In *The Zacheman*, Ibid. 152, which was a mistake as to the law of contraband, under the Swedish treaty, and the seizure was pronounced perfectly justifiable, demurrage was allowed for unreasonable delay. The *Anna*, Ibid. 332, was a case of restitution, with costs and damages, for a violation of the neutral territory of the United States. The seizure itself was pronounced to be unjustifiable, and costs and damages were given, because the prize ship was improperly brought from the mouth of the Mississippi to England, for adjudication, instead of being carried into one of the West India islands. In *The Washington*, 6 Ibid. 275, damages were given for bringing the vessel to an inconvenient port. The *Acteon*, 2 Dods. 48, was an American ship sailing under a license, unlawfully seized and burnt. The *St. Antonio*, 1 Acton 113, was sailing under a license to enter the port of Holland, but was seized under suspicion of an intention to go to a French port. On bringing in, the captors offered to liberate, on payment of their expenses, but afterwards retracted, and went on to adjudication. There was a decree of restitution, and the claimants appealed to the Lords for costs and damages; the appeal was rejected and the claimants condemned to pay the costs of the appeal. In *The Catharina Elizabeth*, 1 Acton 309, costs and damages were given by the Lords, for carrying the captured vessel to an inconvenient port. In *The Louis*, 2 Dods. 210, damages were refused by Sir W. Scott, although he held the seizure clearly illegal, it being a case of the first impression.

2. The rule on the subject of compelling the captors to proceed to adjudication, where the property is lost in their hands, is, that where the seizure is unjustifiable, the captor is answerable for every loss or damage. In cases of justifiable seizure, he is responsible for due diligence only, and is held to simple restitution in value. The *Carolina*, 4 Rob. 255, was a neutral ship which had been employed in carrying French troops to Egypt, and was taken coming away. Had she been taken in actual *delicto*, she would have been liable to condemnation. The captors were held exempt, not only from costs and damages, but from restitution in value, the ship having been lost while in their possession, by stress of weather. In *The William*, 6 Ibid. 316, the original seizure was held justifiable, but restitution in value was decreed for a loss occasioned by not taking a pilot on board, but no damages were given. In *The Der Mohr*, 3 Ibid. 129, the original seizure was considered as justifiable, but the captors were held responsible to make restitution in value (not for costs and damages), on account of the loss, of the vessel by the ignorance and wilfulness of the prize-master.

3. In general, the captors are allowed their expenses and costs on restitution, whenever there is probable cause of capture. The *Imina*, 3 Rob. 167; *The Principe*, Edw. 70. The only exceptions to this rule are, where there has been some negligence or misconduct on the part of the captors. There are a great number of cases on this head, which it was deemed unnecessary to cite.

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conduct of the captured vessel to suspect her of being an American, would exempt the captors from damages, because it was of opinion, that had she been so, the seizure would still not have been warranted by the law. And the case of *Maley v. Shattuck*, 3 Cranch 458, was the application of the ordinary principle of the prize court, that if the seizure is without probable cause, the captors are liable to make restitution, with costs and damages, even if the property be lost without their fault; evidently implying, that if there had been probable cause for the original seizure, they would not have been so liable.

Webster, on the same side, entered into a minute examination of the evidence, in order to show that the party, who was in fact the wrongdoer, and the aggressor, now appeared before the court in the character of a plaintiff, seeking redress for a supposed injury done to himself. It had been said, that the owners of the ship, and of the cargo, were not to be held responsible for the misconduct of the master. There were two answers to this objection: 1. That it was not the captors who were seeking to *punish
*25] the owners, but the owners who were seeking compensation against the captors, for the consequences of the misconduct of their own agent. 2. That the universal principle, applied by courts administering the law of nations, was to consider the thing taken *in delicto*, as responsible, whether it was the property of the master or of others. In cases of blockade, of contraband, of carrying enemy's property with false papers, of resistance to visitation and search, he is considered as the agent of the owner both of ship and cargo. So also, the revenue laws, from the necessity of the case, regard him in that character, and subject the vessel and goods under his control to confiscation for his unlawful acts. In every case, until the innocent are separated from the guilty, until examination and regular adjudication can be had, the law is compelled to regard the ship, and everything on board, as belonging to the master.

It had also been contended, that though the original seizure might be justifiable, the captors were liable in costs and damages for not releasing the vessel, after she was subdued and seized. But it was not pretended, that Captain Stockton had authority to punish her himself; and therefore, unless the Portuguese ship had, notwithstanding all that had happened, a clear right to go off with impunity, he had an unquestionable right to send her in for adjudication. If she had a right to pursue her voyage, she would have had the same right, if the consequences of her aggression had been ever so
*26] calamitous; if she had *crippled the Alligator, and destroyed half her crew. The actual consequences being less serious, do not affect the right, though they may the exercise of discretion. But we have nothing to do here with the question of military discretion. The captured vessel had made war. She had committed what was, *prima facie*, a piratical restraint and depredation. If unexplained, it was piracy. Whether it could be satisfactorily explained, or excused, was a question to be decided by the civil tribunals. It was not too much to say, that the captors had here something of a belligerent right. The act of congress was not a mere municipal law; it was a prize ordinance. The seizure was not a mere municipal seizure. War against pirates existed, and the act was intended to define who

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should be treated as pirates. And, even if the court should now be of opinion, that the captured vessel ought not, under all the circumstances, to be sent in, still the question recurs, whether Captain Stockton might not, at that time, have thought otherwise. He was called on, suddenly, to decide and act on a question full of difficulties, and which has occasioned no little embarrassment to the civil tribunals, with all the advantages of a deliberate examination. Even with these advantages, the learned judges of the courts below have differed in their judgments upon it ; and yet, it is now contended, that this naval commander was bound to be better instructed in the laws than those whose peculiar duty it is to study and expound them. Upon these grounds it was, that Sir W. SCOTT *determined, in the case of *The Louis*, 2 Dods. 210, 264, that it being a case *primæ impressionis*, [*27 the captors were exempt from costs and damages, although the court was clearly of opinion, that the seizure itself was unjustifiable, a right of search not existing in time of peace. A doubt respecting the true construction of the law, is as reasonable a ground for seizure, as a doubt respecting the fact. 5 Cranch 311. But here was doubt respecting both fact and law, and that doubt is not yet cleared up. The capture was made in repelling what appeared, at the time, to be an act of piratical aggression. It has turned out not to be so, after a judicial examination. But the question is, what it appeared to be *recenti facto*. It cannot be maintained, that an habitual course of piratical depredation is necessary to constitute the offence of piracy. A single act of piratical aggression, stimulated by revenge, or national prejudice, or wanton cruelty, would be sufficient. The act of congress evidently supposes it, and is in conformity with the public law.

It had also been argued, that this was a municipal seizure, and that the vessel having been restored, without a certificate of probable cause, costs and damages followed as a matter of course. But it was insisted, that municipal seizures are for offences within our own territorial jurisdiction, or by our own citizens elsewhere. Here, the proceedings are under the law of nations ; and, if found guilty, the property would be condemned, *not for a municipal offence, but as prize, and distributed as prize. And [*28 even if it had been a municipal seizure, it could not be admitted, that such consequences would necessarily follow, in every case, without regard to its circumstances. The true principle applicable to seizures of every kind was, that the party having a right to cruise, and bring in some vessels, if others so conduct as to give themselves the character of those who are liable to capture, they would be entitled to nothing but simple restitution. This is laid down in clear and satisfactory terms by Sir W. SCOTT. "The natural rule is, that if the party has been unjustly deprived of his property, he ought to be put as nearly as possible in the same state as he was before deprivation took place ; technically speaking, he is entitled to restitution with costs and damages. This is the general rule ; but, like all other general rules, it must be subject to modifications. If, for instance, any circumstances appear, which show that the suffering party has himself furnished occasion for the capture ; if he has, by his own conduct, in some degree contributed to the loss ; then he is entitled to a somewhat less degree of compensation, to what is technically called simple restitution." *The Acteon*, 2 Dods. 48.

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Emmet, for the appellants, in reply, argued, that the second count in the libel filed in the circuit court, charging a hostile aggression, was inadmissible, as the original subject-matter *of the suit was originally cognisable in the district court (where the ship and cargo had been acquitted from the original charge of a piratical aggression), and to allow such an amendment would be to institute an original, and not an appellate proceeding, in the circuit court.

The appellants were entitled to damages as claimed. The capturing vessel derived her right under the municipal law. The piracy alluded to in the act of congress is sea-robbery. It is an act to protect commerce; and the history of the times shows, that the great evil to be remedied was the system of depredations on the ocean. They were, indeed, frequently accompanied with murder, and various other enormities. But these were only subservient to the system of plunder, and intended only to facilitate or conceal the crimes of the offenders. The piracy referred to is, that by the law of nations, and not by any peculiar law of the United. *United States v. Smith*, 5 Wheat. 153; *United States v. The Pirates*, Ibid. 184. And, even if our statutory piracy had been contemplated in this act, it would not apply to the present case. The crimes act of 1790, defines the piracy created by that statute to be "murder, or robbery, or any other offence, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death." Now, as the firing by the Portuguese did no mischief, no offence was committed, which, if committed on land, would be punishable with *death. Besides, it has been determined, that this *30] section of the crimes act does not extend to foreign vessels. *United States v. Palmer*, 3 Wheat. 610; *United States v. Klintock*, 5 Ibid. 144. For the purposes of this case, then, if not for the purposes of every case, it may be assumed, that the piratical aggression mentioned in the act of the 3d of March 1819, c. 76, must be with intent to rob or plunder. Nor can the act affect the antecedent rights of other nations. It did not, and could not, create a state of war. Pirates are, indeed, called *hostes humani generis*; but the use of such metaphorical language is often calculated to mislead, and to confound our ideas of legal rights. They are, indeed, public offenders, like the highway robber, but they are not public enemies, so as to give those who cruise against them any of the rights of war, in respect to the subjects of friendly states who are not involved in their guilt. The act could not give to our own ships the right of visitation and search, or any other belligerent rights, so far as respects foreign nations. It could not affect the pre-existing rights of Portuguese subjects to maintain for themselves the privileges of a state of peace. Its utmost effect would be, to impose on vessels of this country the obligation to submit to examination, and the seizures it authorize must be regarded as strictly municipal. The commissioned vessel must, therefore, act on credible information, or on evidence it has of *31] acts of piracy. A claim to examine *or detain vessels of another nation, on suspicion, without information or evidence, would be as large as the belligerent right of search, though under another name. If the commissioned vessel acts against a foreign vessel, it acts at its own peril, and (more especially, when it acts without information or evidence) must abide the consequences as to damages, if it has acted erroneously. In captures *jure belli*, if there be probable cause, the captors are entitled, as of right,

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to an exemption from damages ; but in case of a municipal seizure, there must be some provision of positive law creating and defining the exemption. The party who seizes, does it at his peril ; if condemnation follows, he is justified ; if an acquittal, then he must make compensation, unless he can protect himself under some statute. *The Apollon*, 9 Wheat. 372.

It has been said, that under this construction, the act would become a dead letter. The same was said in the case of *The Louis*, and the answer of Sir W. SCOTT to the objection is conclusive and pertinent to the present case. But the objection is unfounded. The dangerous pirates are, for the most part, not difficult to distinguish. Their haunts, their habits, their appearance, point them out ; and though the commissioned officer acts at his own risk, yet if he acts on those *indicia*, and on information and evidence, and stays his hand, where he can find no trace or evidence of guilt, he incurs no real danger *of being liable to damages ; and in any event, may rely on the justice and liberality of his own government for protection. [32 This is also the doctrine of the municipal law, in analogous cases on land, both criminal and revenue proceedings.

One of the privileges of a state of peace, which the Portuguese have still a right to maintain for themselves, is the benefit of the principle, that on the high seas the merchantman is equal to the man-of-war. Each may protect itself according to its sense of expediency and necessity, and resist the doing of anything by the other, as a right, which is not a right. If the man-of-war has no right to examine, the merchantman has a right to resist that examination. Even in war, a vessel navigating the ocean may, to a certain extent, draw a line of jurisdiction around itself. This is proved by the restrictions put on the right of search. It is said, indeed, that these are the result of treaty stipulations. But they are the result of a true interpretation of the law of nations, and have been recognised in treaties, because England had practically violated the right : *à fortiori*, in time of peace may every vessel draw a circle of jurisdiction around itself, and resist the exercise of that search and visitation which is not lawful in time of peace. It is upon this ground that Sir W. SCOTT held the doctrine, that if a neutral resist search, not knowing of the existence of a war, it is no ground of condemnation (*The St. Juan Baptista*, 5 Rob. 36) ; and that still more recently he has *determined, that the right of visitation and search does not exist, and cannot be exercised, in time of peace. *The Louis*, 2 [33 Dods. 210. Every ship navigating the ocean in time of peace may appropriate to her temporary use so much of it as is necessary to her protection, consulting the equal rights of others. It is a right that will lie dormant, and never be exercised, except upon real apprehension. When there is no apprehension of danger, the consent to approach will never be withheld. But the right to approach *in invitum* can never exist ; and, both parties being independent and equal, each party is to judge for himself as to the extent and reality of that danger. Unless this exclusive right of judgment is maintained, the approach of pirates could never be prevented, who frequently assume the flag of public ships, and fall upon their victims under this disguise.

The learned counsel here argued upon the evidence, to show, that upon a just application of these principles, the conduct of the Marianna Flora was perfectly justifiable. The first fault was committed by the Alligator, in chasing, and not affirming her flag with a gun. This is the law of nations,

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and recognised as such by every maritime nation on the continent of Europe. The language of Azuni on this subject is peculiarly appropriate to the present case. He says, "the fear of meeting with a pirate, and being the dupe *34] of deceitful appearances, is the reason why *no credit is given to the flag of a vessel, though a ship of war." 2 Azuni 204, 602, c. 3, § 3. Had the flag been affirmed, in this instance, in the manner to which the Portuguese are accustomed, they would not have resisted the attempt to approach their vessel, and all the present consequences would have been avoided.

They might also have been avoided, by that deliberate and impartial examination, which it was Captain Stockton's duty to make, before he decided on sending in the ship for adjudication. It would have been his duty, even in war, to examine faithfully the ship's papers, and pay due respect to the evidence produced. *The Anna Maria*, 2 Wheat. 327; 2 Azuni 212, § 8. But it is said, that the usual documentary evidence would prove nothing, since it was not a question of proprietary interest or neutral character. The answer is, that the ship's papers would have shown, that the vessel, whom he treated as a pirate, was an innocent merchantman; and that the cargo was not liable, by the act, to confiscation, even if the vessel had been guilty of a piratical aggression. The 4th section of the act only subjects the vessel or boat to confiscation, and even that must be understood with the implication, that they are the property of the wrongdoers; for the master can never be considered as the owner, even of the ship, so as to subject it to forfeiture for his criminal acts, much less can he be considered as the owner *35] of the cargo for such a purpose. *In the words of this court, it may be said, that, "however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction to places and persons upon whom the legislature has authority and jurisdiction." *The Apollon*, 9 Wheat. 370.

Nor can it be maintained, that here was an act of private unauthorized war, committed by the Portuguese, which, being a violation of the law of nations, would subject the vessel, if taken *in delicto*, to confiscation. Private war never gives the right of capture and confiscation. Stewart's Vice Adm. 301. That belongs to public war alone. In time of war, every violation of belligerent rights is followed by condemnation, because it is considered as evidence of enemy's property, which, by the laws of war, is transferred to the capturing power. But in time of peace, to make every violation of the law of nations, however slight, produce the condemnation of property, however valuable, and belonging to innocent persons, would reduce the law of nations to the sweeping severity of Draco's code.

In this case, the sending in for adjudication has been sought to be justified by hypothetical reasoning, grounded upon the supposition that lives might have been lost; and a learned discussion of the municipal law of homicide was entered into, to show, that if any of the Alligator's crew *36] *had been killed, it would have been murder; and then, it is asked, whether it would not have been Captain Stockton's duty to send in for trial, for what would have been clearly piracy. But we are to deal with the case as we find it. No lives were, in fact, lost; no injury done to the vessel. It was nothing but the offence of firing, and in self-defence, against a vessel that turned out to be a public ship of war, but which did not at first

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manifest her character in the mode to which the Portuguese had been accustomed. Was it possible to suppose, that such an act could produce the confiscation of the cargo, belonging to innocent owners, or of the ship, the owner of which was equally innocent? It was, at most, a marine trespass, cognisable in the courts of the offender, because it was not a case of war, nor to be determined by the law of war; or if there were a doubt whether there was anything of national insult in it, it might be a fit subject to be represented to this government for diplomatic discussion. But after the ship and cargo were brought in, and it was ascertained, that she could not be subjected to confiscation, why were they detained and proceeded against as if captured *jure belli*? Here are a series of wrongs, for which they who suffer damage must look for compensation to him whom the law considers as the wrongdoer, although many of them were the acts of his agents, and done in his absence. They do not seek vindictive damages, but simple compensation only. The long list of cases which *has been arrayed [37 against us cannot furnish a rule for a seizure, which was not made *jure belli*, but which (if to be justified at all) must be considered as having been made in execution of a municipal statute. Will probable cause, even if it existed, furnish a defence in such a case? That is not the law of *Hoyt v. Gelston* (13 Johns. 141, 561; 3 Wheat. 246), which was a seizure under an act of congress, and where there was probable cause, thought it was not certified by the court according to the statute. Is it the law of any case, where the wrongdoer acts under municipal laws, on his own responsibility? Is it the law to be collected from the cases of *The Acteon*, 2 Dods. 48, 52; of *Murray v. The Charming Betsey*, 2 Cranch 125; of *Little v. Barreme*, Ibid. 170; of *The Jeune Eugenie*, 2 Mason 409, 439; or even of *The Louis*, 2 Dods. 210? In the last case, indeed, damages were refused, because it was *primæ impressionis*—a case of some doubt and difficulty as to the new construction of the law of nations, and the application of the French decree respecting the slave-trade, and the parties seeking damages were stained with crime. But here, the law is old, and well settled; and nothing but the offence is of novel impression. The parties are innocent; and the very novelty of the offence ought more certainly to secure its punishment.

March 20th, 1825. STORY, Justice, delivered the opinion of the *court, and after stating the pleadings, proceeded as follows:—An [38 objection, which is preliminary in its nature, has been taken to the admissibility of this new count to the libel, filed in the circuit court, upon the ground, that the original subject-matter was exclusively cognisable in the district court; and to allow this amendment would be to institute an original, and not an appellate inquiry in the circuit court. But the objection itself is founded on a mistaken view of the rights and authorities of appellate courts of admiralty. It is the common usage, and admitted doctrine of such courts, to permit the parties, upon the appeal, to introduce new allegations, and new proofs, *non allegata allegare, et non probata probare*. The courts of the United States, in the exercise of appellate jurisdiction in admiralty causes, are, by law, authorized to proceed according to the course of proceedings in admiralty courts. It has been the constant habit of the circuit courts, to allow amendments of this nature, in cases where public

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justice, and the substantial merits, required them ; and this practice has not only been incidentally sanctioned in this court, but on various occasions, in the exercise of its own final appellate jurisdiction, it has remanded causes to the circuit court, with directions to allow new counts to be filed. We may, then, dismiss any further discussion of this objection, and proceed to the main questions in controversy. [Here the learned judge recapitulated

*39] *the facts of the case as they have been before stated.]

In considering the circumstances, the court has no difficulty in deciding, that this is not a case of piratical aggression, in the sense of the act of congress. The Portuguese ship, though armed, was so for a purely defensive mercantile purpose. She was bound homewards, with a valuable cargo on board, and could have no motive to engage in any piratical act or enterprise. It is true, that she made a meditated, and, in a sense, a hostile attack, upon the Alligator, with the avowed intention of repelling her approach, or of crippling or destroying her. But there is no reason to doubt, that this attack was not made with a piratical or felonious intent, or for the purpose of wanton plunder, or malicious destruction of property. It was done upon a mistake of the facts, under the notion of just self-defence, against what the master very imprudently deemed a piratical cruiser. The combat was, therefore, a combat on mutual misapprehension ; and it ended, without any of those calamitous consequences to life, which might have brought very painful considerations before the court.

It has, indeed, been argued at the bar, that even if this attack had been a piratical aggression, it would not have justified the capture and sending in of the ship for adjudication, because foreign ships are not to be governed by our municipal regulations. But the act of congress is decisive on this subject. It not only authorizes a capture, but a condemnation in our courts, *40] for *such aggressions ; and whatever may be the responsibility incurred by the nation to foreign powers, in executing such laws, there can be no doubt, that courts of justice are bound to obey and administer them.

The other count, which seeks condemnation on the ground of an asserted hostile aggression, admits of a similar answer. It proceeds upon the principle, that, for gross violations of the law of nations, on the high seas, the penalty of confiscation may be properly inflicted upon the offending property. Supposing the general rule to be so, in ordinary cases of property taken *in delicto*, it is not, therefore, to be admitted, that every offence, however small, however done under a mistake of rights, or for purposes wholly defensive, is to be visited with such harsh punishments. Whatever may be the case, where a gross, fraudulent and unprovoked attack is made by one vessel upon another, upon the sea, which is attended with grievous loss or injury, such effects are not to be attributed to lighter faults, or common negligence. It may be just, in such cases, to award to the injured party full compensation for his actual loss and damage ; but the infliction of any forfeiture beyond this, does not seem to be pressed by any considerations derived from public law.

Pirates may, without doubt, be lawfully captured on the ocean, by the public or private ships of every nation ; for they are, in truth, the common enemies of all mankind, and, as much, are liable to the extreme rights of war. And a piratical *aggression by an armed vessel, sailing under *41] the regular flag of any nation, may be justly subjected to the penalty

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of confiscation for such a gross breach of the law of nations. But every hostile attack, in a time of peace, is not necessarily piratical. It may be by mistake, or in necessary self-defence, or to repel a supposed meditated attack by pirates. It may be justifiable, and then no blame attaches to the act; or, it may be without just excuse, and then it carries responsibility in damages. If it proceed further, if it be an attack from revenge and malignity, from gross abuse of power, and a settled purpose of mischief, it then assumes the character of a private unauthorized war, and may be punished by all the penalties which the law of nations can properly administer. These latter ingredients are entirely wanting in the case before us; and therefore, if the question of forfeiture were now in judgment, we should have no doubt, either upon the act of congress, or the general law, that it ought not to be enforced.

But, in the present posture of this cause, the libellants are no longer plaintiffs. The claimants interpose for damages in their turn, and have assumed the character of actors. They contend, that they are entitled to damages, first, because the conduct of Lieutenant Stockton, in the approach and seizure of the Marianna Flora, was unjustifiable; and secondly, because, at all events, the subsequent sending her in for adjudication was without any reasonable cause.

*In considering these points, it is necessary to ascertain, what are the rights and duties of armed, and other ships, navigating the ocean, [42 in time of peace. It is admitted, that the right of visitation and search does not, under such circumstances, belong to the public ships of any nation. This right is strictly a belligerent right, allowed by the general consent of nations, in time of war, and limited to those occasions. It is true, that it has been held in the courts of this country, that American ships, offending against our laws, and foreign ships, in like manner, offending within our jurisdiction, may, afterwards, be pursued and seized upon the ocean, and rightfully brought into our ports for adjudication. This, however, has never been supposed to draw after it any right of visitation or search. The party, in such case, seizes at his peril; if he establishes the forfeiture, he is justified; if he fails, he must make full compensation in damages.

Upon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all; and no one can vindicate to himself a superior or exclusive prerogative there. Every ship sails there with the unquestionable right of pursuing her own lawful business, without interruption; but whatever may be that business, she is bound to pursue it in such a manner as not to violate the rights of others. The general maxim in such cases is, *sic utere tuo, ut non alienum lœdas*.

It has been argued, that no ship has a right to *approach another at sea; and that every ship has a right to draw round her a line of [43 jurisdiction, within which no other is at liberty to intrude. In short, that she may appropriate so much of the ocean as she may deem necessary for her protection, and prevent any nearer approach. This doctrine appears to us novel, and is not supported by any authority. It goes to establish upon the ocean a territorial jurisdiction, like that which is claimed by all nations, within cannon-shot of their shores, in virtue of their general sovereignty. But the latter right is founded upon the principle of sovereign and permanent appropriation, and has never been successfully asserted

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beyond it. Every vessel, undoubtedly, has a right to the use of so much of the ocean as she occupies, and as is essential to her own movements. Beyond this, no exclusive right has ever yet been recognised, and we see no reason for admitting its existence. Merchant ships are in the constant habit of approaching each other on the ocean, either to relieve their own distress, to procure information, or to ascertain the character of strangers; and, hitherto, there has never been supposed in such conduct any breach of the customary observances, or of the strictest principles of the law of nations. In respect to ships of war, sailing, as in the present case, under the authority of their government, to arrest pirates, and other public offenders, there is no reason why they may not approach any vessels descried at sea, for the purpose of ascertaining their real characters. Such a right seems

*indispensable for the fair and discreet exercise of their authority; *44] and the use of it cannot be justly deemed indicative of any design to insult or injure those they approach, or to impede them in their lawful commerce. On the other hand, it is as clear, that no ship is, under such circumstances, bound to lie by, or wait the approach of any other ship. She is at full liberty to pursue her voyage, in her own way, and to use all necessary precautions to avoid any suspected sinister enterprise or hostile attack. She has a right to consult her own safety; but, at the same time, she must take care not to violate the rights of others. She may use any precautions dictated by the prudence or fears of her officers; either as to delay, or the progress of course of her voyage; but she is not at liberty to inflict injuries upon other innocent parties, simply because of conjectural dangers. These principles seem to us the natural result of the common duties and rights of nations, navigating the ocean in time of peace. Such a state of things carries with it very different obligations and responsibilities from those which belong to public war, and is not to be confounded with it.

The first inquiry, then, is, whether the conduct of Lieutenant Stockton was, under all the circumstances preceding and attending the combat, justifiable. There is no pretence to say, that he committed the first aggression. That, beyond all question, was on the part of the Marianna Flora; and her firing was persisted in, after the Alligator had hoisted her national flag, and, of *course, held out her signal of her real pacific character. *45] What, then, is the excuse for this hostile attack? Was it occasioned by any default or misconduct on the part of the Alligator? It is said, that the Alligator had no right to approach the Marianna Flora, and that the mere fact of approach authorized the attack. This is what the court feels itself bound to deny. Lieutenant Stockton, with a view to the objects of his cruise, had just as unquestionable a right to use the ocean, as the Portuguese ship had; and his right of approach was just as perfect as her right of flight. But, in point of fact, Lieutenant Stockton's approach was not from mere motives of public service, but was occasioned by the acts of the Marianna Flora. He was steering on a course which must, in a short time, have carried him far away from her. She lay to, and showed a signal ordinarily indicative of distress. It was so understood, and, from motives of humanity, the course was changed, in order to afford the necessary relief. There is not a pretence in the whole evidence, that the lying to was not voluntary, and was not an invitation of some sort. The whole reasoning on the part of the claimants is, that it was for the purpose of meeting a sup-

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posed enemy by day-light, and in this way, to avoid the difficulties of an engagement in the night. But how was this to be known on board of the Alligator? How was it to be known, that she was a Portuguese ship, or that she took the Alligator for a pirate, or that her object in laying to, was a defensive operation? When the vessels *were within reach of each other, the first salutation from the ship was a shot fired ahead, and, [*46 at the same time, no national flag appeared at the mast-head. The ship was armed, appeared full of men, and from her manœuvres, almost necessarily led to the supposition, that her previous conduct was a decoy, and that she was either a piratical vessel, or, at least, in possession of pirates.* Under such circumstances, with hostilities already proclaimed, Lieutenant Stockton was certainly not bound to retreat; and, upon his advance, other guns, loaded with shot, were fired, for the express purpose of destruction. It was, then, a case of open, meditated hostility, and this, too, without any national flag displayed by the Portuguese ship, which might tend to correct the error, for she never hoisted her flag, until the surrender. What, then, was Lieutenant Stockton's duty? In our view, it was plain; it was to oppose force to force, to attack and subdue the vessel thus prosecuting unauthorized warfare upon his schooner and crew. In taking, therefore, the readiest means to accomplish the object, he acted, in our opinion, with entire legal propriety. He was not bound to fly, or to wait until he was crippled. His was not a case of mere remote danger, but of imminent, pressing and present danger. He had the flag of his country to maintain, and the rights of his cruiser to vindicate. To have hesitated in what his duty to his government called for on such an occasion, would have been to betray (what no honorable *officer would be supposed to indulge) an indifference to its [*47 dignity and sovereignty.

But it is argued, that Lieutenant Stockton was bound to have affirmed his national flag by an appropriate gun; that this is a customary observance at sea, and is universally understood as indispensable to prevent mistakes and misadventures; and that the omission was such a default on his part, as places him *in delicto* as to all the subsequent transactions. This imputation certainly comes with no extraordinary grace from the party by whom it is now asserted. If such an observance be usual and necessary, why was it not complied with on the part of the Marianna Flora? Her commander asserts, that by the laws of his own country, as well as those of France and Spain, this is a known and positive obligation on all armed vessels, which they are not at liberty to disregard. Upon what ground, then, can he claim an exemption from performing it? Upon what ground, can he set up as a default in another, that which he has wholly omitted to do on his own part? His own duty was clear, and pointed out; and yet he makes that a matter of complaint against the other side, which was confessedly a primary default in himself. He not only did not hoist or affirm his flag in the first instance, but repeatedly fired at his adversary, with hostile intentions, without exhibiting his own national character at all. He left, therefore, according to his own view of the law, his own duty unperformed, and fortified, as against himself, the very inference, that his ship *might properly be deemed, [*48 under such circumstances, a piratical cruiser.

But we are not disposed to admit, that there exists any such universal rule or obligation of an affirming gun, as has been suggested at the bar. It

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may be the law of the maritime states of the European continent already alluded to, founded in their own usages or positive regulations. But it does not hence follow, that it is binding upon all other nations. It was admitted, at the argument, that the English practice is otherwise; and, surely, as a maritime power, England deserves to be listened to with as much respect, on such a point, as any other nation. It was justly inferred, that the practice of America is conformable to that of England; and the absence of any counter-proof on the record, is almost of itself decisive. Such, however, as the practice is, even among the continental nations of Europe, it is a practice adopted with reference to a state of war, rather than peace. It may be a useful precaution to prevent conflicts between neutrals and allies, and belligerents, and even between armed ships of the same nation. But the very necessity of the precaution, in time of war, arises from circumstances, which do not ordinarily occur in time of general peace. Assuming, therefore, that the ceremony might be salutary and proper in periods of war, and suitable to its exigencies, it by no means follows, that it is justly to be insisted on, at the peril of costs and damages, in peace. In any view, therefore, we do not think this omission can avail the claimants.

*Again it is argued, that there is a general obligation upon
*49] armed ships, in exercising the right of visitation and search, to keep at a distance, out of cannon-shot, and to demean themselves in such a manner as not to endanger neutrals. And this objection, it is added, has been specially provided for, and enforced by the stipulations of many of our own treaties with foreign powers. It might be a decisive answer to this argument, that here, no right of visitation and search was attempted to be exercised. Lieutenant Stockton did not claim to be a belligerent, entitled to search neutrals on the ocean. His commission was for other objects. He did not approach or subdue the Marianna Flora, in order to compel her to submit to his search, but with other motives. He took possession of her, not because she resisted the right of search, but because she attacked him in a hostile manner, without any reasonable cause or provocation. Doubtless, the obligation of treaties is to be observed with entire good faith, and scrupulous care. But stipulations in treaties, having sole reference to the exercise of the rights of belligerents in the time of war, cannot, upon any reasonable principles of construction, be applied to govern cases exclusively of another nature, and belonging to a state of peace. Another consideration, quite sufficient to establish that such stipulations cannot be applied in aid of the present case, is, that whatever may be our duties to other nations,

we have no such treaty subsisting with *Portugal. It will scarcely
*50] be pretended, that we are bound to Portugal by stipulations to which she is no party, and by which she incurs no correspondent obligation. Upon the whole, we are of opinion, that the conduct of Lieutenant Stockton, in approaching, and ultimately, in subduing the Marianna Flora, was entirely justifiable. The first wrong was done by her, and his own subsequent acts were a just defence and vindication of the rights and honor of his country.

The next inquiry is, whether the act of sending in the Marianna Flora for adjudication, was, under all the circumstances, unjustifiable, so as to carry with it responsibility in damages. It is argued, that, upon examination of the ship's papers, the crew and the cargo, it must clearly have appeared,

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that the ship was a merchant ship, bound on a lawful voyage, and not a piratical cruiser. This state of the case must be admitted to have been apparent. But the real difficulty is of another sort. Her papers, and cargo and destination, could give no information of the nature of the attack made upon the Alligator. However hostile, malignant or even piratical the aggression might be, the papers could shed no light upon the subject. The owners of the cargo, and the owners of the ship (so far at least as their duties and responsibilities were not bound up by the acts of the master, as their agent), might be innocent; the voyage might be of a purely mercantile character, and yet, acts of aggression might be committed, *which might bring [*51 the case completely within the act of congress, or of the general law of nations, as a gross and violent injury, calling for ample redress. The real duty imposed upon Lieutenant Stockton was, not to examine the papers, unless so far as they might explain doubtful circumstances, but to ascertain the nature, object and intent of the attack upon his vessel. He was bound to exercise an honest and fair discretion on the subject, and to obtain such explanation as might guide his judgment. What was the excuse offered for attack upon him? It was not that the guns were fired by mistake or accident. They were admitted to have been by authority and design. They were fired, after his own flag was displayed, and with the express intention of disabling the vessel and destroying the crew. The only excuse offered for this unjustifiable act was, that the commander entertained a fear that the Alligator was a pirate. But such a fear, unauthorized by any acts on the other side, was no excuse for a wrong which might have led to the most fatal consequences. If the Alligator had been seriously injured, or any of her crew had been killed, no doubt could exist, that, under such circumstances, the ship ought to have been sent in for adjudication, to enforce redress, and also to administer, if necessary, punishment. The attack was not the less inexcusable, because the consequences were not as injurious as the master intended.

It is a different thing to sit in judgment upon this case, after full legal investigations, aided by *the regular evidence of all parties, and to [*52 draw conclusions at sea, with very imperfect means of ascertaining facts and principles, which ought to direct the judgment. It would be a harsh judgment, to declare, that an officer, charged with high and responsible duties on the part of his government, should exercise the discretion intrusted to him, at the peril of damages, because a court of law might ultimately decide, that he might well have exercised that discretion another way. If Lieutenant Stockton had acted with gross negligence or malignity, and with a wanton abuse of power, there might be strong grounds on which to rest this claim of damages. But it is conceded on all sides, and in this opinion the court concurs, that he acted with honorable motives, and from a sense of duty to his government. He thought the aggression was piratical, and that it was an indignity to the national flag, utterly inexcusable. The view now taken by this court, in respect to the whole case, upon a full examination of all the facts, is certainly somewhat different. It leads us to say, that Lieutenant Stockton might, without justly incurring the displeasure of his government, have released the ship, not because she had done no wrong, but because the wrong was not of such a nature as called for vindictive redress.

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But the question upon which damages must depend, is not whether he *might* not have released the ship, but, whether he was, at all events, *bound* *53] so to do ; and whether that obligation *was so imperative, that the omission ought to be visited with damages. We are, then, to consider the real difficulties of Lieutenant Stockton's situation. An attack had been made upon a national ship, under his command, without cause. It was a hostile act, an indignity to the nation, and a trespass upon its rights and sovereignty. It was not an accidental, but a meditated act ; not necessarily carrying its own excuse along with it, but susceptible of different interpretations. It was not an affair in which he was at liberty to consult his own wishes or honor merely, although a brave and distinguished officer might naturally feel some solicitude to preserve his high reputation untarnished in the eyes of his government. He was bound to look to the rights of his country. He might well hesitate in assuming the arbitration of national wrongs ; he might well feel a scrupulous delicacy in undertaking to waive any claim which the government had authority to enforce, or to defeat any redress which it might choose to seek, or to prevent any inquiries which, though its established tribunals, it might think fit to institute, in respect to his conduct, or that of the offending vessel. Considerations of this nature could not but weigh heavily upon the mind of a gallant officer ; and they are not unfit to be entertained by this court in forming its own judgment.

It is also further to be observed, that the case was confessedly new in its character and circumstances. The researches of counsel throughout *54] *the progress of this protracted controversy, have not discovered any case, which in point of law, can govern this. If it is new here, it may well be deemed to have been new and embarrassing to Lieutenant Stockton. In such a case, it is not matter of surprise, that he should come to the conclusion, that it was not proper to take upon himself the responsibility of a final decision ; but to confide the honor of the nation, as well as the rights of the other party, to judicial decision. No inference is attempted to be drawn, that his acts were intentionally oppressive and harsh ; and it would be going a great way, to declare, that an exercise of honest discretion, in a case of wrong on the other side, ought to draw after it the penalty of damages.

There is another more general consideration, which is entitled to great weight in this case. In cases of capture, strictly so called, no decision has been cited, in which, if the capture itself was justifiable, the subsequent detention for the adjudication has ever been punished by damages. So far as counsel have examined, or our own researches extend, no such principle has ever been established. The present case stands upon a strong analogy, and to inflict damages would be to desert that analogy. Even in cases of marine torts, independent of prize, courts of admiralty are in the habit of giving or withholding damages upon enlarged principles of justice and equity, and have not circumscribed themselves within the positive boundaries of mere municipal law. They have exercised a conscientious discretion *55] *upon the subject. A party who is *in delicto*, ought to make a strong case, to entitle himself to general relief.

The case of *The Louis*, 2 Dods. 210, is a striking example in illustration of these remarks. There, a French slave-ship was, in a time of peace, taken possession of by an English armed cutter, after a sharp engagement, in

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which several men were killed on both sides. The ship was carried into Sierra Leone for adjudication, and subsequently, the cause came before the high court of admiralty, upon appeal. The decision pronounced by Lord STOWELL appears to have been made after very full consideration, and is expounded in his most elaborate manner. He decided, that the original seizure was totally unjustifiable; and that, even if the slave-trade was prohibited by the French laws (which, he thought, it was not), still, it was not for English cruisers to claim a right of search, or to seize such vessels to enforce those laws. He, therefore, pronounced a decree of restitution. But he denied damages and costs to the claimant. His language on that occasion was, "Upon the matter of costs and damages, that have been prayed, I must observe, that it is the first case of the kind, and that the question itself is *primæ impressionis*; and that, upon both grounds, it is not the inclination of the court to inflict such a censure." Here, then, we have a case of an acknowledged maritime trespass, accompanied with circumstances of immediate and fatal injury, in which the original wrong travelled along with, *and infected, the whole subsequent proceedings; and yet the court, on account of its being the first instance, and of the novelty of the [*56 question, deemed it a conscientious exercise of its discretion, not to award damages. The case before this court is also of the first occurrence, and the question is entirely new in its presentation. It has this striking fact, in which it is most favorably distinguished from *The Louis*, that the original seizure was justifiable, and if the intent of piratical aggression had been established, condemnation must have ensued.

If, then, this court should, under these circumstances, award damages, it would take a new step, never known to have been taken before by a court of admiralty. It would desert the analogy of cases of justifiable capture in matters of prize, and introduce a rule, harsh and severe, in a case of first impression, whose bearing and character have engaged the bar and bench in several most laborious discussions, and inflict upon an honest exercise of discretion, a punishment which has been denied, in *The Louis*, to an inexcusable wrong.

There are one or two other suggestions which were urged in the argument, that ought not to be passed over in silence. It is said, that the tort, if it ought to be redressed at all by a proceeding *in rem*, was exclusively cognisable in the courts of Portugal. We are not aware of any principle upon which this position can be legally maintained. There is no more reason why the courts of Portugal should hold exclusive *jurisdiction [*57 upon this case, than the courts of this country. We see no difficulty in supporting the jurisdiction, as concurrent in both nations. But if there be any choice, it seems more properly to belong to the country of the injured, than of the offending party.

It is also said, that, at all events, the cargo was not liable to condemnation, even if the offending vessel was liable under the act of congress. Probably, this is true, in respect to that act. But the second count embraces a wider range; and if it had been proved in its aggravated extent, it does not necessarily follow, that the cargo ought to be exempted. That is a question which would require grave deliberation. It is, in general, true, that the act of the master of the vessel does not bind the innocent owner of the cargo; but the rule is not of universal application. And where the master is also

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agent of the owner of the cargo, or both ship and cargo belong to the same person, a distinction may, perhaps, arise, in the principle of decision. But however this may be, in the present case, if the vessel was sent in for adjudication, the cargo must, of necessity, accompany her; nor could its particular ownership be fully ascertained, until the examinations of the crew were regularly taken. There is no evidence in this case to show, that at any subsequent period, it was desirable, or could have been advantageous to the claimants, to have separated the ship and *cargo, and to have instituted a new voyage for the latter, under other auspices.

In the district court, an allowance was made of \$500, distributable among the crew, on account of their confinement on the passage to Boston, on the ground, that the sending in of the vessel was wrongful. That award was reversed in the circuit court; and no appeal was taken by the crew, as, indeed, none could be, on account of this insufficiency of the sum to entitle the parties in interest to appeal. It is only necessary, therefore, to state, that that matter is not now before this court; and it is to be presumed, that the confinement was such only as was indispensable for the safety of the seizers.

Upon the whole, it is the opinion of the court, that the decree of the circuit court ought to be affirmed, and it is, accordingly, affirmed, without costs to either party.

Decree accordingly

*59] *SOLOMON ETTING, Plaintiff in error, v. PRESIDENT, DIRECTORS AND COMPANY OF THE BANK OF THE UNITED STATES, Defendants in error.

Charge.—Court and jury.—Divided court.

Although a judge may refuse to declare the law to the jury on a hypothetical question, not warranted by the testimony in the cause, yet, if he proceed to state the law, and state it erroneously, his opinion may be revised in the court above; and if it can have had any influence on the jury, their verdict will be set aside.¹

Although it is the province of the court to construe written instruments, yet, where the effect of such instruments depends, not merely on the construction and meaning of the instruments, but upon collateral facts *in pais*, and extrinsic circumstances, the inferences of fact to be drawn from them are to be left to the jury.²

Where the court is equally divided in opinion, upon a writ of error, the judgment of the court below is to be affirmed.

Quære? What concealment or suppression of material facts, in a contract where both parties have not equal access to the means of information, will avoid the contract?

ERROR to the Circuit Court of Maryland. This was an action of *assumpsit*, brought in the court below, by the defendants in error, against the plaintiff in error, Etting, as the indorser of the promissory note of James W. McCullough, under the following circumstances.

In the year 1819, the president of the branch bank, established at Baltimore, his partner in trade, McCullough, the cashier of the branch, and *60] Williams, one of the directors of the parent *bank, had contracted a debt to the bank to the amount of \$3,497,700. The directors at Philadelphia, in consequence of some information which they had received

¹ *Beaver v. Taylor*, 1 Wall. 637.

² *Richardson v. Boston*, 19 How. 263.