

Maley v. Shattuck.

the note to the commencement of the war, in 1775, not being sufficient to bar the demand on the said note, according to the said act of assembly, the treaty of peace between Great Britain and the United States, of 1783, does not admit of adding the time previous to the war, to any time subsequent to the treaty, in order to make a bar: and is also of opinion, that the agent merely for collecting debts, mentioned and described in the said state of facts, is not to be considered as a factor within the meaning of the said act of assembly, so as to bring the case within the proviso of said act. But this the court is not to be understood as giving an opinion on the construction of the note, as to the time of payment.

WILLIAM MALEY v. JARED SHATTUCK.

Marine trespass.—Sentence of foreign prize court.

The commander of a United States ship of war, if he seize a vessel on the high seas without probable cause, is liable to make restitution in value, with damages and costs, even although the vessel be taken out of his possession by a superior force; and the owner is not bound to resort to the re-captor, but may abandon, and hold the original captor liable for the whole loss.

A foreign sentence of condemnation as good prize, is not conclusive evidence that the legal title to the property was not in a subject of a neutral nation.¹

Shattuck v. Maley, 1 W. C. C. 245, affirmed.

On the 20th of August 1804, Jared Shattuck exhibited his libel in the district court of the United States for the district of Pennsylvania, in the following form.(a)

*To the Honorable Richard Peters, Esq., judge of the district court of the United States, in and for the district of Pennsylvania. [*459
The libel of Jared Shattuck, merchant, most respectfully sheweth:

That your libellant, being a subject of his majesty the King of Denmark, some time in or about the beginning of the month of May, in the year of our Lord, 1800, at St. Thomas, one of his said majesty's West India islands, loaded a certain schooner or vessel called the Mercator, being an unarmed merchantman, fitted out at St. Thomas aforesaid, for trade only, and being then and there *bonâ fide* the property of your libellant, with a cargo of merchandise, consisting of provisions, wines and dry goods, for the sole and *bonâ fide* account of your libellant, said cargo amounting to \$13,920, or thereabouts, on a voyage to Jacmel and Port Republican, in the island of St. Domingo, which he consigned to Toussaint Lucas, also a Danish subject, then and there master of the said schooner Mercator, who was instructed by your libellant, to dispose of the said cargo at Jacmel or Port Republican aforesaid, to the best advantage, for account of your libellant, invest the proceeds in coffee of good quality, and return therewith to the said island of St. Thomas.

(a) As there are so few forms of admiralty proceedings in print, it is hoped, that a recital of a considerable part of the record in this case, will be acceptable to the profession; particularly, as it is not a libel *in rem*, but for restitution in value, for not bringing in the vessel and cargo for adjudication.

¹ s. p. Fitzsimmons v. Newport Ins. Co., 4 Cr. 185; Lambert v. Smith, 1 Cr. C. C. 361; Vanderheue v. United Ins. Co., 2 Johns. Cas. 451; Kemble v. Rhinelander, 3 Id. 130; Goix v. Low, 2 Id. 480; New York Firemen's Ins. Co. v. De Wolf, 2 Cow. 56; Vasse v. Ball, 2 Dall. 270.

Maley v. Shattuck.

And your libellant further saith, that on or about the 6th day of the said month of May, the said Toussaint Lucas sailed in the said schooner from the said island of St. Thomas, upon the said voyage, for Jacmel and Port Republican, having on board the said cargo, and also a private adventure belonging to the said Toussaint Lucas, together with all such necessary papers and documents, for ascertaining the property and neutrality of the said vessel and her cargo, as are usually carried by vessels belonging to Danish subjects; and proceeded on her said voyage, until on or about the 14th day of the said month of May, when, in endeavoring to enter the said port of Jacmel, the said schooner Mercator was met with by a certain schooner, called the Experiment, a public armed vessel belonging to the government of the United States of America, and commanded by William Maley, a lieutenant in the navy of the said United States, who unlawfully, and in violation of the law of nations, took possession of the said schooner Mercator, and put *on board of her a prize-master, and four seamen, who carried the said schooner Mercator, and her cargo, to places unknown to your libellant. And so it is, may it please your Honor, that neither the said William Maley, nor any person or persons acting under him, have brought the said schooner Mercator, or her cargo, to legal adjudication in any court of the United States, having admiralty jurisdiction.

To the end, therefore, that complete justice may be done to your libellant in the premises, may it please your Honor to direct a monition to issue out of this honorable court, directed to said William Maley, Esq., commanding him forthwith to proceed in due form in this honorable court, against the said schooner Mercator and her cargo, in order to obtain a legal adjudication of the same, in due course of admiralty proceedings, or in default thereof, to appear before your Honor, at such time and place as to your Honor shall seem fit, to answer your libellant in the premises, and show cause why, by the said honorable court's final sentence and decree, he shall not be adjudged to make restitution in value, and pay to your libellant the whole amount of his loss aforesaid, with full damages and costs, and that such further justice may be done to your libellant in the premises, as to this honorable court shall ever seem meet, and your libellant shall ever pray &c.

PETER S. DU PONCEAU, for the libellant.

To this libel, Maley appeared, (a) and filed the protest following:

To the Honorable Richard Peters, Esq., judge of the district court of the United States, in and for the district of Pennsylvania. The protest of William Maley, Esq., late commander of the schooner Experiment, a public armed vessel of the United States of America, appearing here in court, to avoid all, and all manner of contempt, contumacy and *default, under this his protest, against the libel filed by Jared Shattuck, merchant.

This protestant, saving and reserving to himself all, and all manner of exception to the manifest uncertainties, imperfections and insufficiencies in the said libel contained, and protesting that he ought not, in any wise, to be required to appear thereto, or to proceed against the schooner Mercator and

(a) It does not appear that a monition issued. The appearance of Maley seems, by the record, to have been voluntary.

Maley v. Shattuck.

her cargo, as is therein prayed, nevertheless, for the reasons aforesaid, and as cause why the said libel should be dismissed, without further appearance or answer, avers, propounds and says :

That true it is, that the said protestant, while commanding the said schooner *Experiment*, a public armed vessel of the United States of America, under a lawful commission and authority from the government of the said United States of America, did, on or about the 15th day of May 1800, meet on the high seas, and take possession of the said schooner called the *Mercator*, in the said libel mentioned, and put on board an officer, and four seamen. But this protestant denies, that by so doing, he acted unlawfully and in violation of the law of nations ; for he avers, propounds and says, that since the passing of the act of the said United States of America, entitled "an act further to suspend the commercial intercourse between the United States and France, and the dependencies thereof," and before the said 15th day of May 1800, that is to say, on ——— day of ———, in the year 1799, the said schooner, called the *Mercator*, being an American registered vessel, owned, hired and employed by a person or persons resident within the said United States, or by citizens thereof, resident elsewhere, sailed and departed from the port of Baltimore, within the said United States, and at the time of her being met and taken possession of by this protestant as aforesaid, and before her return within the said United States, was proceeding directly, or from some intermediate port or place, to Jacmel, a port or place within the island of St. Domingo, within the territory or dependencies of the French republic.

And this protestant further avers, propounds and says, that at the time of his meeting and taking possession of the said schooner *Mercator* as aforesaid, she was steering a direct course for the said port of Jacmel, and not for Port-au-Prince, whereas, the letter of instructions *from the said Jared Shattuck, the libellant, and all the other papers exhibited to this protestant, by Toussaint Lucas, the master of the said schooner *Mercator*, or found on board thereof, falsely, fraudulently and colorably represented and declared among other things, that the said schooner was bound on a voyage from the island of St. Thomas to Port-au-Prince, a place then in the power and possession of the British troops, and not within the territory or dependencies of the French republic. And this protestant further avers, propounds and says, that at the time of his meeting and taking possession of the said schooner *Mercator* as aforesaid, the master thereof appeared to be a Frenchman (although this protestant has since heard, but does not admit, that he is an Italian), and the crew consisted chiefly of Portuguese and Italians, nor was there then, nor at any time before or since, exhibited to this protestant, any burgher's brief or brief, or other evidence whatsoever, that the said master or crew, or any part thereof, had become burghers of the said island of St. Thomas, or were otherwise naturalized subjects of the King of Denmark, without which this protestant avers, that the said master and crew could not lawfully command and navigate a Danish vessel, according to the laws and usages of Denmark.

And this protestant further avers, propounds and says, that the said Jared Shattuck, the libellant, alleging himself to be the owner of the said schooner *Mercator* and her cargo, and to be a burgher of the island of St. Thomas (neither of which allegations is admitted by this protestant), was born in

Maley v. Shattuck.

the state of Connecticut, one of the United States aforesaid, nor did it satisfactorily appear to this protestant (considering the many other proofs and causes of suspicion to the contrary), at the time of his meeting and taking possession of the said schooner Mercator as aforesaid, nor has it so appeared at any time since, that the said Jared Shattuck, the libellant, had, by any lawful act of expatriation, or otherwise, at any time, become a subject or citizen of any other government or nation, and ceased to be a citizen of the said United States, owing fidelity and allegiance thereunto ; but admitting it to be true, that the said Jared Shattuck, the libellant, was an inhabitant of the said island of St. Thomas, this protestant did then, and does still, *463] verily believe, that the said Jared Shattuck had repaired to the *said island of St. Thomas, or remained there, for the purpose of carrying on an illicit and clandestine commerce with ports and places within the territory and dependencies of the French republic, during the hostilities which were then waged between the United States and the French republic, and also between the King of Great Britain and the said French republic.

And this protestant further avers, propounds and says, that believing, from all the appearances, circumstances and reasonable and just causes of suspicion, herein before averred and propounded, touching the original American character of the said schooner Mercator, the voyage on which she was actually proceeding, the false destination declared and represented in the said letter of instructions, and other papers exhibited and found on board, the description of the master and crew, and the birth-place and original allegiance of the said Jared Shattuck, the libellant, that the said schooner Mercator was a registered vessel of the said United States, voluntarily carried or suffered to proceed to a French port or place as aforesaid, and to be employed as aforesaid, contrary to the intent, and in defiance of the prohibitions of the said act of the congress of the United States, entitled "an act further to suspend the commercial intercourse between the United States and France, and the dependencies thereof ;" this protestant, in obedience to the said act of congress, and to his official instructions, took possession of the said schooner as aforesaid, with a view to such further examination and proceedings as the law of nations, and the laws of the United States, should warrant, justify and require. But this protestant avers, that such possession was taken lawfully, upon the just and reasonable causes, motives and designs aforesaid, and with the utmost care, caution and solicitude, that the said schooner Mercator and her cargo, should thereby suffer no injury, damage or spoliation ; and that the real national character, and the real commercial objects of the said schooner Mercator, of her pretended owner, and of the said master and crew, while prosecuting her said voyage, should be more fully examined and satisfactorily ascertained, without any unnecessary detention or delay, this protestant, at the time of placing on board of the said schooner Mercator, an officer and four seamen as aforesaid, did not remove, nor take therefrom, the said master and crew of the said schooner Mercator, *464] or any of *them, nor remove, take away, cancel or destroy, any of the papers and documents of said schooner Mercator and her cargo, but ordered the officer, so put on board of the said schooner, having on board her said master and crew, and all the documents and papers of the said schooner and cargo, to make the best of his way to Cape Francois, there to

Maley v. Shattuck.

deliver all his letters to Silas Talbot, Esq., then commodore and commander of the public vessels of the said United States, upon that station, and to wait the orders of the said Silas Talbot, with express instructions, also, to pay particular attention to everything belonging to the said schooner Mercator and her cargo, seeing that nothing should go to waste, and to deliver the said schooner to the said master thereof, if the said Silas Talbot, commodore and commander as aforesaid, should clear her.

And this respondent further avers, propounds and says, that in a short time, not exceeding the space of six hours, or thereabouts after the said schooner Mercator had parted from the said schooner Experiment, destined for Cape François as aforesaid, under the orders aforesaid, the said schooner Mercator was captured on the high seas, as prize, by a British private armed vessel of war, called the General Simcoe, commanded by Joseph Duval, who thereupon forcibly took the said schooner Mercator and her cargo, from and out of the possession, care, custody and control, as well of the said master and crew of the said schooner Mercator, as of the said officer and men who had been put on board of her as aforesaid, by this protestant, and who were thereupon, taken out of and removed from the said schooner Mercator, into and on board of the said British privateer, and the said schooner Mercator and her cargo, sent to the island of Jamaica, under the charge of a prize-master and men belonging to the said British privateer, without the assent, connivance, assistance, negligence or fault whatsoever of this protestant, or of the officer and men whom he had put on board of the said schooner Mercator as aforesaid, for the causes, and with the intentions, aforesaid.

And this protestant further avers, propounds and says, that the said schooner Mercator, and cargo, being so as aforesaid captured on the high seas, as prize, and sent to the said island of Jamaica, by the said British privateer, a libel, in due form of law, was exhibited and filed by the said captors, in the court of vice-admiralty, lawfully established in the *said island of Jamaica (being a court of competent jurisdiction in all mat- [*465 ters of prize), alleging and charging, that the said schooner Mercator and cargo were the property of France, or of the King of Spain, or of some person or persons being subjects of France, or of the King of Spain, or inhabiting within some of the territories of France, or of the King of Spain, and were good and lawful prize, inasmuch as hostility and war then notoriously subsisted between the King of Great Britain, on the one part, and the said French republic and the King of Spain, on the other part; and thereupon, the said captors, in their said libel, prayed that the said schooner Mercator and her cargo, might be adjudged lawful prize, and be confiscated and condemned.

And this protestant further avers, propounds and says, that notwithstanding the denial of the said Jared Shattuck, in his said libel contained, he, the said Jared Shattuck, received speedy and full notice that the said schooner Mercator and her cargo were captured as prize, and sent into the said island of Jamaica as aforesaid, and there prosecuted by the said captors as prize, in manner aforesaid; and thereupon, a claim was exhibited, and a defence made, by and for the said Jared Shattuck, the alleged owner of the said schooner Mercator and her cargo. And upon hearing of the parties, by their respective advocates, and upon examining all the ship's papers and documents, together with other evidence and proofs in the cause, the judge

Maley v. Shattuck.

of the said court of vice-admiralty was pleased to adjudge and decree, that the said schooner *Mercator*, and her general cargo, were good and lawful prize, and did therefore adjudge, order and decree, that the same be condemned and confiscated to the use of the said captors, &c. From which sentence, the said Jared Shattuck, the libellant, prayed leave to appeal, which was granted. But this protestant avers, that this appeal has not been duly prosecuted by the said Jared Shattuck, but has been altogether waived and abandoned.

And this protestant further avers, &c., that at the time of the capture of the said schooner and cargo by the British privateer as aforesaid, and at the time of the libel and of the condemnation, and of the appeal as aforesaid, peace and amity notoriously subsisted between the United States of America and the King of Great Britain and the King of Denmark; and also between *466] the said King of Great Britain and the King of Denmark, and their respective citizens and subjects: and therefore, this protestant avers, that if the allegations contained in the libel of the said Jared Shattuck had been true, sentence of condemnation and confiscation, as prize, could not, and would not, have been pronounced as aforesaid, against the said schooner *Mercator* and her cargo, by the said court of vice-admiralty, having competent jurisdiction upon all matters of prize, as aforesaid, and therein proceeding according to the law of nations and the faith of treaties.

Wherefore, this protestant prays that the said libel may be dismissed with costs, &c.

A. J. DALLAS, for the protestant.

The replication of Shattuck was as follows:—

To the Honorable Richard Peters, Esq., judge of the district court of the United States in and for the district of Pennsylvania. In the case of the schooner *Mercator* and her cargo, Toussaint Lucas, master. The replication of Jared Shattuck, late owner of the said schooner *Mercator* and her cargo, to the protest of William Maley, Esq., late commander of the public armed schooner of the United States Experiment.

This replicant, not confessing or acknowledging any of the facts, matters and things, by the said William Maley, in and by his said protest set forth, propounded and alleged, and also saving and reserving to himself all and all manner of exception to the manifold uncertainties and insufficiencies in the said protest contained, and to the informality thereof, and protesting on his part, that the said William Maley ought to have appeared absolutely, and not under protest, and made direct answer, upon oath or affirmation, to the charges in this replicant's libel contained, or to so much thereof as he has been advised to be material for him to reply unto; doth aver, allege, pro- *467] pound and say, that this replicant was born in the state of Connecticut, in the year 1774, and when he was between fifteen and sixteen years of age, viz., about the end of 1789, or beginning of 1790, the United States then being at peace with all the world, he migrated to the island of St. Thomas, one of the dominions of the King of Denmark and Norway, with a view to settle and establish his permanent residence in that island. That he served his apprenticeship there, with a mercantile house, for about six years, and from his first arrival, has constantly and permanently resided, and now continues to reside there. That on the 10th of April 1797, the

Maley v. Shattuck.

United States being still at peace with all the world, he became a naturalized Danish subject, and burgher of the said island, and shortly afterwards, intermarried with an inhabitant of that place, by whom he has several children, all living in that island. That he did acquire, and now hold reals estate there, and is there permanently settled and established, and carries on the trade and business of a merchant.

The replication then went on to deny that he went or remained there for the purpose of illicit trade. It averred, that during the war between France and Great Britain, which terminated by the treaty of Amiens, he was largely concerned in trade, at and from St. Thomas to foreign ports, and had a number of vessels, navigating under the Danish flag, in the West India seas. That several of his vessels were taken as well by British as French cruisers, carried into their respective islands, and there acquitted, and his neutral character, and that of his property, was acknowledged by the tribunals of both nations.

That in May 1800, he loaded the *Mercator*, as mentioned in his libel, and sent her on a voyage to St. Domingo, consigned to the said Toussaint Lucas, who was also a *bonâ fide* subject. That the original destination of the vessel was for Port-au-Prince, alias Port Republican, a place then in the power, and under the dominion of the negro General Toussaint, not of the British troops, as stated in Maley's protest. That, at that time, commerce was lawfully carried on between the United States and ports of St. Domingo, which were in the power of General Toussaint. That on the 3d of May 1800, he gave *written instructions to Lucas, to proceed with his vessel to Port-au-Prince, but as she was ready to sail, he was in- [*468 formed that the forces of General Toussaint had taken Jacmel from General Rigaud, who held for the French republic. That Jacmel is a port of the island of St. Domingo, which lies between the island of St. Thomas and Port-au-Prince, and is in the way between the former and the latter. That the distance from Jacmel to Port-au-Prince is, by land, only between thirty and forty miles, but by sea, upwards of one hundred leagues. That conceiving it to be advantageous to try the market at Jacmel, before proceeding to Port-au-Prince, he gave verbal directions to Lucas for that purpose.

It denied that anything false or colorable was intended, and that any of the *Mercator*'s papers were false or colorable, and that he gave any orders to Lucas to deny or conceal his intention of going into Jacmel.

It admitted, that after the passage of the act of congress, "further to suspend," &c., and before the 15th of May 1800, the *Mercator* was an American registered vessel, owned by a citizen of the United States, and sailed from Baltimore, but denied, that when taken by Maley, she was navigating contrary to the laws of the United States. It averred, that on the 26th of November 1799, he purchased her *bonâ fide* at St. Thomas, for the sum of \$8500, which he had actually paid and took a bill of sale, which was on board, at the time of her capture. That from the day of purchase, until her capture, he was *bonâ fide* the sole owner, and that no other person had any interest in her or her cargo. That almost the whole shipping of the island of St. Thomas consisted of vessels built in the United States, and in the island of Bermuda, and brought to the former island for sale.

That at the time of her capture, the *Mercator* was navigated as a *bonâ fide* Danish vessel, and had on board every paper and document which the

Maley v. Shattuck.

law required to prove her neutrality; and especially that she had, 1st. The king's passport, in the usual form; 2d. The certificate of measurement; 3d. Her muster-roll, or official list of her crew; 4th. The bill of sale; 5th. *479] The burgher's *brief of her master Toussaint Lucas; 6th. Her clearance; 7th. The invoice and bill of lading of her cargo, duly attested, as to the ownership and neutrality thereof; 8th. The master's instructions, or sailing orders; and 9th. A certificate, upon oath, of several respectable merchants of the island, attesting the fact of Shattuck's citizenship and residence in the island. That the crew consisted of eleven persons, viz., the master, the mate, seven seaman, the cook and a boy, who were all, by birth, Italian or Portuguese. That the master was a native of Leghorn, in Tuscany, was a Danish subject, and had resided seven years in St. Thomas. That very few Danish seamen are to be had in the Danish islands; and that, except the officers of government, there are very few Danes in the islands of St. Thomas and St. Croix, the inhabitants being chiefly native English and Americans, with some French and other foreigners.

It denied, that by the laws of Denmark, a vessel could not be lawfully navigated by others than Danish or naturalized Danish sailors, and averred, that the crew might be subjects of any nation whatever, provided that, in time of war, not more than one-third thereof be native subjects of one or other of the belligerent powers. It denied, that any of the crew of the Mercator were subjects of any of the belligerent nations; and that at the time of her capture, there was any reasonable cause of suspicion that she was an American vessel carrying on an illicit trade. It submitted to the court, whether Maley had a right, by the law of nations, to arrest a vessel on the high seas, sailing under the protection of his Danish majesty's royal passport, under pretence of a violation of a municipal law of the United States. It suggested, that Maley acted *malá fide*, and offered to prove, that he was in the habit of violating the law of nations, and the instructions of his government, with respect to neutral vessels and property, and that he was dismissed from the service of the United States, principally on that account.

With respect to the capture by the British privateer, it admitted, that the Mercator was so captured, while under the protection of the United States, and their national *flag, but did not admit, that it was without the *470] connivance or fault of Maley, or the officer whom he put on board. It admitted, the condemnation as prize; but averred, that it was the duty of the officer and men to have resisted the capture, and to have demanded of the court of vice-admiralty, at Jamaica, restitution of the vessel and cargo, on the ground, that the same had been unlawfully, and in violation of the respect due to the national vessels of the United States, and to the flag thereof, taken from the possession, and from under the protection, of the commander of one of the public vessels of war of the United States.

It admitted, that Lucas filed a claim for the vessel and cargo, before the vice-admiralty court at Jamaica, and that they were condemned as prize, but alleged, that the sentence of condemnation was contrary to the evidence. It admitted also, that an appeal was entered, and exhibited an exemplification of the proceedings. It denied, that Lucas was bound to exhibit a claim, or to appeal from the condemnation, and that Shattuck was bound to prosecute the appeal, but averred, that the whole should have been done by or in behalf of the United States, to whom alone the vessel and cargo would legally have

Maley v. Shattuck.

been restored, as having been taken from their possession, and from under their protection.

It averred, that Shattuck, as soon as he received notice of the capture and condemnation, gave information thereof to the governor-general of the Danish West India islands, and to Richard Soderstrom, charged with the consular functions for the King of Denmark, in the United States, who communicated the information, without loss of time, to the government of the United States, and claimed reparation. That the government of the United States expressed a wish that the appeal should be prosecuted, in compliance with which Shattuck, without delay, forwarded the necessary papers to England; but when they arrived, he was informed by his proctors, that it was useless to prosecute the appeal, because the prize-money had been distributed, and the prize-agent had died insolvent.

*It denied, that the vessel and cargo would not have been condemned, if they had been really and *bona fide* neutral property, [*471 and averred, that they really were such as stated in his libel, and did not admit, that he was precluded by the sentence of the court of vice-admiralty of Jamaica from showing the same.

It concluded, "that for aught that has been said and alleged by the said William Maley, in his protest aforesaid, this replicant ought not to be precluded from obtaining the benefit of the prayer of his said libel; he, therefore, prays, that the said William Maley may, by the interlocutory decree of this honorable court, be ordered to appear absolutely, and without protest, before your Honor, so that further justice may be done by this honorable court in the premises, as to right shall appertain."

(Signed) JARED SHATTUCK.

Jared Shattuck, being duly sworn according to law, on his oath, doth say, that all and singular the facts, matters and things, by him in the foregoing replication stated, as far as they relate to his own acts, and matters within his own knowledge, are true; and inasmuch as the same relate to the acts of others, he verily believes them to be true.

(Signed) JARED SHATTUCK.

Sworn before me, the 26th of May 1804,

(Signed) RICHARD PETERS.

The rejoinder of Maley was as follows:—

This rejoinant, saving and reserving to himself all and all manner of exception to the manifold uncertainties and insufficiencies in the said replication contained, and not confessing or acknowledging any of the facts, matters and things by the said Jared Shattuck in and by his said replication set forth and alleged, but denying the same, saith, that the facts in this rejoinant's protest set forth, are true and sufficient to excuse him *from [*472 further appearance and answer to the libel of the said Jared Shattuck.

(Signed) A. J. DALLAS, for William Maley.

Whereupon, it was adjudged, ordered and decreed, that the libel be dismissed, with costs. From which decree, Shattuck appealed to the circuit court. Upon the appeal, the circuit court, (a) being of opinion that the

(a) Holden by Judge WASHINGTON, in May 1805. See 1 W. C. C. 245.

Maley v. Shattuck.

appellant was entitled to restitution, with damages and costs, reversed the decree of the district court, overruled and rejected the protest of Maley, and ordered him to appear absolutely, without protest, before the district court, to whom the cause was remitted for further proceedings. In the district court, upon the remission of the cause, the following entry was made :

And now, to wit, this 9th day of August 1805, the said William Maley, by Alexander James Dallas, his proctor aforesaid, having appeared absolutely as aforesaid, comes here into court, and for answer to the libel of the said Jared Shattuck, propounds and says, that the facts by this respondent in his said protest set forth are true, and to the intent that justice may be done in the premises, this respondent prays that the said Jared Shattuck may be called upon to declare, on his solemn oath, to whom, and when, and in what manner, he paid for the said vessel called the *Mercator*, and whether the original American owner hath any interest therein, or in the restitution in value, by the said libel prayed for ; and whether any correspondence, and what, took place between the said Jared Shattuck and the captain of the said vessel, or any other person, after she was carried into Jamaica ; and *473] whether any correspondence, *and what, took place between the said Jared Shattuck and any persons, and whom, relative to the prosecution of an appeal from the decree of condemnation in Jamaica ; and whether the said Jared Shattuck made any, and what application, and when, to the American government, relative to the capture of the said vessel by this respondent, as aforesaid, &c.

A. J. DALLAS, for the respondent.

And thereupon, the said Jared Shattuck, under all legal protestations and reservations, for replication to the answer of William Maley above mentioned, saith, that all and singular the facts, matters and things by him, this replicant, in his libel, and in his replication to the answer under protest of the said William Maley, filed in this honorable court, are true. Without this, that the facts by the said respondent, in his said answer under protest set forth, are true. He, therefore, humbly prays, that this honorable court, by its final decree in this cause, will be pleased to order, adjudge and decree, that the said defendant, William Maley, make restitution to this replicant of the value of the schooner *Mercator*, her rigging, tackle, apparel, &c., and of her cargo, at the time of her capture by the United States' armed schooner *Experiment*, under the command of the said respondent; and that the said respondent pay to the said replicant the amount of the damages by him suffered, by reason and in consequence of the capture and loss of the said schooner *Mercator*, and her cargo ; the said value and damages to be inquired of, estimated and reported to this honorable court by the clerk, taking to his assistance two merchants, in the usual form ; and that the said respondent pay the costs of this suit, &c.

PETER S. DU PONCEAU, proctor for libellant.

The clerk having returned an estimate of the value and damages, amounting to \$41,658.67, Maley filed the following exceptions to that report.

*1. That the respondent is charged with the expense of papers *474] and outfits, advances to mariners, provisions and stores for the voyage, and labor of sailors, before the shipping.

Maley v. Shattuck.

2. With the certificate of neutrality of property, duties at St. Thomas, commission on shipping the cargo, and insurance, without proof that any insurance was actually paid.

3. With expenses at Jamaica, and for copies of the proceedings in the court of admiralty, and of the appeal papers.

4. With expenses of Mr. Soderstrom.

5. With too much interest.

6. That there was no proof of the actual price of the schooner, other than the bill of sale on board.

7. That there was no proof of the value of the cargo, other than the invoice on board.

In the district court, judgment was entered, by consent, in favor of the libellant, for the amount reported by the clerk, saving all exceptions upon the appeal. In the circuit court, the following answer of Shattuck to the exceptions to the report of the clerk was filed.

1st. To the first exception, he answers, that these expenditures of outfits, &c., made after the purchase, and after the sailing of the vessel, increased the value thereof, and are properly charged as a part of the said value. The same were allowed in the case of the *Charming Betsy*; confirmed by a decree of this court (the circuit court) and not appealed from.

2d. To the second exception he answers, *1. As to the insurance, that it is a regular mercantile charge, the owner being considered as his own insurer. That it is generally admitted in mercantile accounts. That it is peculiarly admissible, in the case of an unjust capture like the present, however it might be in a case of lawful capture, or capture with sufficient probable cause. 2. The commission on shipping is also a regular mercantile charge; the said commission, the duties of exportation paid at St. Thomas, and the certificate of neutrality, would have been charged on the goods, had the vessel arrived at the port of her destination. The present being a case of unjust capture, the respondent conceives that the commissioners would have been justified in allowing to him all the loss of possible profit, and to have taken into view the profit which he, could have made, had the vessel arrived at the port of her destination, whereas, they have only indemnified him for his actual losses, and he conceives that he ought not to be debarred from any part of his said indemnity. [*475]

3d. To the third and fourth exceptions, he answers, that the said expenses are reasonable, and the like were allowed and confirmed in the case of the *Charming Betsy*.

4th. To the fifth, he answers, that the interest is not overcharged.

5th. To the sixth and seventh, he answers, that the evidence of the papers found on board is sufficient in law, in prize causes, unless contradicted by other evidence. That it is confirmed, in this case, by the oath of the party, contained in the pleadings in this cause. And as to the ship, is again confirmed by the oath of the same party, taken a second time on special interrogatories of the appellant, William Maley.

The answer of Shattuck, upon oath, to the several interrogatories contained in the answer of Maley to the libel, stated, that he purchased the schooner *Mercator*, at St. Thomas, on the 26th of November 1799, of one

Maley v. Shattuck.

John Liddel, of Baltimore, for the sum of \$8500, *which, at the time of purchase, he actually and *bonâ fide* paid to the said John Liddel, in Spanish milled dollars. That the original owner had not then, nor had had, at any time since the purchase thereof by the respondent, directly or indirectly, by way of trust, cover or otherwise, any interest therein, nor in the restitution in value, or damages prayed for in the libel.

That to the best of his recollection, the said schooner was taken by the British privateer, on the 15th of May 1800, was carried into, and arrived at Jamaica, and libelled on the 23d of the same month, and condemned as lawful prize on the 28th of June following. That the respondent was informed of the capture, by a letter from Lucas, and that Dick, McCall & Co. had taken the necessary steps to defend the property. That he was informed, afterwards, by the arrival of a Mr. Grigg, in the beginning of August 1800, that the schooner was condemned, and that an appeal had been entered. That the respondent had no opportunity of writing to Lucas, during the trial. That immediately upon receiving notice of the condemnation, he applied to the commandant-general of the Danish West India islands to use his endeavors to obtain reparation from the American government, to which he received an answer (which is lost), together with a letter for the secretary of state of the United States, which he forwarded.

That being advised that the United States were the proper party to prosecute the appeal, and fearing that his further interference might prove prejudicial to his interest, he did not prosecute the appeal, until he received from Mr. Soderstrom, a copy of a letter from the secretary of state of the United States, to him, dated the 26th of November 1800, by which he understood that the government of the United States wished him to prosecute his appeal, in consequence of which, he wrote for that purpose to his correspondents in London, by whom he was informed, that they had taken the necessary steps to procure a reversal of the decree of condemnation; but that, in the meantime, the proceeds of the sales of the prize had been paid to the prize-captain, who had died insolvent, so that no redress was finally had.

*477] *On the 29th of January 1806, the circuit court affirmed the sentence of the district court, except as to the first and second items in the report of the clerk, and decreed restitution of the value and damages, amounting to \$33,244.67, and costs. From this sentence, Maley appealed to this court. The libellant also appealed as to so much of the sentence as disallowed those two items of the clerk's report.

Breckenridge (Attorney-General), for the appellant, and *Harper, Key* and *Martin*, for the appellee.

Argument for the *appellant*.—Two grounds were taken by the attorney-general: 1st. That Maley had committed no act *malâ fide*, but was in the performance of an authorized public duty, and was, therefore, justified. 2d. That the claim to reparation is without merit, and without law.

1. The act being done in the execution of a public duty, cannot, in our courts, be considered as done *malâ fide*. It was the policy of the times, to prevent our citizens, whether resident here or abroad, from trading directly or indirectly with the French; and that policy ought to be kept in view, when the several acts of congress on this subject are under consideration. These acts are June 13th, 1798 (1 U. S. Stat. 565); 9th February 1799 (Ibid. 613);

Maley v. Shattuck.

and 27th February 1800 (2 Ibid. 7). These laws being all *in pari materia*, are to be taken into one view, and although some of them had expired, yet it is proper that they should be considered, when deciding upon the construction of subsequent statutes on the same subject.

All the acts went, successively, to cut off the intercourse more effectually. The fifth section of the act of February *1799, authorizes the president to give instructions to the commanders of the public armed ships to stop, examine and send in ships suspected. (1 U. S. Stat. 615.) This was going a step farther than the act of June 1798, which did not authorize any such instructions. The act of February 1800 (2 Ibid. 7), goes farther still, and extends the prohibition of intercourse to citizens of the United States residing abroad; and expressly prohibits the Island of Hispaniola, excepting such ports as should be excepted by the proclamation of the president.

Under the act of 1799, the president caused the instructions (a) of 12th of March 1799, to be issued to the commanders of the public armed vessels of the United States, by which their attention was particularly called to the practice of covering the illicit trade, under the Danish flag. The direction not to injure or harass the fair, neutral commerce, implies a right to stop and examine; and if, upon such examination, they should have reasonable cause to suspect that the vessel was engaged in violating the law, the instructions, as well as the law, required them to seize and send her in for adjudication. There was, therefore, a clear right (at least, a right which our courts cannot deny) to detain the vessel a reasonable time for examination, and if it was a doubtful case, to send her for further examination to the commanding officer on that station.

That there was probable cause, sufficient to justify such a measure (however it might be in a case of actual seizure, and sending in for adjudication), can scarcely be doubted.

1. Shattuck was a native American citizen, resident in a place suspected by our government. The certificate of the merchants of St. Thomas, respecting his burghership, naturally led to suspicion. It appears, by the letters in the record, that although his neutrality had been respected in Tortola, yet it had not been respected in Jamaica.

*2. The vessel was known to have been built in the United States, and to have lately belonged to American citizens. She had sailed from Baltimore, after the passing of the act of congress. [*479]

3. The ship's papers showed her destination to be to Port-au-Prince, a place not prohibited; but she was stopped, as she was entering Jacmel, a forbidden port. An attempt is made to account for this, by verbal orders, but there is no proof of them; and it does not appear, that Lieut. Maley was informed of such orders, at the time of the detention, nor of the fact that Toussaint had possession of the place. But if Maley had known of the verbal orders, the reason assigned by Shattuck for those orders, was, in itself, a strong ground of suspicion. The reason was, that he had heard that Toussaint had possession of Jacmel. If the vessel and cargo were *bonâ fide* Danish property, he might, with equal safety, have traded there, while the place

(a) See these instructions at length, cited in the case of Little v. Barreme, 2 Cranch 171.

Maley v. Shattuck.

was in possession of Rigaud, as while in that of Toussaint. The reason could only apply to American property, upon the presumption that the United States would take off the prohibition, when it should be known that Jacmel was no longer under the acknowledged jurisdiction of France.

4. All the material papers were not produced. The master did not produce his burgher's brief, showing him to be a Danish subject ; and a Danish vessel cannot lawfully sail, but under a Danish master. The attestation of his burgher's brief is dated long after the vessel was stopped.

It must be remembered, that Maley did not seize the vessel as a prize, or as a forfeiture, but only detained her for further examination. The question, therefore, is not, whether there was probable cause of seizure, but probable cause for further examination. The master was not dispossessed of his vessel ; none of the crew were taken out ; her papers were not re-
*480] moved ; no violence or outrage was committed. But *while detained for further examination, the vessel was seized by a stronger hand, and carried away by a superior force.

If it be objected, that no resistance was made ; it is answered, that none could be made. The vessel was not armed ; and the officer was bound by his instructions, to permit the right of search by all the belligerents, except France. If it be said, that Maley ought to have claimed the vessel in Jamaica ; the answer is, that he had no right to seize, unless it was really an American vessel. If she was a fair neutral, Shattuck's claim must prevail. If she was an American vessel, she would not be condemned ; if she was anything else, he was not interested. Maley's possession, therefore, was lawful and *bonâ fide*. If a loss has happened, it has been produced by the *vis major* of another, to whom the injured party ought to look for reparation. 4 Rob. 284. Maley's possession being *bonâ fide*, he cannot be answerable for the *malâ fide* act of another. He detained the vessel only six hours ; and she was sailing towards Port-au-Prince, the ostensible place of her destination, when captured by the British ship of war.

Even if Maley was mistaken, but acted with good faith, he is not answerable for the loss. *The Betsey*, 1 Rob. 18. That was an American ship and cargo, taken by the English, at the capture of Guadaloupe, in April 1794 ; and retaken by the French, in June following. The American claimants libelled the English captors for restitution in value. The captors defended themselves by an allegation that the ship had broken the blockade. Sir WILLIAM SCOTT, after deciding that there was no defence, on the ground of breach of blockade, stated the question to be, whether the original captors
*481] were exonerated of their responsibility to the American claimants. **"It is to be observed,"* says he, *"that at the time of re-capture, America was a neutral country, and in amity with France. I premise this fact, as an important circumstance in one part of the case ; but the principal points for our consideration are, whether the possession of the original captors was, in its commencement, a legal bonâ fide possession ? And 2d. whether such a possession, being just in its commencement, became afterwards, by any subsequent conduct of the captors, tortious and illegal ? For, on both these points, the law is clear, that a bonâ fide possessor is not responsible for casualties ; but that he may, by subsequent misconduct, forfeit the protection of his fair title, and render himself liable to be considered as a trespasser from the beginning. This is the law, not of this court only, but of all courts.*

Maley v. Shattuck.

and one of the first principles of universal jurisprudence." He then notices two cases very much in point: "*The Nicholas and Jan* was one of several Dutch ships taken at St. Eustatius, and sent home, under convoy, to England, for adjudication. In the mouth of the channel, they were retaken by the French fleet. There was much neutral property on board, sufficiently documented," and a demand of restitution, in value, was made by the neutral owners, on the first captors. One of the grounds of the demand was, that the captors had wilfully exposed the property to danger, by bringing it home, when they might have resorted to the admiralty courts, in the West Indies; but on this point, the court was of opinion, that under all the circumstances, they had not exceeded the discretion necessarily intrusted to them by the nature of their command. It was also urged against the claimants in that case, that since the property had been retaken by their allies, they had a right to demand restitution in specie from them; and on those grounds, the English courts rejected their claims. The other case which he cites, *The Hendrick and Jacob*, is still more like the present. A Hamburghese ship was erroneously taken as Dutch, and retaken by a French privateer, and was lost going into Nantz. *On demand for restitution, [482 against the British captor, the lords of appeal decided, that as it was a seizure made on unjustifiable grounds, the owners were entitled to restitution from some quarter; that as the French re-captor had a justifiable possession, under prize taken from his enemy, he was not responsible for the accident that had befallen the property in his hands. That if the property had been saved, indeed, the claimant must have looked for redress to the justice of his ally, the French; but since that claim was absolutely extinguished, by the loss of the goods, the proprietor was entitled to indemnification from the original captor. After citing these authorities, Sir W. SCORR inquires, whether, in the case then before him, the original seizure was so wrongful as to induce that strict responsibility, which attaches to a tortious and unjustifiable possession. He then states some grounds of suspicion, which might have appeared to the captors, as to the fairness of the neutrality, and proceeds to inquire, whether any conduct of the captors, after the first seizure, had rendered them liable to the strictest responsibility. "On this point," says he, "I must distinctly lay it down, that the irregularities, to produce this effect, must have been such as would justly prevent restitution by the French. If such a case could be supported, I will admit, there might then be just grounds for resorting to the British captor for indemnification; but till this is proved, the responsibility which lies on re-captors, to restore the property of allies and neutrals, will be held by these courts to exonerate the original captors." In the conclusion of his opinion, he says, "if the neutral has sustained any injury, it proceeds not from the British, but from the French; and there is no reason that British captors should pay for French injustice." So we say, in our case, there is no reason that the American officer, who merely stopped the vessel for examination, should pay for British injustice.

2. That the claim to reparation is without merit, and without law. *Shattuck was himself the cause of the suspicious circumstances which [483 led to the detention of the vessel by Maley, who would have been guilty of a neglect of duty, and disobedience of orders, if he had done otherwise than he did. There was no improper conduct on his behalf, and the

Maley v. Shattuck.

whole detention was only six hours. The British were bound to restore the vessel and cargo, without salvage, and with damages and costs, if it was really the property of a neutral, and this would have been done, without doubt, if Snattuck had prosecuted his appeal, and been able to prove his property. But having acquiesced in the decree of condemnation as enemy-property, he can never deny the fact. It is conclusive evidence against him. If not conclusive, it is still evidence of probable cause of suspicion. Upon the evidence which caused Maley to suspect, the court of admiralty condemned. This is surely sufficient to justify his detention of six hours for examination.

Argument for the *appellee*.—Unless the taking was lawful, or with probable cause, the captor is liable for all the loss. This principle is admitted by the argument for the appellant. The case of the *Charming Betsy*, 2 Cranch 64, was stronger in favor of Captain Murray than this is in favor of Lieutenant Maley; and yet, in that case, this court decided that Captain Murray was a trespasser, and liable for damages and costs. It is no answer, to say, that the loss does not appear to have been the consequence of Maley's act. If the taking was unlawful, he is liable, at all events. It is like the case of deviation, which throws the loss upon the assured, although the loss was not the consequence of the deviation. It is sufficient, if it exposed the property, in any manner, to a liability to danger. But here, it is evident that the loss would not have happened, if the vessel had not been detained. She was within an hour's sail of Jacmel, and would have gone in with safety.

*484] *Two questions present themselves for consideration. 1st. Was the capture lawful? and 2d. Was there probable cause? A third question may also arise, whether, upon the appeal of Shattuck, the sentence of the district court ought not to be affirmed, as to the items excepted to by the counsel for Maley?

1. The first question is, whether the capture was lawful? On this point, the case of the *Charming Betsy* is conclusive. It was there decided by this court, 1st. That the non-intercourse law did not extend to vessels built in the United States, and *bond fide* sold, before the act of trading. In the present case, the vessel was sold, before the existence of the act under which her seizure is now attempted to be justified. 2d. That the sale must appear to be made with intent to evade the law. 3d. That a native citizen of the United States may so far change his national character, as to take him out of the operation of that act. The present appellee is the same person whose property was in contest in that case; and although that fact does not appear on this record, yet it appears that he is a person in exactly the same circumstances.

But the sentence of the vice-admiralty court in Jamaica is said to be conclusive evidence against Shattuck. But the sentence is only conclusive evidence that she was good prize to the British. It does not state, for what cause. It contains no direct reference to the libel, or other parts of the proceedings. If it refers to the libel, the property is there stated to be French or Spanish, or to belong to some other enemy of Great Britain. If you look into the proof exhibited in that court, it shows it clearly to be the property of Shattuck. *At all events, neither the record, nor the proceedings

*485] in Jamaica, show it to be American property, violating the laws of

Maley v. Shattuck.

the United States, which is the only case that could justify the capture by Maley. If it was Spanish property, he had no right to touch it. If it was a French vessel, unless armed, he had no right to seize it. So that if the sentence is conclusive evidence, it is as conclusive against Maley as it is against Shattuck.

But it is said, he ought to have prosecuted his appeal; and, not having done so, he has been guilty of negligence. So far from this is the truth, that he was not bound to resort at all to the British captors. It was the duty of Maley, or the United States, to resort to them. His remedy was against Maley. He was not bound to look further. It can be no ground of a charge of negligence to say, that he has done more than he was bound to do.

2. Was there probable cause? On this point too, the case of the *Charming Betsy* is conclusive. The grounds of suspicion in this case are not so strong as they were in that. But probable cause is no ground on which to deny restitution of the thing itself, or its value. It only excuses from damages for the *tort*. It is no bar to a reimbursement of actual loss. Shattuck asks only for restitution and expenses; and this is the least that a friendly nation ought to give.

3. As to the items in the statement of the value, and expenses, which have been excepted against. All the outfits of the vessel, and expenses of shipping the cargo, together with the outward duties, in addition to the first cost, constituted the value of the vessel and cargo, at the time of seizure, and ought to be allowed. The premium of insurance also was a proper charge. For, although no insurance was actually made, yet Shattuck was to be considered in the light of his own insurer, and the risk was worth the premium. *There is evidence in the record that it is a customary [*486 charge in such cases.

Argument, *in reply*.—This case is not like that of the *Charming Betsy*. In that case, the loss was produced by Captain Murray's own act. But in this, the loss is not the immediate effect of the act of Maley, but of the commander of the British privateer, who is liable to Shattuck for the injury he has sustained. To convert an originally lawful act into a trespass, by subsequent misconduct, that misconduct must proceed from the party himself, and not from the act of another, whose conduct he cannot control.

In the case of the *Charming Betsy*, the court decided, in express terms, that, "her papers were perfectly correct." In the present case, some of the papers were false and delusive, and others were not shown, or were not found.

The sentence in Jamaica is conclusive evidence, that the property was not neutral Danish property, which is the very ground of the present libel. Unless, therefore, the admiralty court of one nation can reverse the sentence of an admiralty court of another nation, that sentence in Jamaica is conclusive against Shattuck's title. If he had prosecuted his appeal, and reversed the sentence, he would have obtained indemnification. By his instructions from his government, Maley was bound to act on reasonable suspicion. They gave him notice of the practice of covering this illicit trade with the Danish flag. When, therefore, he found a recent sale of an American vessel to a person pretending to have become a Danish subject, and

Maley v. Shattuck.

residing in a place notorious for its abuse of its neutral flag, when he found the vessel attempting to enter a prohibited port, with an ostensible destination to a port not prohibited, when no evidence was exhibited to show that the master of that vessel was a Danish subject, and when his instructions required him "to be vigilant, that vessels really American, but covered by *487] Danish papers and bound to or from French ports, do not escape *you," how is it possible to say that he had not "reason to suspect?" Although any one of these circumstances alone might not afford "reason to suspect," yet the combination of the whole certainly did.

With respect to the claim of insurance, the case of the *Charming Betsy* is full in point. It is admitted, that no insurance has been paid. And the court in that case expressly said, that "a public officer, intrusted on the high seas, to perform a duty deemed necessary by his country, and executing, according to the best of his judgment, the orders he has received, if he is the victim of any mistake he commits, ought certainly never to be assessed with vindictive or speculative damages." The claim for insurance not paid is certainly a claim for speculative damages. The direction of the court to the assessors was, "to take the prime cost of the cargo and vessel, with interest thereon, including the insurance actually paid."

The consideration of the other items is submitted to the consideration of the court.

March 3d, 1806. MARSHALL, Ch. J., delivered the opinion of the court.—In this case, each party has appealed from the sentence of the circuit court. Maley complains of that sentence, because it subjects him to damages and costs for the value of the Mercator and her cargo, first captured by him, and afterwards taken out of his possession by a British privateer, and because, also, some items are admitted into the account, taken for the purpose of ascertaining the sum for which he is liable, which ought to be excluded from it. Shattuck complains of the sentence, because he was not allowed by the circuit court, all the items contained in the report, to the whole of which he thinks himself entitled.

*488] In discussing the right of Shattuck to compensation for the Mercator, and her cargo, the first question which presents itself is, was that vessel and cargo really his property? Without reciting the various documents filed in the cause, it will be admitted, that they demonstrate the affirmative of this question, unless the court be precluded from looking into them, by the sentence in Jamaica, condemning the ship and cargo as lawful prize.

On the conclusiveness of the sentence of a foreign court of admiralty, it is not intended now to decide. For the present, therefore, such sentence will be considered as conclusive, to the same extent which is allowed to it in the courts of Great Britain. But, in those courts, it has never been supposed to evidence more than its own correctness; it has, consequently, never been supposed to establish any particular fact, without which the sentence may have been rightly pronounced. If then, in the present case, the Mercator, with her cargo, may have been condemned as prize, although, in fact, they were both known to be the property of a neutral, the sentence of condemnation does not negative the averment, that they both belonged to Jared Shattuck.

Maley v. Shattuck.

It is well known, that a vessel libelled as enemy's property, is condemned as prize, if she act in such manner as to forfeit the protection to which she is entitled by her neutral character. If, for example, a search be resisted, or an attempt be made to enter a blockaded port, the laws of war, as exercised by belligerents, authorize a condemnation as enemy's property, however clearly it may be proved, that the vessel is in truth the vessel of a friend.¹ Of consequence, this sentence, being only conclusive of to its own correctness, leaves the fact of real title open to investigation. This positive impeding to inquiry being removed, no doubt upon the subject can be entertained.

It being proved that the Mercator and her cargo belonged to Jared Shattuck, who, though born in the United States, had removed to the island of St. Thomas, *and had acquired all the commercial rights of his domicile, before the occurrence of those circumstances which occasioned [*489 the acts of congress under which this seizure is alleged to have been made, the case of the *Charming Betsy* determines that the vessel and cargo were not liable to forfeiture under those acts.

It remains then to inquire, whether the Mercator appeared under such circumstances of suspicion as to justify her seizure? On this point too, the authority of the *Charming Betsy* appears to be decisive. In each case, the vessel was built in America, and had been recently sold to a person born in the United States, who had become a Danish burgher, before the rupture between this country and France; and both cases present the same circumstances of suspicion, derived from the practice of the island to cover American as Danish property. The points of dissimilitude are, that in the *Charming Betsy*, the captain and crew were of a description to give greater suspicion than the captain and crew of the Mercator; and in the *Charming Betsy*, was found a *procès verbal*, which stated facts unfavorable to that vessel, whereas, no similar paper was found in the Mercator. The only circumstance of suspicion attending the Mercator, which did not belong to the *Charming Betsy*, is, that she was bound to Port-au-Prince, and was taken entering the port of Jacmel. This circumstance appears to be sufficiently accounted for, but if it was not, the court can perceive in it no evidence of her being American property, which can weigh against the testimony offered by the papers that she was Danish. The documents on this point which were thought decisive in the case of the *Charming Betsy* exist in this case also. The information of the captain, uncontradicted by any of his crew, in this case, as in that, is corroborated and confirmed by the documents on board the vessel.

The only paper, the absence of which could be important, was an authenticated burgher's brief proving the captain to have been a Danish subject. How far *the absence of this paper might have justified a suspicion [*490 in a belligerent that she was enemy-property, so as to excuse from damages for capture and detention, according to the usages of belligerents, the court will not undertake to determine; but it was a casualty which is not sufficient to justify a suspicion that the vessel was American. The burgher's brief is stated to have been in possession of the captain; but is supposed not to have been produced, and, consequently, it could have no influence on Lieutenant Maley. However this may be, no inquiry respecting

¹ The Baigorry, 2 Wall. 474.

Maley v. Shattuck.

it was made, and he does not appear to have suggested any difficulty on that ground.

Unquestionably, Lieutenant Maley had a right to stop and to search the Mercator, and to exercise his judgment on the propriety of detaining her; but, in the exercise of that judgment, he appears to have come to a decision not warranted by the testimony presented to him. The circumstances of suspicion arising in the case, were not sufficiently strong to justify the seizure which was made.

But it is obvious, that Lieutenant Maley suspected the Mercator to be a French, not an American vessel. In his answer, he says, that he mistook the captain for a Frenchman; in his letter of instructions, he speaks of the vessel as a prize; and in the protest of the American prize-master, she is denominated "a French prize." From these circumstances combined, it is supposed to be sufficiently apparent, that the mistake committed by Lieutenant Maley was in supposing the Mercator to be a French vessel, liable to capture under the laws of the United States.

The argument of the attorney-general, that Lieutenant Maley is not liable for this loss, because it was produced by a superior force, which it was not in his power to resist, would have great weight, if the circumstances under which the Mercator appeared had been such as to justify her seizure. But the court is not of that opinion, and, consequently, that argument loses its application to this case.

*Neither is it conceived, that the failure of Shattuck to appeal in
*491] time, destroys his claim on Lieutenant Maley. He had certainly a right to abandon, if he chose to do so, and to resort to the captor for damages.

In the opinion given in the circuit court, that the libellant was entitled to compensation for the Mercator and her cargo, this court can perceive no error; but in so much of the report of the commissioners appointed to adjust the account as is affirmed, some unimportant inaccuracies appear. In its circumstances, this case so strongly resembles that of the *Charming Betsy* that the court will be governed by the rule there laid down. In pursuance of that rule, the rejection of the premium for insurance, that premium not having been paid, is approved; but the rejection of the claim for outfits of the vessel, and the necessary advance to the crew, is disapproved. Although the general terms used in the case of the *Charming Betsy* would seem to exclude this item from the account, yet the particular question was not under the consideration of the court, and it is conceived to stand on the same principles with the premium of insurance, if actually paid, which was expressly allowed. But this claim is nearly balanced by two items in the account which were admitted, as this court thinks, improperly. One is the charge of \$540 for the expense of soliciting compensation from the United States. The court can perceive no reason for charging this expense to Lieutenant Maley. The other is the charge of \$326.12, the account of Ross & Hall, for expenses in England.

Had the appeal been prosecuted in time by Shattuck, it is scarcely possible to doubt, but that the sentence of the court, in Jamaica, would have been reversed, in which case, it would have been reasonable, that the expense of the prosecution should have been paid by Lieutenant Maley. But as it was not prosecuted in time, in consequence of which the proceeds of the vessel

Lawrason v. Mason.

and *cargo were lost, it is not conceived, that Lieutenant Maley ought to be charged with the cost of a subsequent ineffectual attempt, not made at his instance, to repair the original neglect. What may be the claim of Shattuck, on the government of the United States, for this sum, is not for this court to inquire ; but his claim against Lieutenant Maley is not admitted.

This court affirms so much of the sentence of the circuit court, as awards compensation for the Mercator, and her cargo, to the libellant, and approves of the sentence on the report of the commissioners, except as to that part which rejects the claim for advances for the outfits of the vessel, and the wages of the crew, and which admits the charges of \$540, on account of the expenses attending the application to the government of the United States, and of \$326.12, on account of expenses attendant on the ineffectual attempt which was made to prosecute an appeal in England. In these respects, the account is to be reformed, for which purpose, so much of the sentence of the circuit court as respects this part of the subject is reversed, and the case is remanded to the circuit court to be further proceeded in, as to justice shall appertain.

LAWRASON v. MASON.

Letter of credit.

A letter from the defendants to J. M., saying, that they would be his security for 130 barrels of corn, payable in twelve months, will sustain an action of *assumpsit* against the defendants, by any person who, upon the faith of the letter, shall have given credit to J. M. for the corn.¹

ERROR to the Circuit Court for the district of Columbia.

This was an action of *assumpsit*, brought by Mason against Lawrason, surviving partner of the firm of Lawrason & Smoot, upon the following note :

*“ Alexandria, 28th November 1800. [*493

“ Mr. James McPherson,

“ Dear Sir—We will become your security for one hundred and thirty barrels of corn, payable in twelve months.”

(Signed)

LAWRASON & SMOOT.”

The declaration contained several counts, laying the *assumpsit* in different forms, but the substance of each was, that the plaintiff, relying on, and placing confidence in, the promise of the defendants, and at their instance and request, sold and delivered the corn to McPherson, at the price of three dollars a barrel, who, although requested, never paid the plaintiff therefor, of which the defendants had notice, whereby the defendants became liable, and in consideration thereof, promised to pay.

The defendants pleaded the general issue ; and at the trial, a verdict was taken for the plaintiff, subject to the opinion of the court, upon a demurrer to evidence, which stated, in substance, that the defendants signed and delivered the said note to McPherson ; that he applied to the agent of the plaintiff for the corn, and offered three dollars a barrel, payable in twelve months ; that the agent consulted the plaintiff, who agreed that

¹ And see *Union Bank v. Coster*, 3 N. Y. 203.