*Dobynes and Morton *v.* United States.

Summary judgment.

To support a judgment on a collector's bond, at the return-term, it must appear by the record, that the writ was executed fourteen days before the return-day.

This writ of error came up at last term from the District Court of the United States for the Kentucky district, which, by law, has the jurisdiction of a circuit court of the United States.

The suit was originally brought by the United States against Lewis Moore, as principal, and Dobynes and Morton, as sureties, in a bond given by Moore, as a collector of the revenue. The writ of *capias ad respondendum* was issued on the 12th of February 1803, returnable to the 2d Monday of March following; and judgment was recovered by default, at the return-term, on motion.

The error insisted upon was, that it did not appear by the record that the writ had been "executed fourteen days before the return-day thereof," according to the 14th section of the act of congress of July 11th, 1798. (1 U. S. Stat. 594.)

The record contained a copy of the bail-bond given by Morton, dated the 11th of March 1803; and a receipt from the jailer, for the body of Dobynes, dated the 12th of March 1803. The 2d Monday of March could not have been later than the 14th of the month.

*242] *Mason*, for the United States, suggested diminution in this, that the writ was served on Dobynes and Morton, on the 20th of February, as appeared by the record of the district court; and obtained a *certiorari*. But now, at this term, the return of the *certioriari* not showing anything more than what appeared on the first transcript—

Breckenridge, Attorney-General, admitted, that the judgment could not be supported, as there was nothing in the record by which the return of the marshal could be amended, so as to show that the writ had been executed fourteen days before the return-day.

C. Lee, for the plaintiffs in error.

Judgment reversed.

Hannay *v.* Eve.

Illegal contract.

The courts of the United States will not enforce an agreement entered into in fraud of a law of the United States; although that agreement was made between persons who were then enemies of the United States, and the object of the agreement a mere stratagem of war.

The duty of a master of a vessel to his owners, will not oblige him to violate the good faith even of an enemy, in order to preserve his ship, nor to employ fraud, in order to effect that object.

This was a writ of error to the Circuit Court of the United States for the district of Georgia, sitting in chancery, to reverse a decree, which dismissed the complainant's bill, on a demurrer.

The complainant, as assignee of Cruden & Company, alleged in his bill, that on the 24th of December 1782, during the war between the United States and Great Britain, the British armed ship Dawes, owned by Cruden

& Company, who were British subjects, and commanded by Oswell Eve, the defendant, sailed with a cargo, the property of Cruden & Company, from Kingston, in Jamaica, for New York, then in possession of the British troops. That on her passage, the ship met with much tempestuous weather, by which she was rendered incapable of reaching her port of destination; in consequence of which, the defendant, after *consultation with the crew and passengers, came to the determination, to sail for the nearest port in [*243 the United States, thereby to save the lives of the crew and passengers, which were in imminent danger, and also to save as much as possible to the owners. That the vessel and cargo were liable to be captured by the cruisers of the United States, or if she went into any port of the United States, without being captured, she would become a *droit* of admiralty to the United States, or some of them. That the defendant stated to the crew and passengers, that as congress, by their resolve of the 9th of December 1781, had enacted and declared, "That all ships and vessels, with their cargoes, which should be seized by the respective crews thereof, should be deemed and adjudged as lawful prize to the captors," as the vessel was incapable of reaching New York, and as she would be totally lost to the owners, to himself, and the crew, if captured by the cruisers of the United States, the best mode would be, to seize and capture the vessel and cargo, make the passengers, who were military men of high rank and distinction, prisoners of war, and sail for the nearest port, and there obtain a condemnation of the vessel and cargo, for the benefit and compensation of the crew, who would lose their wages, if she was regularly captured, and that the residue should remain in the defendant's hands, as agent and trustee, and for the sole use and benefit, of the owners. That this plan was agreed to and executed; and an agreement, signed by the defendant and the crew, ascertaining what share each man was to be allowed, and which was to be the basis of the judge's decree, as to the distribution of the prize money. That the crew consented to the defendant's having a larger share than they would, if he had not declared his intention to act in the whole as the agent and trustee, and for the benefit, of the owners. That the vessel was accordingly carried into a port in North Carolina, libelled, condemned and distribution made, according to the proportion fixed by the agreement. That the defendant afterwards purchased a number of the shares of the seamen, for the benefit of his owners; that he also purchased part of the cargo, at the marshal's sales, and shipped it to Charleston, where he sold it to great profit, for the benefit of the [*244 owners. *The bill then prayed a discovery, and that the defendant might account, and be decreed to pay, &c.

To this bill, the defendant demurred, and assigned two causes of demurrer. 1. That it appears by the complainant's own showing, that the ship and cargo were regularly condemned under the resolve of congress, of the 9th of December 1781, as lawful prize, and the proceeds decreed to the defendant and others, as lawful captors, the legality of which decree ought not now to be called in question. 2. That the bill contains no matter of equity, but what is cognisable at law.

Upon argument, the judge (STEPHENS) sustained the demurrer, and dismissed the bill, but without costs.

P. B. Key, for the plaintiff in error.—The principal question is, whether

the complainant has equity. If Eve had given up the ship for his own benefit, it would have been an act of barratry, a breach of trust, and the owners would have had a right of action at law against him for his misfeasance. But they may, if they please, affirm his surrender of the vessel, and oblige the defendant to account. If there is any impediment to the relief sought, it must be grounded on the resolve of congress; for if the owners had a right of action at law, it was saved by the treaty of peace.

The master was always under a moral obligation to account, whatever protection he might derive from the resolve of congress, which gave the whole ship and cargo as prize. There being, then, a moral obligation, sufficient to support a promise, so as to prevent it from being *nudum pactum*, and an express promise charged in the bill, and confessed by the demurrer there is nothing wanting to entitle the complainant to the relief he asks. It is true, that the promise was made to the crew, yet it inures to the benefit
*245] of the owners. Should *it be said, that the promise was *in fraudem legis*, the answer is, that it was a stratagem of war, and therefore, justifiable. In *foro conscientiæ*, it was as justifiable to evade, as to enforce such a law; and if it was a fraud against the law of congress, to receive the proceeds of the ship and cargo, for the use of the owners, it was equally a fraud against the owners, to persuade the crew to carry the vessel into a port of the United States, under a pretence of saving the property to the owners, and afterwards, to take the whole proceeds to his own use.

Harper, contrà.—The ordinance of congress of 4th December 1781 (Journals of Congress, vol. 7, p. 243), it is true, authorized mutiny and treachery, but it was only a law of retaliation. The British had adopted a similar provision; and congress found it necessary to retaliate.

The facts stated by the complainant, in his bill, are such as to show the necessity of delivering up the vessel, and that she was absolutely lost to the owners. The bill states, expressly, that she was incapable of reaching her port of destination; that she must either founder or be captured, or voluntarily run into an enemy's port. It justifies the conduct of the master, in giving up the vessel, but grounds its claim to relief, either upon a supposed moral obligation of the defendant (resulting from his duty as master of the vessel) to do everything in his power for the benefit of the owners; or upon an express promise made to the crew, which, it is contended, inures to the benefit of the owners; or upon an allegation of an imposition upon the crew, to induce them to consent to deliver up the vessel.

As to the first ground, the master's duty did not oblige him to violate the laws of another country, especially of that country to whose laws he applied for protection and relief. His duty to his owners ceased, when he could no longer preserve the property, by fair and honorable means. His duty could never oblige him to commit a fraud upon the good faith even of an enemy.

*246] *The second ground is, that of an express promise to the crew. This is liable to three objections. 1st. That it is a promise without consideration, and therefore, *nudum pactum;* 2d. That it is not made to the owners; and 3d. That it was *in fraudem legis.*

The third ground of claim is, that of imposition upon the crew, to induce them to give up the vessel. This, if it can be the ground of claim by any

person, must be that of a claim by the crew, or some of them, to set aside the agreement for the division of the prize-money, and cannot be a ground of claim by the complainant. It is also liable to the objection, that the courts of the United States can never sanction a claim grounded upon a fraud upon the laws of the United States. The owners, by affirming the transaction, and calling upon the defendant to account, have made themselves a party to the fraud; and the maxim of law applies, *in pari delicto melior est conditio possidentis.*

To show the extent of the principle that contracts *in fraudem legis* were void, he referred the court to the following authorities: 1 Plowd. 75; 1 Domat 145; 2 Bac. Abr. 582; Cowp. 39, 342; 1 T. R. 734; 1 Atk. 352; 2 Ibid. 136; Bull. N. P. 146; 2 P. Wms. 134, 347, 350; 3 T. R. 454.

Key, in reply.—The foundation of this bill is the original trust, before the agreement with the crew. It was a violation of that trust, to give up the ship. The defendant was bound to do all in his power to protect the property. If he has been guilty of a fraud upon the United States, the owners were not a party. The fraud of which the plaintiff complains is, that the defendant induced the crew to give up the ship, under the idea of doing it for the benefit of the owners, and then turning round, and pleading the resolve of congress against the claim of the owners. But if that resolve was a bar, a subsequent acknowledgment of the original trust, and a promise to account, will again set it up.

*February 13th, 1806. MARSHALL, Ch. J., delivered the opinion of the court.—The essential difficulty in this cause arises from the consideration, that under the resolution of congress, by which the vessel and cargo mentioned in the proceedings were condemned, a sanction is claimed to a breach of trust, and a violation of moral principle. In such a case, the mind submits reluctantly to the rule of law, and laboriously searches for something which shall reconcile that rule with what would seem to be the dictate of abstract justice. [*247

It has been correctly argued by the plaintiff in error, that the master was under obligations to the owners, from which, in a moral point of view, he could not be completely absolved. He was bound to save for them the ship and cargo, by all fair means within his power; but he was not bound to employ fraud, in order to effect the object. The situation of the vessel, unquestionably, justified her being carried into the port of an enemy, and, perhaps, in the courts of England, the libelling of the vessel by the master and crew, might be construed to be an act which would inure solely to the benefit of the owners; but war certainly gives the right to annoy an enemy by means such as those which were employed by congress, and courts are bound to consider them as legitimate, and to leave to them their full operation.

The agreement to save the ship and cargo, under the semblance of a condemnation, was not, in itself, an immoral act; it was, as has been truly said, a stratagem which the laws of war would authorize, but it was certainly a fraud upon the resolution of congress, and no principle can be more clear, than that the courts of the United States can furnish no aid in giving efficacy to it. Congress having a perfect right, in a state of open war, to tempt the navigators of enemy-vessels to bring them into the American ports, by making the vessel and cargo prize to the captors, the condemnation of a vessel

so brought in, amounted necessarily to an absolute transfer of the property, and to a complete annihilation, in a legal point of view, of the title of the
*248] owners, and of their *claim upon the master. Had no communication taken place between the master and his crew, whereby a portion of the prize-money was allotted to him, in trust for the owners, which would not have been allotted to him as a captor, in virtue of his station in the vessel, it would have been a plain case of prize, under the resolution of congress, and any intention under which the capture was made, whether declared or not, would have been, like other acts of the will, controllable and alterable by the persons who had entertained it. But if, by a contract with the crew, stipulating certain advantages for the owners of the ship and cargo, the vessel has been carried in, when she would not otherwise have been carried in, or a larger proportion of the prize has been allowed to the master than would have been allowed to him, for his own use, a plain fraud has been committed by him, and the question, whether the trust which he assumed upon himself, and under which he obtained possession of the property, can be enforced in this court, is one of more difficulty, upon which a difference of opinion has prevailed. It has been thought, by some of the judges, that the contract being, in itself, compatible with the strictest rules of morality, and being opposed by only a temporary and war regulation, which exists no longer, may now be enforced. But upon more mature consideration, the majority of the judges accede to the opinion, that the contract being clearly in fraud of the law, as existing at the time, a law to which, under the circumstances attending it, no just exceptions can be taken, its execution cannot be compelled by the courts of that country to evade whose laws it was made. The person in possession must be left in possession of that which the decree of a competent tribunal has given him.

This opinion seems completely to decide the point made under the treaty of peace. According to it, a debt never existed, to which the treaty could apply. No debt was due from the master to his owners, but in virtue of the confiscation of the ship and cargo; and it has never been alleged, that the treaty extended to captures, made during the war, of property in the actual possession of the enemy, whatever might be the means employed in making them.

*If the allegations of the bill had stated any contract, subsequent
*249] to the condemnation, by which Captain Eve had made himself a trustee, the previous moral obligation might have furnished a sufficient consideration for that contract. But the allegations of the bill are not sufficiently explicit on this point: they do not make out such a case. His declarations appear to have been contemporaneous with the transaction, and only to have manifested the intention under which he acted, an intention which he was at liberty to change.

Judgment affirmed.