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Whether the words "from and after the 30th of June," are in the beginning, middle or end of the sentence, the meaning, in this respect, appears to me the same; to give the collector a new allowance on goods imported after that time. When the former duties were secured by bond, the laws, I think, consider them, as far as regards the collector's allowance, as collected and received; the principal services being already done by securing the duties by bond.

MARSHALL, Ch. J., being one of the judges whose opinions were opposed in the court below, did not sit at this hearing.

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Agents and factors.

foreign merchants send out, by their general agent, written orders to their factor in this country, to purchase tobacco upon their account, but to ship it in the name of the factor, and by those orders, the factor is referred to the verbal communications of the general agent, who undertakes to order the tobacco to be shipped in the name of another person, and declares he has authority from the foreign merchants thus to control and vary their orders; the factor is justified in obeying the new orders of the general agent, though contrary to the first written orders.

ERROR to the Circuit Court of the United States for the district of Maryland.

The action was brought by the plaintiffs in error, to recover from the defendant, Barry, the price of three cargoes of tobacco, purchased and shipped by Barry, for account of the plaintiffs, but which were captured on their way to Spain, and condemned. The ground of the claim was, that Barry had not strictly pursued his instructions as to the shipments.

The transcript of the record contained two bills of exception. In the first bill of exceptions, all the material facts of the case were stated, but the exception was taken only to the opinion of the court, who refused to suffer a witness to be sworn to prove the jury, to what was the true translation of a certain part of the Spanish instructions, as to which the parties differed, although the plaintiffs and defendant consented that the witness should be so sworn. This opinion, it is understood, was founded upon the idea, that the court, and not the jury, was the proper tribunal to decide the meaning and construction of all written evidence.

The facts stated in the first bill of exceptions, and which were referred to in the second, presented the following case: On the 27th of January 1798, Bernardo Lacosta, of Cadiz, in Spain, for and on behalf of the plaintiffs, who were also Spanish subjects, wrote and transmitted to the defendant, by the hands of Juan Alonzo Menendez Conde, a letter in the Spanish language, the following translation of which, purporting to be made by a sworn translator, was read in evidence to the jury.

*"Cadiz, 27th January 1798. [*416

"To Mr. James Barry, Baltimore.

"My most esteemed friend:—I derive a particular satisfaction in introducing to you the bearer of this letter, Mr. Juan Alonzo Menendez Conde, who goes to Baltimore, as agent of the house of Messrs. Manella, Pujals & Co., of this place, principally interested in the importation of tobacco for this

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kingdom. The confidence I have always had in you, and the friendship you have on all occasions manifested for me, warrant the conclusion, that you will view this measure as your own, and will execute it with your wonted zeal and efficacy. Being an undertaking of considerable magnitude, a proportionable degree of economy should be observed in the purchases, the shipments and the reimbursements, because the least neglect may cause an enormous loss. By the last accounts from America, I find, that tobacco has risen to a great price, but I hope this was only momentary. However, upon a reasonable calculation, it will not answer them, at more than ten dollars per quintal, in America ; these are the limits to which they can go, without exposing themselves to too much loss. You will, however, consult the bearer, Mr. Menendez, or he with you, and in case you should determine on an advance of one-fourth or one-half a dollar more, to prevent delay, you may do so, if you think proper, being fully convinced, if you can do it for less, that you will omit nothing that may advance the interest of my friends. With this, the said Mr. Menendez takes an order for 20,000 quintals to be shipped for this place, in seven or eight vessels, and not less than six, under which condition, the insurance will be made here. You will take care to seek captains of fidelity, American born, and that all the crews be strictly agreeable to law.

"For the greater perspicuity, the shipments will be made in the following manner :

"1. You will lade the vessels in your own name, stating that they are on your own account and risk, as an American citizen, and consign them to this place, alternately to me, to Messrs. Gahn & Company, and to Messrs. Pablo, Greppi, Marliani & Company.

*417] "2. Your letter, by the vessel, will state that the consignment is made on your account ; that you order her to Cadiz, where you hope that the consignees may be able to sell, but that if the government should not permit the sale, or the English prevent her entry, that then the vessel is to proceed to Genoa.

"3. That the captain carry no other letters than those relating to the cargo, but he must have one for Charles Longhy, of Genoa, to whom the consignment will be made, in the supposed case of not being suffered to enter this port, or be permitted to sell here.

"4. Should the captain be prevented entering here, he will put into the nearest Spanish port to this, and send an express to the consignee.

"5. The captain will bring the charter-party, and the letter to cover the shipment ; that, as well as the bill of lading, should specify two freights one for Cadiz, and the other as though the vessel was in fact destined for Genoa.

"6. In the invoice by the vessel, you will insert all the charges, except the commission, which is understood shall be five per cent. to be hereafter added.

"7. By the way of England, you will transmit the true invoices, adding thereto your commission.

"8. Great care should be taken, in the *role d'equipage*, as to the birth, age, size, &c., of the seamen, and that it agree in date and number with the shipping articles.

"9. Admitting that the vessel cannot enter here, there must not be any

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excess of freight, on her going to another Spanish port ; but this condition must be confidential with the captain, and must not appear in any document.

"10. The vessels should have Mediterranean passes, and, in a word, all other necessary documents, that we may have no difficulties with the privateers there ; and if you could have the papers examined by the French, *English and Spanish consuls, in your country, it appears to me, it [*418 might serve as a great protection.

"11. The bills of lading will be remitted, by triplicates, by the way of London or Lisbon, to Messrs. Pablo, Greppi, Marliani & Co., of this place.

"As to your reimbursements, you may draw as follows, to wit : \$80,000 on Don Juan de la Chappeaurouge & Urgulla, of Hamburg ; \$40,000 on John Gore & Co., of London ; \$40,000 on Loria & Co., of Amsterdam ; \$40,000 on A. E. & I. E. Metzueca & Koosen, of Lisbon—\$200,000 ; which sum you will dispose of according to your wants, advising the persons on whom you draw, that it is on account of, and by order of, Messrs. Pablo, Greppi, Marliani & Co. You will take special care to avoid drawing too large a sum at once, and that the bills on those places be at ninety days' sight ; it being always understood, that in case you are able to negotiate upon Spain, you will draw on that country, in preference, on Manella, Pujals & Co., of this place, and at sixty days' sight, and then you will specify whether it is to be paid in cash or in *vales reales*. Although I have already mentioned, that the insurance should be made here, yet you will make that charge in the invoice sent, as though it had been effected by you. I refer you to the verbal communications of the bearer, on this subject, who is sent on purpose to superintend the shipments ; and you will, upon the whole, act for the advantage of the interested, taking care to keep this business a secret, in order to prevent a rise in your market, and its being known that it is for foreigners, but always that it is on your own account as an American citizen.

"You will determine the quality of the tobacco to be shipped, with the said Mr. Menendez. It should be well assorted, very sound and dry, though it does not appear necessary, that it should be all of the best quality.

"In order to avoid every unforeseen accident, in case any of the said houses should not accept the drafts above mentioned, which I do not apprehend, you will point out to the holders, to present them to Messrs. Greppi, Marliani & Co., who will accept and domicil *them with our friends [*419 of the same place, as has been agreed on, and the said Messrs. Greppi have written to this effect, to their correspondents. But we all flatter ourselves, that this case will not occur. I remain, as always, your affectionate friend.

(Signed)

BERNARDO LACOSTA."

This letter was delivered by Menendez, on the 22d of March 1798, to the defendant, who, in pursuance thereof, purchased 1528 hogsheads of tobacco, containing, in the whole, 1,838,393*lbs.* and amounting, exclusive of charges, to the sum of \$180,824.77, and including charges, other than freight, insurance and commissions, to the sum of \$204,077.77. This tobacco was shipped in the following manner.

On the 28th of April 1798, sixty-two hogsheads, amounting, with cost and charges, to \$8846.36, by the Moorish brig Muqueni, regularly docu-

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mented as a Moorish vessel, and navigated by subjects of the emperor of Morocco, shipped for account and risk of the defendant, a citizen of the United States, and consigned to Messrs. Gahn & Co., at Cadiz.

On the 18th of May 1798, 270 hogsheads, amounting to \$27,868.35, by the brig *Minerva*, a Danish vessel, regularly documented as such, navigated by Danish subjects, shipped for account and risk of the defendant, a citizen of the United States, and consigned to Messrs. Pablo, Greppi, Marliani & Co., at Cadiz.

On the 26th of May 1798, 500 hogsheads, amounting to \$60,914.56, by the ship *Polly and Nancy*, an American vessel, regularly documented as such, and navigated by citizens of the United States, shipped for account and risk of the defendant, a citizen of the United States, and consigned to Bernardo Lacosta, at Cadiz.

*On the 10th of July 1798, 100 hogsheads, amounting to \$13,-
*420] 876.48, by the schooner *Felicity*, an American vessel, regularly documented as such, and navigated by American citizens, for account and risk of Don Carlos Longhy, of Genoa, and consigned to Messrs. Gahn & Co., at Cadiz.

On the 23d of July 1798, 117 hogsheads, amounting to \$17,269.77, by the brig *Susanna*, an American vessel, regularly documented, and navigated by citizens of the United States, for account and risk of Don Carlos Longhy, of Genoa, and consigned to Messrs. Pablo, Greppi, Marliani & Co., at Cadiz.

On the 16th of August 1798, 288 hogsheads, amounting to \$43,064.54, by the ship *Henrietta*, an American vessel, regularly documented, and navigated by citizens of the United States, for the account and risk of Don Carlos Longhy, of Genoa, and consigned to Bernardo Lacosta, at Cadiz.

And on the 8th of November 1798, 191 hogsheads by the brig *Fly*, an American vessel, regularly documented, and navigated by citizens of the United States, for account and risk of the defendant, a citizen of the United States, and consigned to Bernardo Lacosta, at Cadiz.

The Moorish brig *Muqueni* was captured by the British, and condemned at Gibraltar, together with her cargo, as enemy's property. The Danish brig *Minerva* was captured by the French, and, together with her cargo, condemned as good prize, by a French consul at Malaga, in Spain. The ship *Henrietta* was captured by the British, and, with her cargo, condemned at Halifax, as enemy's property. The other four vessels arrived safe, and their cargoes were received by the plaintiffs, and applied to their own use and profit. The bills drawn by the defendant, to the amount of \$204,-

*421] 073.72, were duly paid, and the proceeds came to the hands of *the defendant, and were applied to the purchases of the tobacco. The cost and charges of the tobacco, which arrived safe, exceeded the sum to which it would have amounted at \$10 per quintal, by the sum of \$5478.27.

The defendant produced the letters of Menendez, of which the following are translated extracts :

“City of Washington, 28th May 1798.

“Mr. James Barry, Baltimore : Esteemed Sir : By your favor of 27th inst., I am informed relative to the purchases of tobacco, and the affreightments entered into for its shipment, all of which you have executed with that zeal and efficacy which you are accustomed to, and I therefore approve of the exact-

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itude of your operations. At same time, I flatter myself that you will continue successively with equal activity, until the total compliance of 20,000 quintals ordered ; and you may rest assured, as to my particular errand, that the payments shall be realized in London."

" Washington, 29th May 1798.

" Under date of yesterday, I wrote you a letter, approving of all your operations relative to the tobacco purchases, and affreightment for its shipment. The contents thereof I now confirm, you having done everything to my entire satisfaction, and as I would have expected from your exactitude and zeal. On the score of placing the funds in London, you may rest satisfied, because you well know that this is the principal object which has compelled me to go to Spain. I hope that in the next order, we shall be able to effect the purchases to more advantage, and with less trouble."

*"Capes of Virginia, on board the ship Polly [*422
and Nancy, 14th June 1798.

" Dear Friend—The 4th instant, we sailed from Alexandria, and ever since have we been in the river, detained by calms and contrary winds, which has made me very impatient. By the last accounts which I have observed in the newspapers, I am persuaded, that war is as much as declared between the United States and France. This novelty troubles me much, for which reason, if it be agreeable to you, and equally convenient, to have the future shipments made on Danish or Swedish flags, and in the name of Charles Longhy, of Genoa, you acting as his agent, you may do it so, by declaring in the bills of lading and invoices, that the cargoes are for the account and risk of said Longhy, and by giving letters to the said captains for Messrs. Greppi, Lacosta, or Gahn, of Cadiz, of the following tenor :

"Gentlemen : In virtue of orders I have received from Mr. Charles Longhy, of Genoa, to remit him a cargo of tobacco, on his proper account and risk, I have loaded in the ship —, captain — [so many] hogsheads of tobacco, and I have given orders to said captain to touch at your port (if not blockaded) and to call upon you with a view to get permission from your government to sell a parcel ; should the captain succeed in entering your port, and that you can obtain leave to dispose of the whole or part of his cargo, you will please to do so, for the best advantage of the said Mr. Longhy, remitting him the proceeds to Genoa. And in case that you cannot obtain a sale, you will please to direct the captain to proceed on to the said port of Genoa, supplying him with the means therefor, &c.

" In this way, it will be proper for you to charge your commission in the invoice. I contemplate that by making the further shipments in this mode, the property will go with more security, said Longhy being a neutral subject ; and should the vessel be met by French cruisers, *the cargoes [*423
would go secure, as the property would not appear to be American. I also believe, that nothing of this would affect the insurances ; and at all events, it is best, because the insurances will be done on neutral ships and neutral property, so that the property also sounds as neutral. Should you, since my departure from Baltimore, have chartered any American vessel, you can make the shipment in the same way ; because, in case a French cruiser should capture the vessel, the cargo may be saved, on account of its not appearing to be American property ; so that the only thing subject to

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condemnation, in that case, will be the vessel and her freight ; whereas, if the property goes in your name, both vessel and cargo will be condemned, if under American colors ; but, if on a Danish or Swedish vessel, then the cargo only would be condemned. Therefore, whenever you can meet a Danish or Swedish vessel, and by making the shipment as for account of Longhy, the neutral subject, there can be no risk. Therefore, it appears to me very proper and consistent, in order to obviate these risks, in every case, that the further shipments do not sound in your name, but in that of said Longhy ; or if not, in that of Messrs. Ghan & Co., of Cadiz, or of Mr. Gould, your brother-in-law, provided the French and the Portuguese come to a good understanding, which I am informed is the case, and that matters have been accommodated between them.

"Finally, you know, better than I do, the critical circumstances of the day, and for this reason, I am satisfied, you will be attentive in making choice of the mode which may be best calculated to save any shipment you may make. I can only say, that of this vessel, I have much fear and apprehension, notwithstanding she sails fast.

"In case you should act conformably to what I have here mentioned, as to further shipments, I, from this moment approve thereof ; and that it may appear, and to save you from any accident that may occur, as also to prove that such has been with my knowledge and approbation, you are to keep this letter in your possession, in order that at no time whatever you should be chargeable with the consequences.

*424] *"You will encharge the captains to wait the opportunity of a fresh N. W. wind, in order the sooner to get clear of the coast, and the danger of cruisers, the same we had in view. You will also direct them to make for the first port of Spain, be it which it may, as the great object is, to save the cargoes."

This letter was received by the defendant, before the shipment by the Henrietta was made.

On the same 14th of June 1798, Menendez wrote a letter also to Robert Barry, the nephew, and principal clerk and assistant of the defendant in his business, of which the following are translated extracts :

"By what I wrote your uncle, under this same date, you will be informed of all that I have recommended. In addition to which, I shall mention to you, that you will perceive in the copy of the private instructions, what I am directed to do, on the score of the tobacco shipments, and you will see, in one article thereof, that I am expressly ordered to make the shipments in neutral vessels, and that the property shall appear as that of the neutral subject. In the present day, it may be said, that war is declared between these states and the French republic ; for which reason, we may view the thing in a different light.

"When you make up the general invoice, you will recollect to charge in that which you are to forward to Bernardo Lacosta, two and a half dollars per quintal of tobacco, over and above the real costs and charges, adding a note to the bottom thereof, that you do not charge insurance, nor loss on the reimbursements, such being to be done in Europe, and that you do not know to what amount they may ascend. The general invoice containing the real costs and charges you will remit to Mr. Joseph Anthony de Sola, adminis-

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trator-general of the king's tobacco stores, at Cadiz, or directed in my name, which letter for me will always come to the hands of said Sola. You already know, that the other fictitious invoice is intended to be exhibited at Madrid, but that no other person shall know anything of the other that is to contain the real cost and charges, by which only we the concerned *are to be governed. The invoice you are to remit to Bernardo Lacosta, in [*425 which the two and a half dollars per quintal is to be overcharged, is also to be delivered to Joseph Anthony de Sola, which you will remind him of."

This last letter was received by Robert Barry, within a few days after its date, and before the shipment by the Henrietta, and was by him delivered to the defendant.

It was also proved, that Menendez, on his first arrival at Baltimore, declared to the defendant that he had private instructions, not contained or specified in the said letter of the 27th of January 1798; and that those private instructions authorized, among other things, a shipment of the tobacco to be purchased, in neutral vessels, generally, without confining the same to American vessels. That Robert Barry saw in the possession of Menendez, soon after his arrival in Baltimore, a written paper in the Spanish language, purporting, and declared by Menendez to be a paper containing such private instructions. That Menendez read a part of them to Robert Barry, who looked at the paper at the same time, and saw that he read correctly, and that what he read was of the purport aforesaid.

That at the time of taking up the Moorish brig and Danish barque, the defendant found it impossible to procure suitable American vessels. That Menendez knew of, and approved, the shipments in the Moorish brig and Danish barque, at the time they were made. That the defendant constantly communicated with Menendez, during his stay in Baltimore, on the subject of the said purchases and shipments, and therein acted with his entire approbation and concurrence. That Menendez urged the necessity of making the shipments of the tobacco speedily, even if the price should be greater than \$10 per quintal, calculating, as he said, that if the tobacco should arrive in Spain at \$15, the concern would clear \$100,000, and that for his share or interest therein, which was one-tenth, he should clear \$10,000. That the aggregate of all the purchases of tobacco, excluding insurance, freight and commissions, *did not exceed \$10.50 per quintal, and that Menendez approved the prices at which they were made. That Danish and [*426 Moorish vessels were neutral vessels, and that the tobacco was really shipped for the actual account and risk of the plaintiffs.

Whereupon, says the first bill of exceptions, "the plaintiffs, by their counsel, offered to swear a witness, to prove to the jury, that the said paper, at first read in evidence to the jury by them, as a true translation of the said letter of the 27th of January 1798, is not a correct translation of the said letter, in that part of it which is contained in the following words, '*para presentiar la expedicion,*' and that the true construction of the said words is, 'to be present at, or assist in, the shipments,' and not 'to superintend the shipments,' as in the said paper is stated; to the swearing which witness, for the purpose aforesaid, the defendant, by his counsel, consented, but the court would not admit such evidence to be given to the jury, on the trial of such

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issue, to determine the true import and legal construction of the said words." To which opinion, the counsel for the plaintiffs excepted.

The second bill of exceptions began as follows: "And upon the foregoing statement, prefixed to the first bill of exceptions in this case, the plaintiffs, by their counsel, prayed the directions of the court, that if the jury believed the matters so offered and given in evidence by the plaintiffs, then the plaintiffs are entitled to recover, in their action, the amount of the price, costs and charges of the tobacco, shipped as aforesaid on board" the Moorish brig *Muqueni*, the Danish brig *Minerva*, and the American ship *Henrietta*, and also the sum of \$5478.27, being the excess in the price, costs and charges of the four cargoes shipped by the defendant, and received by the plaintiffs as aforesaid, over and above the price limited by the letter of the 27th of January 1798. "But the court were of opinion, and did direct the jury, that by that letter, the defendant was authorized to make the shipments of tobacco on board of other than American vessels, or *vessels belonging

*427] to citizens of the United States, agreeable to the laws thereof, and that the shipment of the tobacco in the Moorish and Danish vessels, as stated in this bill of exceptions (the said vessels being admitted to be neutral vessels as aforesaid), was not in violation of the instructions in the said letter, and that the plaintiffs have not sustained the present action for the recovery of damages for such shipments on the said Danish and Moorish vessels, against the said defendant. And the court were also of opinion, and did accordingly direct the jury, that by the said letter of instructions, the defendant was authorized to make the shipment of tobacco in the ship *Henrietta*, as above stated in this bill of exceptions, and to consign the said tobacco for the account and risk of the said Don Carlos Longhy, as stated in the said bill of exceptions. And the court were also of opinion, and did direct the jury, that if the defendant had not such discretion, by the said letter, yet if the jury believed, that the said several shipments of tobacco, on board the said Moorish and Danish vessels, and the said American ship *Henrietta*, were made as herein before stated, by the direction, and with the approbation of the said Menendez, or were afterwards ratified by him, as agent of the plaintiffs, as herein before stated, the plaintiffs have not sustained their present action for the recovery of damages for such shipments. And the court were of opinion, and directed the jury, that the evidence was sufficient in law to establish that the said shipments were made by the direction of the said Menendez, as agent of the plaintiffs, and were also ratified and confirmed by him, as agent as aforesaid. And the court were also of opinion, and directed the jury, that the price of \$10.50 for each quintal of tobacco, limited by the said letter of the 27th of January 1798, for the purchase of tobacco by the defendant, was the price that the defendant might give in America, exclusive of charges of every kind, and that as the price of the said tobacco, shipped by the defendant, did not average so much as \$10.50 per quintal, the plaintiffs have not sustained the present action to recover damages for the excess of price given, including charges." To which several opinions, the plaintiffs excepted.

*The verdict and judgment were for the defendant, and the plaintiffs brought their writ of error into this court.

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Harper, for the plaintiffs in error, observed, that the duty which he was

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now called upon to perform, was more painful than any which had occurred in the course of his professional practice. He was called upon to urge a claim against an honorable and respectable man, to the amount, perhaps, of his whole fortune. A claim founded upon no charge of dishonorable conduct or intentional injury, but upon an excess of authority in undertaking to judge for the plaintiffs, where the plaintiffs meant to judge for themselves. A loss has happened, and the question is, upon whom shall it fall? If the defendant has violated his instructions, though with the purest intention, he has taken the responsibility upon himself.

The first point made in the court below was, that the jury, and not the court, was to ascertain the true translation of the Spanish instructions. The question, what ideas a man meant to convey, is a question of fact, to be decided by a jury. But what is their legal effect, is matter of law. To enable the jury to say what ideas are, by the custom or usage of a nation, annexed to certain words or phrases, they must inquire by witnesses.

But this is a question not material to the merits of this case, and admitting, for the sake of argument, that the court was the proper tribunal to translate the instructions, two questions will arise: 1. Whether the defendant has deviated from the strict letter and prohibition of his instructions? and 2. Whether, if he has, he was justified by any authority contained in the letter of Lacosta, or by the orders and assent of Menendez?

*1. He has deviated from the letter of his instructions, in shipping [*429 the tobacco in Danish and Moorish vessels, which could not be commanded by American masters. The words of the instructions are, "you will take care to seek captains of fidelity, American born, and that all the crews be strictly agreeable to law;" evidently contemplating none but American vessels, and the obvious reason was to guard against British captures. For this purpose, it was believed, that the property would be safer in American, than in foreign ships. American produce, in foreign vessels, would be considered *prima facie* by the British as enemy's goods.

2. In the case of the Henrietta, he violated his instructions, by not shipping the tobacco for his own account and risk, but for that of Longhy, of Genoa. That the property should be shipped in his own name, as a citizen of the United States, is the alpha and omega of the instructions. It is true, that we were in a state of limited hostility with France. But it being, in fact, Spanish property, and Spain being the ally of France, there was no danger of French condemnation. At that time, too, Great Britain hoped and expected that the United States would have joined her in the war. There was less probability, therefore, that she would commit depredations upon American property, than upon that of any other nation. That Genoa was either a province of France, or a very humble and submissive ally. To ship the property, therefore, as that of a Genoese, was to place it in the most dangerous situation possible as to British cruisers. This was done, no doubt, with good intentions, but with a weakness of judgment, truly astonishing, and in direct violation of instructions.

2. The 2d question is, was he justified by any part of the letter in substituting his own judgment for that of his principals, in opposition to the positive injunctions of his instructions? He was to exercise his judgment only in cases not provided for by those instructions; but where they were

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precise and positive, he had no discretion. The great object of the whole letter *was, that the property should not appear to belong to a foreigner. Language is useless, if it is not to be regarded. No man can be safe in commerce, if his orders are not to be obeyed: all confidence will be destroyed, and commerce must cease. The general expression of the letter cannot be supposed to revoke all the specific orders, and give unlimited powers. For what purpose were those specific orders given, if a general and unlimited authority was conferred? The general expressions mean no more than this: we depend upon your fidelity and judgment in executing our orders. All the parts of the letter are to be taken together, so as to give effect to the whole. He has not pursued his instructions with respect to the price. *Expressio unius est exclusio alterius*. By naming a price, they must be understood as restricting the defendant to that limit.

The defendant, then, is not justified by anything in the letter itself. Is he justified by the authority of Menendez? It is not proved, that Menendez was an agent; or that, if he was, he had any power to dispense with the precise instructions contained in the letter of 27th of January. His declarations are not evidence, unless he is first proved to be an agent. It does not appear, what authority he had. His private instructions might be very limited. It is not to be presumed, that he had authority to vary the particular instructions contained in the letter. If he had, can it be believed, that the defendant did not require him to produce them? He knew that he was about to act contrary to his instructions, and that he was taking a great responsibility upon himself. He ought to have taken a copy. The burden of proof lies on him.

But why not produce the testimony of Menendez? The cause has been pending five years in the court below. [It was answered, that he had gone to Spain; that a commission had been sent there, but the commissioners refused to act, or the witness kept out of the way.] Does the letter itself show such an authority *vested in Menendez? It calls him agent, and refers *431] the defendant to his verbal communications. But how agent? for what purpose? To see that their orders were duly executed; and to make verbal communications not inconsistent with written orders. If agent, will that convert the letter into a set of hints instead of instructions? If he was their general agent, with full powers, why write particular instructions to the defendant? The agent would have kept the instructions in his pocket. They would have been written to him, and not to the defendant.

But how was he agent? 1st. As to the price; 2d. To superintend the shipments, within the limits of the instructions; 3d. To select tobacco of the proper quality to suit the Spanish market. His duty and authority were like those of a supercargo. He was an agent, even if he had only a particular authority. In order to constitute an agent, it is not necessary that he should have general powers. If his powers are not to be considered as restricted, we must violate that rule of construction which would give effect to the whole instrument, if possible. "*Para presentiar la expedicion*." The word *expedicion* means shipment, not the whole enterprise. He was to communicate with the defendant, as to the whole enterprise, but not to control it. But supposing the expression to mean, that Menendez was to superintend the enterprise, it can only mean that he should see that the enterprise was conducted according to the instructions, and not that he should sanction

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a violation of them. It was to see that they should be fulfilled, not disobeyed. But the phrase *para presentiar*, does not mean "to superintend;" it only means that he should assist. It is translated into the French language by the word *assister*, to be present at, to partake of. But if we take the English meaning of the word assist, the question occurs, how assist? Certainly, according to the instructions. The very next sentence in the letter contradicts the idea of a general agency. The words are, "and you" (in the singular number) "will, upon the whole, act for the advantage of the interested." The discretion, if any, was given to the defendant himself, and not to Menendez. *He was only to be consulted and advised with. [*432 In any point of view in which it can be placed, it does not justify the idea, that a power was given to control the orders to give the property an American character.

W. Pinckney and Martin, contra.—The points of this case are few, and float upon the surface. They depend upon the construction of the orders, and the authority of Menendez. Menendez was not the casual bearer of the letter of instructions to the defendant, but sent on purpose; his sole business was to superintend this transaction. The defendant agreed to undertake the business; he entered upon his duty, and endeavored to discharge it with fidelity. This action is, therefore, grounded on the ungracious idea, that in performing his duty to the best of his judgment, he has erred. The defendant is not charged with fraud or intentional injury. It is, therefore, an action *stricti juris*.

When the nature of this transaction is considered, the fraud meditated upon the Spanish government by the double sets of invoices, and the neutral cover attempted for the property, the plaintiffs come with an ill grace into a court of justice, to charge a loss upon the defendant, for a mere error of judgment, while acting with honor and fidelity, and exercising his discretion for their advantage, to the best of his ability.

If there was any ambiguity in the letter, it was the fault of the plaintiffs; and to take advantage of it now, would be fraudulent. If that ambiguity was intended, it would be base and dishonorable. The plaintiffs ought to have explained themselves. The defendant, at 3000 miles distance, could not consult them, and he cannot be chargeable for an error, if any, upon a point of the instructions in itself ambiguous. *Verba fortius accipiuntur contra proferentem.*

The demand consists of three items; *1. The excess of price beyond that limited by the instructions. 2. The price of the cargoes [*433 shipped in the Moorish and Danish vessels. 3. The cargo of the Henrietta, not shipped in the defendant's own name, but in that of Don Carlos Longhy, of Genoa.

1. We had supposed, that the question of price had been abandoned. We contend, that the price limited, meant clear of all charges, subsequent to the purchase in this country. The limitation was to guide the defendant in his purchases; but he could not say, at the time of purchase, what charges might arise upon it, before it would be in his power to ship it. We contend also, that it meant the average of the whole, and not of any particular parcel.

2. The demand for the cargoes shipped in the Moorish and Danish ves-

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sels, rests on the allegation that the defendant was bound by his instructions to employ American vessels only. The only word in the instructions relative to this point, has been misinterpreted by the counsel for the plaintiffs. He has supposed that the orders were to find "captains of fidelity, American born." But the letter only directs him to "seek" such, but he was not bound to find them. The bill of exceptions shows that he sought for American vessels, but they could not be found. It is on the letter, not on the spirit of the instructions, that the plaintiffs will put their case.

The defendant was bound to prevent delay; if he could not find American captains of the description mentioned, he was not justified in waiting. The only condition was, that the shipment should not be made in less than *434] six vessels. In no other part of the letter are the *vessels designated; yet there is another part, where it might have been expected. The simulated insurance was to be made in America, the real in Europe. The conditions of the real insurance are stated; but it is not one of them, that the property should be shipped in American vessels. There was no necessity to discriminate between American and other neutral vessels. The policy of Great Britain was to conciliate all neutral nations, particularly the northern. And having never given up the principle upon which American as well as British naval greatness depends, the right to take belligerent property out of neutral ships, she would search for it as strictly in American, as in Danish or Moorish vessels. But our vessels were not absolutely neutral as to France. Our flag was suspected of covering enemy-goods by one party, and was the object of plunder, if not of hostility, to the other. There was no reason, therefore, for preferring our vessels. The insurance would be made upon property in neutral vessels generally.

But it is said, that it would be a suspicious circumstance, that American property should be shipped in any other than American vessels. This is by no means a strong argument; because our tonnage is not always sufficient for our commerce.

3. As to the shipment by the *Henrietta*. Was it justified, either by the instructions or by the authority of Menendez. The great object of the instructions was to cover the property as neutral. The defendant was bound to keep this constantly in view. When, therefore, in August 1798, America had ceased to be neutral, he was not only not bound to ship the tobacco in his own name, but would have been liable to an action, if he had. The reason of shipping it in his own name had ceased: he was no longer an unsuspected neutral, but a belligerent. Affairs with France had come to a crisis: actual hostilities had commenced: the state of things was materially *435] changed. What was he to do? He could not consult *his principal. If, in such circumstances, he acted with good faith, and according to his best judgment, pursued the spirit of his instructions, they who would subject him to an action ought to blush.

It would be strange, indeed, if he should not, in such a case, have some discretion. Every agent must, in the nature of things, have a discretion to vary from the precise letter of his instructions, to carry into effect their general intent. But he has this discretion in express terms: "You will, upon the whole, act for the advantage of the interested." We do not contend for an unlimited discretion. We admit, that it is limited by the general scope and spirit of the instructions. If he had given a belligerent

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character to the property, then, indeed, he would have been liable. The injunction to keep the business secret, was only "to prevent a rise in" the American "market." It applied only to the transactions in this country. Let us then see how the defendant conducted himself in this unforeseen state of things. As he could not consult his principals, he took the advice of Menendez, their acknowledged agent, who had come for the sole purpose of superintending this expedition, who the plaintiffs said in their letter would communicate verbally with the defendant upon that subject, who was the bearer of the particular instructions to the defendant, and who alleged that he had private instructions from the plaintiffs, and authority to give the orders which he gave.

If the letter to the defendant was ambiguous, who so capable of explaining its meaning as Menendez, the confidential agent of the plaintiffs? Their letter to the defendant, by Menendez, was a letter of credit and confidence. The defendant was bound to place confidence in the representations of Menendez. If he exceeded his authority, they, and not the defendant, must suffer. How could the defendant know, when he was imposed upon by Menendez? What reason had the defendant to doubt the truth of his verbal communications, when the plaintiffs themselves had referred him to those verbal communications? He had no cause of suspicion; the advice of Menendez was reasonable, it was judicious, *and consistent with the gen- [436
eral scope of the enterprise. If the law will not protect a man acting honorably, under such instructions, and in such circumstances, the law is a system of fraud.

Don Carlos Longhy, of Genoa, was the person pointed out by the plaintiffs themselves, as the person to whom the tobacco should be ostensibly consigned, in a certain event. He was, therefore, a person in whom the plaintiffs could place confidence. He was a neutral, while the defendant was not. When Menendez ordered the shipment to be made in his name, the defendant had no cause to suspect that he exceeded his authority. But if he did exceed his authority, who ought to suffer? The plaintiffs, who placed their confidence in him, or the defendant, who was required by the plaintiffs to give him credit?

But we are asked, why have we not examined Menendez as a witness? We answer, that a commission has been sent to Spain for that purpose; the commissioners have refused to act, and have sent back the commission. But the question may be retorted upon the plaintiffs. Why have they not examined Menendez? Nay, why have they not brought their action against him? If any injury has been done, he is the author of it. He directed, and he approved all the acts of the defendant.

But the plaintiffs themselves have affirmed the very conduct of the defendant of which they complain. The two shipments by the *Felicity*, and the *Susanna*, were made in the same manner as that by the *Henrietta*, and were received by the plaintiffs. By what rule can they affirm his conduct, when it turns out for their benefit, and disaffirm the like conduct, when a loss has happened?

P. B. Key, in reply.—We admit, that words are to be construed most strongly against him who uses them, and that where ambiguity exists, the construction will be against him who ought to have explained himself. But

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the question is, whether any ambiguity exists? whether this is not a clear limited agency? The defendant *was limited as to the subject, the *437] price, the consignment, the name of the shipper, the vessels, the captains, and the crew; there was nothing left but a discretion bounded by these limitations: and the authority of Menendez did not exceed that of the defendant. They had either a general discretionary power, or they were limited by the letter of their instructions. If they had a general discretion, why give special and precise instructions?

It is plain, that no vessels were contemplated by the plaintiffs but American vessels. We do not contend, that the strict letter of the instructions directs the defendant to find captains, American born, but we say that such is the spirit and meaning of the instructions. That the whole transaction, from beginning to end, was to bear the appearance and stamp of the American character. But how unnatural must it appear, to see an American cargo shipped on board a Moorish vessel. This circumstance is so singular, as in itself to be a strong ground of suspicion, especially, as our vessels are seeking for employment in every part of the world.

But in the case of the Henrietta, the very letter, as well as spirit, of the instructions, has been violated. The instructions are precise and positive, that the defendant should ship the tobacco for his own account and risk. To justify a departure from these positive orders, it is incumbent on the defendant to show a clear authority in Menendez to dispense with them. No such authority has been proved, and none can be presumed. The specific instructions contradict such a presumption. For why give the defendant special orders, if the whole general agency was in Menendez? Or why were they sent to the defendant, if he was not to be bound by them? The fair presumption is, that the verbal communications referred to, were to be only a further detail of the same plan, and not a general dispensation from the orders already given.

*The general expression which is relied on, that the defendant *438] should, "upon the whole, act for the advantage of the interested," is, in the same breath, qualified by the directions to keep it secret, that the business was on account of foreigners, and by the positive injunction that it should always appear to be on his own account as an American citizen. This is in perfect conformity to the request in the beginning of the letter, "you will view this measure as your own," and shows most clearly their determination to risk their property under an American cover only. The same limitation also applies to the reference which the plaintiffs make to the verbal communications of Menendez; it is included in the same sentence, and is evidently intended to apply as well to those verbal communications, as to the general power to act for the advantage of the concerned. The defendant, therefore, had no right to presume that Menendez had authority to alter the principal character of the risk, and to compel the plaintiffs to accept a Genoese, instead of an American cover.

The defendant derived no sanction to his conduct from the plaintiffs' receiving the cargoes of the Felicity and the Susanna; that circumstance was unknown to the defendant, at the time of the shipment by the Henrietta.

The limitation of price meant to include all the costs and charges in America. The words are, "it will not answer them at more than ten dol-

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lars per quintal, in America." The costs and charges in America make part of its price in America. It is no argument to say, that the defendant could not regulate his purchases, if the price, including those charges, was to be limited, because those charges were uncertain. The usual and customary charges were well known to the defendant, and he was bound to calculate his purchases accordingly. If, indeed, any accidental and unusual charge had been necessarily incurred, this would have been properly chargeable to the plaintiffs, but the letter evidently meant that the tobacco should *not amount to more than \$10 a quintal, including customary [*439 charges.

Upon the whole, then, we contend, that the defendant has violated not only the letter, but the spirit of his instructions, and that he was not justified by the authority of Menendez.

February 26th, 1806. MARSHALL, Ch. J., delivered the opinion of the court.—The court has endeavored to bestow on this cause the attention to which it is alike entitled, by its own importance, by the situation of one of the parties, who is a stranger to our language and our laws, and by the ability and zeal with which it has been argued at the bar.

The action claims from the defendant the value of three cargoes of tobacco, purchased by him as the agent of the plaintiffs, which were captured on a voyage to Europe, and condemned as prize. The foundation of the claim is, that he deviated from the instructions which were given for the government of his conduct, and is, therefore, liable for the loss which has been sustained.

That an agent is bound to pursue the orders of his principals, and is answerable for any injury consequent on his departing from them, however fair may have been his motives for such departure, is a plain principle of law, which has not been drawn into question; and the only inquiry in this case is, has the defendant obeyed or deviated from his instructions? The circuit court was of opinion, that they sanctioned his conduct, and it is the propriety of that opinion, which is now to be reviewed in this court.

It depends on the true construction of the letter of the 27th of January 1798, written by Bernardo Lacosta, on behalf of the plaintiffs, of which Juan Alonzo Menendez Conde was the bearer, and on the testimony which is stated in the bills of exceptions. *This letter introduces Menendez as the agent of the plaintiffs, who were principally concerned in the importation of tobacco into Spain, and declares a confidence that the defendant will embrace the business as his own, and execute it with his wonted attention. [*440

After some general observations, which relate to the proposed transaction, and which seem to be founded on the idea that the defendant and Menendez are to be associated in the business, the letter becomes more definite. The writer says, "with this, the said Mr. Menendez takes an order for 20,000 quintals (of tobacco) to be shipped for this place, in seven or eight vessels, and in not less than six, under which condition the insurance will be made here. You will take care to seek captains of fidelity, American born, and that all the crews conform to the most rigorous ordinances. For greater clearness the shipments (*las expediciones*) will be made according to the following formalities: 1st. You will lade the vessels in your own name, stating that they are on your own account and risk, as an American citizen, and consign them,"

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&c. This instruction is followed by ten others, which seem principally designed to conceal the real character of the cargoes, and to facilitate their escape from cruisers. At the close of these instructions, the following words are added: "I refer you to that which the bearer will communicate to you verbally, respecting this business, who is sent on purpose to superintend the shipment (*va solo para presenciar la expedicion*), and you will, upon the whole, act for the advantage of the interested, taking care to keep this business a secret, in order to prevent a rise in your market, and its being known that it is for foreigners, but always that it is on your own account as an American citizen."

In the execution of this commission, the defendant shipped two cargoes, the one on board a Danish and the other on board a Moorish vessel, each of which was captured and condemned as prize, the one by the French, and *441] the other by the English. *These shipments were made with the full approbation of Menendez, and it is in proof, that American vessels were not, at the time, to be procured.

Before the order was completed, the government of the United States adopted such measures, for repelling the hostile aggressions of France, as to justify an opinion, that open and declared war between the two nations would soon take place. Under the impression of these measures, Mr. Menendez considered the American name as no longer affording a neutral character to the cargo, and directed it to be shipped on account and risk of Charles Longhy, of Genoa, who was a correspondent of the plaintiffs. These instructions were complied with.

The tobacco, so shipped, which came safe, was received without complaint; but a large quantity, shipped in the Henrietta, was captured by a British cruiser, carried into Halifax, and there condemned as prize. For the price of these three cargoes, this action is brought. The inquiry respecting the two first, will rest both on the instructions given to the defendant, and on the power of Menendez: that respecting the last, rests solely on the power of Menendez.

It is alleged, that the orders under which the defendant acted, enjoined him to employ only American vessels, and that in employing those of other neutral powers, he violated these orders. But there is certainly not one syllable in the letter, which contains any instruction to the defendant, relative to the employment of vessels, or which confines the transportation of the tobacco to be purchased to American vessels. The court thinks it a fair construction of the letter, that full powers, in this respect, were confided to Menendez, and that Barry might counsel with him, but was to comply with his directions. Menendez is declared to be the agent of the plaintiffs, and the full extent of this term is not limited in any part of the letter. He brings with him an order for 20,000 quintals, to be shipped in six, seven or eight vessels, under which condition the insurance is to be made in Spain.

*442] *These are not instructions to Barry; they are communications to him of the instructions given to Menendez, so far as was necessary for his understanding the views of the plaintiffs, and facilitating those views, under the authority of Menendez. The order, of which Menendez was the bearer, was for himself; and the degree of aid expected from Barry, is described in the letter. Barry might have been unable, or unwilling, to undertake the business. In any event of that kind, the enterprise was not, cer-

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tainly, at an end ; but Menendez might obtain other assistance. From the nature of the case, therefore, as well as from the expression of the letter, the order was in the possession and power of Menendez, the agent, to whom directions relative to the shipment of the tobacco, in a certain number of vessels, had been given, and who is declared to have been sent to America, for the purpose of superintending those shipments. Having made this explanation of the business confided to Menendez, the letter adds, "you will take care to seek captains of fidelity, American born," &c. Those inquiries, Barry, an American merchant, could make much more successfully than Menendez, a foreigner, and therefore, was directed to make them. But respecting the character of the vessel to be employed, no agency, on the part of Barry, was necessary, further than to comply with such directions as he might receive, and no directions respecting the vessels to be employed were given him, because those directions were given to Menendez. The instructions to Barry, to seek for American captains, are founded, not upon instructions to employ American vessels, which were given to him, for none such were given, but upon the instructions which were given to Menendez. They are founded on the idea, that American vessels would be employed ; but as circumstances might render the employment of them ineligible, it was reasonable to suppose that some discretion would be allowed to Menendez in this respect ; accordingly, the private instructions, as stated in the bill of exceptions, only directed him to employ neutral vessels.

The idea that the power on this subject was completely in Menendez, and not in Barry, is confirmed, by observing, that in the extended and minute rules, which are, for greater clearness, laid down for his government respecting the transportation of the tobacco, not one syllable ^{is said con-} [443] concerning the character of the vessels in which it was to be shipped, a direction which would certainly not have been omitted, had the subject not been confided to the general agent. It is also apparent, from the letters in the bill of exceptions, that the subject was so understood by both Menendez and Barry. When to these circumstances, it is added, that American vessels were sought for at the time, and could not be obtained, it seems to the court perfectly clear, that with respect to the tobacco shipped in the Moorish and Danish vessels, the conduct of the defendant, being sanctioned by Menendez, was free from all exception.

The claim for the cargo of the *Henrietta* stands on stronger ground, because the defendant was explicitly instructed to lade the vessels in his own name, stating that the cargoes were shipped on his own account and risk. On this part of the case, the defendant must seek for a justification in the full powers of Menendez, to vary the orders given to him. These orders have been said to be free from all obscurity, and in themselves, they unquestionably are so. Barry could not have doubted the positiveness of his instructions, to ship the tobacco as his own property. The defence he sets up is, that he was justified in conforming to the directions of Menendez, varying those instructions.

An examination of this defense leads to a still more critical investigation of the letter of the 27th of January. It has been already observed, that Menendez is stated in the letter, introducing him to Barry, to be the agent of the plaintiffs, and the bearer of their orders for the tobacco, which was to be purchased. As it was not unreasonable to expect, that a person,

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crossing the Atlantic in this character, would have some discretionary power to change instructions, with a change in circumstances, so as to be enabled to adapt his conduct to those circumstances, ready faith would be given to all expressions which would convey this idea; and if no such power was intended, no expressions ought to have been used, which could excite and cherish the idea.

The rules stated to Mr. Barry, as those by which his conduct would be *444] governed, are declared to relate to the *part he was expected to take in the "*expedicion*," which the court translate transportation, or conveyance, of the tobacco to Europe. One of these being, that the tobacco was to be shipped in his own name, it follows, that this part of the subject was included in the Spanish term "*expedicion*." All these rules conclude with a reference to verbal communications, to be made by the agent himself, who is expressly declared to go to the United States, for the sole purpose of attending to this very part of the transaction, "*va solo para presenciar la expedicion*." This reference to the verbal communications of Menendez, unqualified by any restriction whatever, is a declaration of complete confidence, placed, at least, in his veracity, by the plaintiffs, and is a full authority given by them to Barry, to credit the representations which he should make. How else is it to be understood? What right could Barry have to say to those who had referred him to the verbal communications which their agents should make to him on a particular subject, that he did not believe those communications?

It is argued, that although no limitation is expressed to the credit which Barry was to give to the representations of Menendez, yet it must be necessarily understood, that he could not change those things which were expressly directed; that the verbal communications referred to, were to be conformable to, not subversive of, the written instructions; that on the idea of a power to alter the written instructions, it was useless to give them, and was only necessary to send out Menendez with a full authority to govern the whole transaction.

But in the course of human affairs, it is not unusual, for a principal to give, in detail, his ideas of the line of conduct to be observed by his agent, and yet to allow a departure from that line of conduct, under particular circumstances. It would not have been extraordinary, had these rules for the conduct of Barry, been followed by a declaration, that, in a total change of circumstances, as in the event of America's becoming a belligerent, he was to ship the tobacco, not as American, but as neutral property. Had Barry been the sole agent, this right to exercise his discretion, if intended *445] to be placed in him, would have *been mentioned in his letter. But Barry was neither the sole nor the principal agent. He was known to the plaintiffs only by recommendation, and while he was employed, because an American merchant could make the proposed purchases to greater advantage, and because an American name was required to cover the property, Menendez was the confidential agent, known to and trusted by the plaintiffs, who brought with him the order for the purchases, and came on purpose to attend to the conveyance of the tobacco to Europe. In the instructions to Menendez, therefore, would any discretion relative to the transportation of the tobacco be found, and it was enough, that Barry was referred to his verbal communications.

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The words which follow the reference to the verbal communications of Menendez, though not those which decide the opinion of the court, are not absolutely unimportant: they are, "and you will, upon the whole, act for the advantage of the parties interested." To what do these words, "upon the whole," refer? Unquestionably, to the verbal communications as well as to the written instructions. They were both to regulate the conduct of the defendant.

The caution which follows those words, is understood by the counsel for the plaintiffs, to limit their extent, and to direct, that in acting for the advantage of the interested, he was yet to keep secret that the tobacco belonged to foreigners. There is, unquestionably, great force in this observation: and if the justification of Barry rested solely on the power given him in this clause, to act for the best, it would be doubtful, how far it would avail him. The court, however, considers those words principally applying to the purchases, and as indicative of an expectation that a state of things would remain, in which the tobacco was to retain the character of American property, rather than as limiting the powers of Menendez over this part of the subject, in the event of such revolution as would make America a belligerent. The court forbears to make a critical examination of the words, because its opinion is formed on the character in which Menendez came to America, as stated in the letter introducing him to Barry. That letter warranted the belief that he was the principal *and confidential [446 agent of the plaintiffs; that he had particular instructions for the government of his conduct, and that Barry was to receive and trust his verbal communications, especially, on the subject of expediting the tobacco to Spain.

It is impossible to read the letters from Menendez to Barry, which form a part of the bill of exceptions, without feeling a conviction that this was the understanding of the parties. He approves the conduct of the defendant, in the style of a man whose approbation gave a sanction to it, and when he directs the shipments to be made in the name of Charles Longhy, of Genoa, he says, "if you act conformably to what I have here mentioned, as to further shipments, I, from this moment, approve thereof, and that it may appear, and to save you from any accident that may occur, as also, that such has been with my knowledge and approbation, you are to keep this letter in your possession, in order, that at no time whatever, you should be chargeable with the consequences." Such was the opinion which the confidential agent of the plaintiffs, in possession of their private instructions, entertained of his own powers.

He was not mistaken in their extent; at least, the defendant had no right to believe him mistaken. On his arrival, he declared to Barry, that he was in possession of private instructions, distinct from those which were contained in the letter of the 27th of January. He produced those instructions. The chief clerk of Barry read so much of them as related to vessels; and they did not require that the shipments should be made in American, but in neutral vessels; and in the letter of Menendez to the chief clerk, dated on the 14th June, and accompanying that of the same date addressed to the defendant, directing him to ship the tobacco as the property of Charles Longhy, of Genoa, he says, referring to a copy of his private instructions, "you will see, that I am expressly ordered to make the shipments in neutral

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vessels, and that the property shall appear as that of a neutral subject." What right had he to suspect that the confidential agent of the plaintiffs, to whose verbal communications they referred him, had forged instructions which he produced as those of his principals?

The counsel for the plaintiffs question the existence of these private instructions, and demand their production. *But how were they to be
*447] authenticated? Only by Menendez himself. Are not then their contents to be proved by the declarations of Menendez, by his stating them, and by the chief clerk of Barry, who read a part of them. To the court, it appears, that in such a case as this, the proof respecting them is as ample and satisfactory as ought to be required.

After taking this extensive view of the case, of the powers of Menendez, and of the confidence the defendant was bound to repose in him, it only remains briefly to observe, that the directions he gave were not such as to awaken suspicion. On the 14th of June 1798, when these instructions were given, America had ceased to be a neutral power. War, it is true, was not formally declared, but it had commenced in fact, and hostilities were authorized by that department of the government which is invested with the power of making war. In such a state of things, the course which prudence would have dictated to the plaintiffs, had they been themselves in the United States, certainly was, to cover the tobacco as neutral, not as American property, and when their agent, possessing private instructions, directed the property to be shipped as neutral, not as American, the defendant would have been culpable in thwarting him.

It is scarcely necessary to add, that Menendez stated himself to be, and probably was, something more than an agent: he declared himself to be interested in the cargoes. This declaration, under all the circumstances of the case, was not to be discredited. Upon that, however, the judgment of the court is not founded. The letter of the 27th of January, represented him as the principal and confidential agent of the plaintiffs, whose verbal communications were to be trusted. He declared himself to possess particular instructions respecting a transaction which he came to superintend, and under those instructions, he gave orders which the defendant has obeyed. The court is of opinion, that in so doing, the defendant is justifiable, and no error has been committed in the court below, in so instructing the jury.

*Upon the other part of the exceptions, the price given for the
*448] tobacco, it is unnecessary to say more than that there is no error in the opinion of the court.

Affirmed.