

THE FLYING FISH.

LITTLE *et al.* v. BARREME *et al.**Responsibility of naval officer for illegal seizure.—Probable cause.*

The commander of a ship of war of the United States, in obeying his instructions from the President of the United States, acts at his peril: if those instructions are not strictly warranted by law, he is answerable in damages to any person injured by their execution.¹

The act of the 9th of February 1799, did not authorize the seizure upon the high seas of any vessels sailing from a French port; and the orders of the President of the United States could not justify such a seizure.

Quere? Whether probable cause will excuse from damages?

APPEAL from the Circuit Court for the district of Massachusetts.

On the 2d of December 1799, the Danish brigantine Flying Fish was captured, near the island of Hispaniola, by the United States frigates Boston and General Greene, upon suspicion of violating the act of congress, usually termed the non-intercourse law, passed on the 9th of February 1799 (1 U. S. Stat. 613), by the 1st section of which it is enacted, "That from and after the first day of March next, no ship or vessel owned, hired or employed, wholly or in part, by any person resident within the United States, and which shall depart therefrom, shall be allowed to proceed directly, or from any intermediate port or place, to any port or place within the territory of the French republic, or the dependencies thereof, or to any place in the West Indies, or elsewhere, under the acknowledged government of France, or shall be employed in any traffic or commerce with or for any person, resident within the jurisdiction or under the authority of the French republic. And if any ship or vessel, in any voyage thereafter commencing, and before her return within the United States, shall be voluntarily carried or suffered to proceed to any French port or place as aforesaid, or shall be employed as aforesaid, contrary to the intent hereof, every such ship or vessel, together with her cargo, shall be forfeited; and shall accrue, the one-half to the use of the United States, and the other half to the use of any person or persons, citizens of the United States, who will inform and prosecute for the same; and shall be liable to be seized, and may be prosecuted and condemned, in any circuit or district court of the United States, which shall be holden within or for the district where the seizure shall be made."

*And by the 5th section it is enacted, "That it shall be lawful [*171 for the President of the United States to give instructions to the commanders of the public armed ships of the United States, to stop and examine any ship or vessel of the United States, on the high seas, which there may be reason to suspect to be engaged in any traffic or commerce contrary to the true tenor hereof; and if, upon examination, it shall appear that such ship or vessel is bound or sailing to any port or place within the territory of the French republic, or her dependencies, contrary to the intent of this act, it shall be the duty of the commander of such public armed vessel, to seize every such ship or vessel engaged in such illicit commerce,

¹ See *Otis v. Bacon*, 7 Cr. 589; *Tracy v. Swartwout*, 10 Pet. 80; *Kendall v. United States*, 12 Id. 525; *Gray v. Lawrence*, 3 Bl. C. C. 117; *Gilchrist v. Collector of Charleston*, 1 Hall L. J. 429; *Foster v. Peaslee*, 21 Law Rep. 341; *Magruder v. United States*, Dev. Ct. Cl. 21.

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and send the same to the nearest port in the United States ; and every such ship or vessel, thus bound or sailing to any such port or place, shall, upon due proof thereof, be liable to the like penalties and forfeitures as are provided in and by the first section of this act."

The instructions given in consequence of this section, bear date the 12th of March 1799, and are as follows :

"SIR—Herewith you will receive an act of congress further to suspend the commercial intercourse between the United States and France, and the dependencies thereof, the whole of which requires your attention. But it is the command of the president, that you consider particularly the fifth section as part of your instructions, and govern yourself accordingly. A proper discharge of the important duties enjoined on you, arising out of this act, will require the exercise of a sound and impartial judgment. You are not only to do all that in you lies, to prevent all intercourse, whether direct or circuitous, between the ports of the United States and those of France and her dependencies, in cases where the vessels or cargoes are apparently, as well as really, American, and protected by American papers only ; but you are to be vigilant that vessels or cargoes really American, but covered by Danish or other foreign papers, and bound to or from French ports, do not escape you.

*172] * "Whenever, on just suspicion, you send a vessel into port to be dealt with according to the afore-mentioned law, besides sending with her all her papers, send all the evidence you can obtain to support your suspicions, and effect her condemnation. At the same time that you are thus attentive to fulfil the objects of the law, you are to be extremely careful not to harass, or injure the trade of foreign nations with whom we are at peace, nor the fair trade of our own citizens."

In the district court of Massachussets, the vessel and cargo were ordered to be restored, without damages or costs. Upon the question of damages, the Honorable Judge LOWELL delivered the following opinion :

"This libel is founded on the statutes of the United States, made to suspend the commercial intercourse between the United States and France, and the dependencies thereof. The libellants not having produced sufficient proof to bring this vessel and cargo so far within the provisions of these statutes as to incur a forfeiture thereof, the same has been decreed to be delivered to the claimants. The question remaining to be decided is, whether the claimants are entitled to damages, which they suggest to have arisen to them, or those for whom they claim, by the capture and detention.

"The facts which appear and are material to this question are, that the vessel was owned, and her cargo, by Samuel Goodman, a Prussian by birth, but now an inhabitant of the Danish island of St. Thomas ; that the master was born in, and is now of, the same island, but for several years had been employed in vessels of citizens of the United States, and sailed out of our ports ; that he speaks our language perfectly, in the accent of an American, and has the appearance of being one. The mate is a citizen of the United States, born here, and having always continued such. The rest of the seamen are Englishmen, Portuguese and negroes : the supercargo, a French-
*173] man. The vessel had carried *a cargo of provisions and dry goods from St. Thomas to Jeremie, and was returning thither, loaded with coffee, when captured. That during the chase by the American frigates, the

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master threw overboard the log-book, and certain other papers. That there was on board a protest signed by the master, supercargo and several seamen, in which they declared that the vessel had been bound from St. Thomas to Port-au-Prince, and was compelled by Rigaud's vessels to go into Jeremie, which was false and totally unfounded; and that, after the capture, the master inquired of his seamen, whether they would stand by him respecting this pretence. That the statutes of the United States prohibiting intercourse with France and its dependencies had been long before known at St. Thomas, and that it had been since a common practice there, to cover American property for the purpose of eluding the law.

"If a war of a common nature had existed between the United States and France, no question would be made but the false papers found on board, the destruction of the log-book and other papers, would be a sufficient excuse for the capture, detention and consequent damages. It is only to be considered, whether the same principles, as they respect neutrals, are to be applied to this case?

"My mind has found much difficulty in settling this question. It is one altogether new to me, and arises from the peculiar imperfect war existing at this time between the United States and France. I have embraced an opinion with much diffidence, and am happy that it may be revised in the superior courts of the United States.

"On what principles is the right of belligerent powers to examine neutral vessels, and the duty of neutrals to furnish their ships with proper papers, and to avoid such conduct as may give cause to suspect they are other than they pretend to be, founded? Do they not necessarily result from a compromise of their respective rights in a state of war? Neither of the belligerent *powers have an original and perfect right to capture the property of neutrals, but they have a right, unless restrained by [*174 treaty, however disguised or covered by the aid of neutrals.(a) It is a breach of neutrality to attempt to defeat this right. The practice of nations, therefore, for many ages has been, on the one hand to exercise, and on the other to prevent, this examination, and to establish a principle that neutral vessels shall be furnished with the usual documents to prove their neutral state; shall destroy none of their papers, nor shall carry false papers, under the hazard of being exposed to every inconvenience resulting from capture, examination and detention, except the eventual condemnation of the property; and even this, by some writers, has been held to be lawful, and enforced by some great maritime powers. Every maritime nation must be involved in the war, on the side of one or the other of the belligerent powers, but from the establishment of these principles. It is not the edicts, statutes or regulations of any particular nation which confer these rights, or impose these duties. They are the result of common practice, long existing, often recognised, and founded on pacific principles. Whenever a state of war exists, these rights and duties exist.

"It does not appear to me to be material, what is the nature of the war, general or limited. Nothing can be required of neutrals but to avoid

(a) It is believed, that there has been an error in copying this passage. It is, however, printed *verbatim* from the transcript of the record. The words to be supplied probably are, "to search for and seize the property of their enemies," to be inserted after the word "treaty."

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duplicity. Sufficient notice to neutrals of the existing state of hostilities is all that is necessary, to attach to them the duties, and to belligerent nations, the rights, resulting from a state of war. This notice is given in different ways, by proclamations, heralds, statutes published, and even by the mere existence of hostilities for a length of time. As the island of St. Thomas, being a dependency of a neutral nation, situated near the dependencies of the belligerent power with whom the United States had prohibited intercourse, and having had long and full knowledge of the state of things, its inhabitants were, *as I conceive, bound not to interfere or attempt to

*175] defeat the measures taken by our government, in their limited war. We find, however, that these attempts have been frequent; that American vessels have, in many instances, been covered in that island, and the trade which our government has interdicted has been thus carried on. It behooved, then, those of its inhabitants who would avoid the inconveniences of restraint to act with openness, and avoid fraud and its appearances.

“This construction of the state in which the United States are (although I am of opinion that, abstractedly from other considerations, it would give them the rights of belligerent powers), places the neutral powers in no new predicament, nor imposes the necessity of any new documents, or other conduct than they were obliged to from the pre-existing state of war between most of the great naval powers. On the whole, I am of opinion, that no damages are to be paid the claimants for the capture and detention, and do so decree, and that each party bear their own costs.”

From this decree, the claimants appealed to the circuit court, where it was reversed, and \$8504 damages were given. The following is the decree of the circuit court.

“This court having fully heard the parties on the said appeal, finds the facts stated in the said decree to be true, and that the said Little had instructions from the President of the United States, on which the action in the said libel is founded, a copy of which instructions is on file. And it further appearing that the said brigantine and her cargo were Danish, and neutral property, and that the said George Little knew that the said brig, at the time of the said capture, was bound and sailing from Jeremie to St. Thomas, a Danish and neutral port, and not to any French port; this court is of opinion, that although Captain Little had a right to stop and examine

*176] the said brig, in case of suspecting *her to be engaged in any commerce contrary to the act of the 9th of February 1799, yet that he was not warranted by law to capture and send her to a port of the United States. That it was at his risk and peril, if the property was neutral; and that a probable cause to suspect the vessel and cargo American, will not, in such case, excuse a capture and sending to port. It is, therefore, considered, adjudged and decreed by this court, that the said decree respecting damages and costs be, and it is hereby reversed, and that the said claimants recover their damages and costs.”

The damages being assessed by assessors appointed by the court, a final sentence was pronounced, from which the captors appealed to this court.

The cause was argued, at December term 1801, by *Dexter*, for the appellants, and by *Martin* and *Mason*, for the claimants.

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February 27th. MARSHALL, Ch. J., now delivered the opinion of the court.—The Flying Fish, a Danish vessel, having on board Danish and neutral property, was captured on the 2d of December 1799, on a voyage from Jeremie to St. Thomas, by the United States frigate Boston, commanded by Captain Little, and brought into the port of Boston, where she was libelled as an American vessel that had violated the non-intercourse law. The judge before whom the cause was tried, directed a restoration of the vessel and cargo, as neutral property, but refused to award damages for the capture and detention, because, in his opinion, there was probable cause to suspect the vessel to be American. On an appeal to the circuit court, this sentence was reversed, because the Flying Fish was on a voyage from, not to, a French port, and was, therefore, had she even been an American vessel, not liable to capture on the high seas.

*During the hostilities between the United States and France, an act for the suspension of all intercourse between the two nations was [*177 annually passed. That under which the Flying Fish was condemned, declared every vessel owned, hired or employed, wholly or in part, by an American, which should be employed in any traffic or commerce with or for any person resident within the jurisdiction, or under the authority, of the French republic, to be forfeited, together with her cargo; the one-half to accrue to the United States, and the other to any person or persons, citizens of the United States, who will inform and prosecute for the same. The 5th section of this act authorizes the President of the United States to instruct the commanders of armed vessels “to stop and examine any ship or vessel of the United States, on the high seas, which there may be reason to suspect to be engaged in any traffic or commerce contrary to the true tenor of the act, and if upon examination, it should appear, that such ship or vessel is bound, or sailing *to*, any port or place within the territory of the French republic or her dependencies, it is rendered lawful to seize such vessel, and send her into the United States for adjudication.

It is by no means clear, that the President of the United States, whose high duty it is to “take care that the laws be faithfully executed,” and who is commander-in-chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited, by being engaged in this illicit commerce. But when it is observed, that the general clause of the first section of the act, which declares that “such vessels may be seized, and may be prosecuted in any district or circuit court, which shall be holden within or for the district where the seizure shall be made,” obviously contemplates a seizure within the United States; and that the 5th section gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound, or sailing *to*, a French port, the legislature seem to have prescribed *that the manner in which this law shall be carried into execution, [*178 was to exclude a seizure of any vessel not bound *to* a French port. Of consequence, however strong the circumstances might be, which induced Captain Little to suspect the Flying Fish to be an American vessel, they could not excuse the detention of her, since he would not have been authorized to detain her, had she been really American.

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It was so obvious, that if only vessels sailing to a French port could be seized on the high seas, that the law would be very often evaded, that this act of congress appears to have received a different construction from the executive of the United States; a construction much better calculated to give it effect. A copy of this act was transmitted by the secretary of the navy, to the captains of the armed vessels, who were ordered to consider the 5th section as a part of their instructions. The same letter contained the following clause :

“ A proper discharge of the important duties enjoined on you, arising out of this act, will require the exercise of a sound and an impartial judgment. You are not only to do all that in you lies, to prevent all intercourse, whether direct or circuitous, between the ports of the United States and those of France or her dependencies, where the vessels are apparently as well as really American, and protected by American papers only, but you are to be vigilant that vessels or cargoes, really American, but covered by Danish or other foreign papers, and bound to or from French ports, do not escape you.”

These orders, given by the executive, under the construction of the act of congress made by the department to which its execution was assigned, enjoin the seizure of American vessels sailing from a French port. Is the officer who obeys them liable for damages sustained by this misconstruction of the act, or will his orders excuse him? If his instructions afford him no protection, then the law must take its course, and he must pay such damages as are legally awarded against him; if they excuse an act, not otherwise excusable, it would then be necessary to inquire, whether this is a case in which the *179] probable cause *which existed to induce a suspicion that the vessel was American, would excuse the captor from damages when the vessel appeared in fact to be neutral?

I confess, the first bias of my mind was very strong in favor of the opinion, that though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think, that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle, that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which, in general, requires that he should obey them. I was strongly inclined to think, that where, in consequence of orders from the legitimate authority, a vessel is seized, with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, nor legalize an act which, without those instructions, would have been a plain trespass.

It becomes, therefore, unnecessary to inquire whether the probable cause afforded by the conduct of the Flying Fish to suspect her of being an American, would excuse Captain Little from damages for having seized and sent her into port? since, had she been an American, the seizure would have been

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unlawful. Captain Little, then, must be answerable in damages to the owner of this neutral vessel, and as the account taken by order of the circuit court is not objectionable on its face, and has not been excepted to by counsel before the proper tribunal, this court can receive no objection to it.

There appears, then, to be no error in the judgment of the circuit court, and it must be affirmed with costs.

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Presumption of payment.

To raise a presumption of payment, from the age of a bond, twenty years must have elapsed exclusive of the period of the plaintiff's disability.¹

Legal impediments to the recovery of British debts existed in Virginia, until the year 1793.

THIS was a writ of error to the Circuit Court of the district of Columbia, sitting in Alexandria. The only question in the case arose upon the following bill of exceptions.

"In this case, the plaintiffs were admitted to be, and always to have been, British subjects, residing in Great Britain, and the defendant to be, and have been, a native and always a citizen of the now state of Virginia; and this suit was commenced on the — day of —, in the year 1802. The debt was contracted in 1773, in Virginia, at which time, the bond was executed on which the suit was brought. It was also admitted, that the plaintiffs had an agent authorized to collect their debts, so far as the plaintiffs could authorize the same to be collected, during the whole time from the date of the bond to this day; which agent resided in the county in which the defendant lived; also open war subsisted between Great Britain and Virginia, from the 19th day of April 1775, until September 1783.

Further to repel the presumption of payment, the plaintiffs produced the following acts of the general assembly of Virginia upon the subject of British debts contracted before the peace, which acts are in the words following" (Here were inserted the acts dated in March 1785, and Dec. 1787, May 1781, and Nov. 1781): "And the fourth article of the treaty of peace of 1783, and the 6th article of the treaty of peace of 1794, between Great Britain and the United States." The plaintiffs also gave evidence that William Wilson, their agent, delivered over the bond to William Hunter, jun., in 1776, to be collected, at which time he (William Wilson) went to Europe. And when he returned, in 1784, he received back the bond from W. Hunter. Some time after the year 1789, he delivered the said bond to James Johnson for collection, who returned it, and neither of those persons stated that the money, or any part, was collected; that Johnson died in 1797.

Whereupon, the counsel for the defendant prayed the court to instruct the jury, that from the length of time they ought to presume payment of the aforesaid bond. Upon which, the court instructed the jury that from the *length of time stated in the facts above agreed on, the bond, in law, [*181 is presumed satisfied, unless they should find from the evidence, that interest was paid on the bond within twenty years from the 5th of September 1775 (the time of the last payment), or that a suit or demand was made

¹s. p. Penrose v. King, 1 Yeates 344; Bailey v. Jackson, 16 Johns. 210.