

Syllabus.

THE GRAY JACKET.

MERITS.)

1. The proclamation of President Lincoln made December 8th, 1863, granting to all persons (with certain exceptions) who had participated in the then existing rebellion, a full pardon, with restoration of all rights of property except in slaves and in property cases, where rights of third persons shall have intervened, has no application to cases of maritime capture, and therefore does not extinguish the liability of a vessel and cargo seized *flagrante delicto*, while running the blockade then declared against our southern coast, from the consequences of condemnation by a prize court.
2. A claimant's own affidavit that he is not within the exceptions of the proclamation, is insufficient to establish the fact in setting up the proclamation as an extinguishment of the liability above described.
3. A remission by the Secretary of the Treasury under the act of July 13th, 1861, providing (§ 5) that all goods, &c., coming from a State declared to be in insurrection "into the other parts of the United States," by land or water, shall, together with the vessel conveying the same, be forfeited to the United States; and also (§ 6) any vessel belonging in whole or in part to any citizen or inhabitant of such State, "found at sea;" but enacting also (§ 8) that the forfeitures and penalties incurred by virtue of the act may be mitigated or remitted in pursuance of the authority vested in the said Secretary by an act approved 3d March, 1797, or in cases where special circumstances may seem to require it, &c., does not reach a case where the vessel and cargo were not proceeding to a loyal State.
4. The statute does not give the Secretary power to remit in any case of property captured as maritime prize of war.
5. The liability of property, the product of an enemy country, and coming from it during war, is irrespective of the *status domicilii*, guilt or innocence of the owner. If it come from enemy territory, it bears the impress of enemy property. If it belong to a loyal citizen of the country of the captors, it is nevertheless as much liable to condemnation as if owned by a citizen or subject of the hostile country or by the hostile government itself. The only qualification of these rules is, that where, upon the breaking out of hostilities or as soon after as possible, the owner escapes with such property as he can take with him, or in good faith thus early removes his property, with the view of putting it beyond the dominion of the hostile power, the property in such cases is exempt from the liability which would otherwise attend it.
6. Where the war (a civil war) broke out in April, 1861, a removal on the 30th December, 1863, said to be too late.
7. An order for further proof in prize cases is always made with extreme

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caution, and only where the ends of justice clearly require it. A claimant forfeits the right to ask it, by any guilty concealments previously made in the case.

APPEAL from the District Court of the United States for the Eastern District of Louisiana, the case being thus :

The steamer Gray Jacket, and her cargo, consisting of 513 bales of cotton, 25 barrels of rosin, some turpentine and tobacco, were captured during the late rebellion, by the United States war vessel Kennebec, on the morning of 31st December, 1863, *on the high seas*, about forty miles south of Mobile Bay and beyond the limits of the blockade then established of that port, by the Federal government. The steamer had gone out of Mobile Bay on the previous night in the dark, and endeavoring, as the captors alleged, to escape, was pursued and on the next morning captured by the Kennebec for breach of blockade. She was, at this time, in a disabled condition owing to a storm in the night, and on the firing of a gun across her bows hove to, without resistance, and without having changed her course.

Being sent into New Orleans for adjudication, her captain (one Meaher), who owned her; the mate, named Flynn, and her chief engineer, were examined *in preparatorio*, *on the standing interrogatories*. These were all the witnesses thus examined.

In reply to these interrogatories, Meaher, the captain, stated that he was born in Maine, but had lived thirty years in Mobile. "I am a citizen," he continued, "of the *State of Alabama*, to which I owe my allegiance." He stated that the vessel came out of harbor with the American flag flying; that he was owner of the vessel and of the cargo; "that the voyage began at Mobile, and was to have ended at Havana;" that in case the vessel had arrived there, he thought that he should have reshipped the cargo to some place where he could have received a better price for it than he could in Havana.

Flynn, the mate, examined after Meaher had been, made the same statement as to the destination of the vessel and cargo. He stated, however, that the vessel sailed "under

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English colors and had no other." As to their ownership, he said :

"The owners of the vessel were Captain Meaher and brother. They also owned *half* the cargo. *The balance was for Confederate government account.* The greatest part of the cotton was produced upon Meaher's lands. I understood they had built the Gray Jacket expressly to carry their own cotton to Havana, but they had to allow the government an interest of one-half; otherwise they would not have been permitted to leave Mobile. The Gray Jacket on the trip in which she was taken had attempted to sail covertly from the port of Mobile, then under blockade. She could not have left it otherwise than secretly."

The cotton, it appeared, was the product of Alabama.

The depositions in which these statements were made, were taken on the 26th of February, 1864. About a month afterwards, Meaher filed what he called a "claim, and *answer* to the libel." It presented a narrative in its material parts, as follows :

"That he, the said Timothy, is the true and *bonâ fide* owner of the said steamer, and of the cargo thereon, and that no other person is the owner thereof.

"That he was living in Mobile, at the time the rebellion broke out, and that he had resided there for upwards of thirty years prior thereto; that after the breaking out of the said rebellion he gave no aid to the same; that he had previously, by a life of industry and economy, and the prosecution of legitimate business, acquired a large amount of property; that after the breaking out of the rebellion he became anxious to adopt some measure by which he might be able to withdraw the same to a place of security; that with that object he built the said steamer with his own means, and loaded her with the goods constituting her cargo, and then procured a clearance from the so-called Confederate authorities, exercising all the powers of a government *de facto* in Mobile, State of Alabama, from the said port of Mobile to the port of Havana, in the island of Cuba, then and now a port of a country in amity with the United States, as the only means by which he could be enabled to effect the withdrawal of his property from the limits of the so-called Confederacy.

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“And he now avers the truth to be that his right of property in the said steamer and in her *cargo*, which was *full and complete while the same were in the port of Mobile*, continued to be full and complete after he had gotten upon the high seas with the intent of escaping from the power and control of the States in rebellion to a port in a country in amity with the United States, and that the said steamer and cargo were not at any time after their escape from the said port of Mobile, rightfully subject to capture, &c.

“And further answering, he says that the President by a proclamation dated the 8th December, A. D. 1863, declared to all persons who had participated in the existing rebellion except as thereafter excepted, that a full pardon is granted to them and each of them, with restoration of all rights of property except as to slaves and *in property cases where rights of third parties shall have intervened*, upon the condition that every such person shall take and subscribe an oath, as prescribed in the said proclamation, and shall thenceforward keep and maintain said oath inviolate; that he, the defendant, is not embraced in the exceptions made by the said proclamation; that on the 18th day of March, 1864, he took and subscribed the oath, as prescribed. That in the premises a full pardon is extended to him, even if he had directly or by implication participated in the existing rebellion, and that he therefore now pleads the pardon as a bar to any further proceedings.”

On a subsequent day the court, on motion of the District Attorney of the United States, ordered so much of the claim and answer as was in the nature of an answer to be stricken from the record. The captors then offered in evidence the proofs *in preparatorio* and a paper found on board the captured vessel, as follows:

“*Memo. of agreements made between Messrs. Meaher & Bro., owners of the s'r Gray Jacket, and Henry Meyers, major and ch'f ord. officer, acting for the gover't of the C. S.:*

“The gover't will furnish the whole cargo of cotton, and will make over to the owners of the vessel one-half of the cotton, in consideration of which the owners do agree to deliver the other half, belonging to the government, at Havana, free of

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further charge, except the one-half of the expenses of compressing and storing incurred at Mobile.

“It is understood and agreed that the said steamer is to return to Mobile, if practicable; if not, then to some other confederate port; and the gover’t is to be allowed at least one-half of the carrying capacity of the steamer in the return voyage, at a freight of £25 per ton, and for any excess over the one-half required by the gover’t, at £30 per ton, payable in cotton, at the rate of 6*d.* per pound for middling, and other grades in proportion, on delivery of the freight.

“It is further understood and agreed that in the event of a partial loss of the outward cargo, the portion of cotton saved is to be equally divided between the parties at the port of destination, and any loss on the inward cargo is to be settled on the principle of general average, as far as the cargo is concerned.

“HENRY MEYERS,

Major and Ch’f Ord. Officer, Dep’t of the Gulf.

“MOBILE, Oct. 22, ’63.”

On the other side, the claimant put in evidence the oath referred to in his claim and answer. It was an oath of loyalty, promising thereafter faithfully to support the Constitution of the United States, &c., being an oath prescribed in the proclamation of President Lincoln of December 8th, 1863, referred to in the answer, and by which the said President, reciting that it was desired by some persons heretofore engaged in rebellion, to resume their allegiance to the United States, “proclaimed and made known to all persons who had directly, or by implication, participated in the existing rebellion, except as hereinafter excepted, that a full pardon is granted to them, and each of them, with restoration of all rights of property, except as to slaves, and *in property cases where rights of third parties shall have intervened*, and upon the condition that every such person shall take and subscribe an oath,” &c. Certain classes of persons were excepted. After the giving of this oath in evidence the claimant moved for an order to take further proof. The matter was held open.

All these proceedings, including the giving in evidence

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of the paper above-named found on board, took place 5th April, 1864. On the 25th May following, the claimant made a new affidavit, which was subsequently filed. It presented a narrative as follows :

“That he, the said Timothy, is a loyal citizen of the United States, born in the State of Maine; that he was late of the city of Mobile, in the State of Alabama, and that he is the true, lawful, and sole owner of the steamer Gray Jacket, and of the cotton constituting her cargo; that he was living in the city of Mobile at the time the existing rebellion broke out, and that he had resided there upwards of thirty years prior thereto; that during the period which preceded the breaking out of the rebellion he opposed secession and did all in his power to prevent the same, and to preserve and maintain the Union; and that after the said rebellion broke out he gave it no aid or assistance in any way whatever.

“And he further says: that after the breaking out of the rebellion he was anxious to adopt some course by which he might be enabled to withdraw the property he was in possession of, or as considerable a portion of it as was practicable, from the so-called Confederate States, to a place of security, and get it into such a position that he might realize the value of it and return to the State of Maine, where his mother now lives and where he has property and many relations and friends; that with this object and intention, well known to several of his confidential friends, he built the said steamer Gray Jacket with his own means, with the design of lading her with cotton belonging to himself; that while he was engaged in building said steamer, and she was approaching completion, the Confederate authorities at Mobile manifested a determination to make use of the steamer to advance their own purposes, and proposed to load her with cotton furnished by them and to give him one-half of the cargo as the owner of the steamer, on condition that the other half was landed at Havana, free of charge for freight, and that he would bind himself to return to Mobile or to some other Confederate port, and give to the so-called Confederate government a certain portion of the carrying capacity of the said steamer on certain terms and conditions; that situated as he was, with his property and himself and his family in the power and under the control of the rebel authorities, he had no freedom

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of action, and could only by his manner manifest his repugnance to any proposal without venturing on an absolute refusal to it; that he did manifest great dissatisfaction to the proposed arrangement, and that no such contract was entered into by him with the rebel authorities, and that no such arrangement by them with him was carried into effect, either wholly or in part; that although the said rebel authorities had seemed to abandon the attempt of carrying out the said proposal, not having found any cotton to be laded aboard of the said steamer, yet he found that when he was ready to begin to lade his own cotton aboard of her that the said rebel authorities had not abandoned all idea of deriving an advantage from exercising a forced control over his property.

“That an officer exercising authority at Mobile visited him and said that he, Meaher, could not take the cargo out unless he consented that one-half of the cargo to be put on board of the steamer should be for the account of the so-called Confederate government, and that if he, Meaher, did not comply, he, the officer, would take possession of the steamer and put a government crew on board of her; that he, Meaher, finding that it was impossible for him to have any control over his property if he refused to comply with the requisition on the part of one armed with physical power to despoil him altogether, *apparently submitted to and complied with the requisition, with the secret determination to assert and maintain his real rights over the entire cargo so soon as he had escaped beyond the authority and control of the rebel States*; that all the cotton laden on said steamer at the time of beginning her voyage, and found on board of her at the time of her capture, was his own property, and had been produced on his own plantation, or had been bought and paid for by him, with a view to its being laded on board of said steamer for transportation to Havana on the contemplated voyage, on his own account, and that before he obtained a clearance of the said steamer Gray Jacket and her cargo, he was required to pay and did pay the export duty imposed on all cotton exported, by authority of an act of the Congress of the so-called Confederacy, upon the entire amount of cargo embarked on the said steamer.

“That neither the so-called Confederate States, or any person or persons in rebellion against the United States, or their factors, or agents, or any others, had at the time of the shipment of the said cotton on the said steamer Gray Jacket, or at the

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time of the capture of the said steamer, on the 31st day of December, 1863, or now have any right, title, or interest in the said cotton or in the said steamer Gray Jacket.

“That it was at first his intention to have taken his wife and children with him on board the said steamer on the said proposed voyage to Havana, but that he was afterwards deterred from attempting to do so lest it should strengthen the suspicion which already existed against him in the minds of the rebel authorities, and prevent his getting away at all, and that he at last unwillingly abandoned the idea and left them after *having made an arrangement with his brother, J. M. Meaher, to send them as soon afterwards as he could find a suitable opportunity, to Havana, where they were to place themselves under the care of the commercial house of Santa Maria, with whom he, Timothy Meaher, was to have made an arrangement.*

“That after lading the steamer, he procured a clearance from the so-called Confederate authorities, exercising all the powers of a government *de facto* in the said city of Mobile, in the State of Alabama, from the port of Mobile to the port of Havana, as the only means by which he could be enabled to effect the withdrawal of his said steamer with its cargo from the limits of the so-called Confederacy and beyond the powers and control of the States in rebellion against the government of the United States. And he further says that the President of the United States, by a proclamation, dated the 8th day of December, 1863, declared,” &c. [setting forth the proclamation and pardon, as in the former affidavit on pp. 344-5.]

The court condemned the vessel and cargo.

The case being now in this court, Mr. B. F. Butler, in behalf of the claimant Meaher, moved for an order to take further proof; its purpose being, in effect, to establish the truth of the facts set forth in the second affidavit of the claimant; to show also in substance—

“That he sailed out past Fort Morgan, in the evening of the 30th of December, with the full intent to deliver himself up to the blockading squadron, if he met it, or, failing to so do, to go to Havana; that during the night his vessel was partially disabled, bursting a steam pipe, but he refused to return to Mobile

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although, owing to the storm, he had difficulty in keeping off shore, and was obliged to make all the offing he could.

“That, seeing the Kennebec, he did not alter his course or attempt to get away from her, although he might have run ten knots, his machinery being repaired, but kept at the rate of four knots till the Kennebec came up.

“That he was sailing under the American flag hoisted on his vessel, being the only one he had on board, and one which he had preserved through the war, at the hazard of his life or liberty, before he was captured.

“That when boarded he told the officer why his vessel was in this predicament, and demanded protection for himself and property, but was *seized as prize*.

“That he answered the interrogatories put to him without any knowledge of the object, and before he had any opportunity to make any explanations or statements in his own behalf.

“That as soon as he was permitted, to wit, on the 18th of March, 1864, he went before the proper officer and took the oath of amnesty prescribed by the President's proclamation of December 8, 1863, with full intention to keep the same, and has ever kept his oath inviolate; that this was more than a year before the war ended, and would have precluded his return to Mobile while the Confederacy existed.

“That he has proved all these facts to the satisfaction of the Secretary of the Treasury, who has remitted to him all the forfeitures prescribed by the act of Congress of July 13, 1861, and acquitted him of all intention of violating the laws of the United States or of aiding or abetting the rebellion.”

Under the form of further proof he desired also to bring before the court the remission by the Secretary of the Treasury above referred to, and made under the act of July 13, 1861.

This act, it is necessary to state, declares (§ 6) that any vessel belonging, in whole or in part, to any citizen or inhabitant of a State whose inhabitants were declared to be in a state of insurrection [as those of Alabama had been declared], “found at sea,” should be forfeited to the United States; and also, by another section (§ 5), “all goods and chattels, wares and merchandise, coming from said State or

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section, *into the other parts of the United States*, . . . by land or water, together with the vessel or vehicle conveying the same."

The act, however, declared (§ 8) that the forfeitures incurred by virtue of it might be remitted in pursuance of the authority vested in the Secretary of the Treasury by an act entitled, &c.

The act of remission under the seal of the Secretary, and sought to be put in proof, bore date March 21st, 1866, and ran thus :

"Whereas a petition has been made before me by Timothy Meaher, a citizen of the State of Alabama, for the remission of the forfeiture of the steamer Gray Jacket, and her tackle and cargo, incurred under the statute of the United States entitled, &c., approved July 13, 1861:

"And . . . it appearing to my satisfaction that the said forfeiture was incurred without any intent on the part of the petitioner to violate the laws of the United States, or to aid or abet the insurrection against the government of the United States, and that the petitioner is a loyal citizen, and that said steamer and cargo were condemned by the United States District Court for the Eastern District of Louisiana as prize of war:

"Now therefore know ye, that I, the Secretary of the Treasury, in consideration of the premises, and by virtue of the power and authority to me given by the said eighth section of the said act of July 13, 1861, do hereby decide to remit to the petitioner all the right, claim, and demand of the United States to the said forfeiture, upon payment, &c., *so far as such forfeiture was incurred under the provisions of the act of July 13, 1861, but not otherwise.*"*

It appeared that as originally drawn, Meaher's petition to the Secretary of the Treasury recited in the foregoing act of remission, set forth that Meaher "would satisfy the honorable Secretary of the Treasury that he was a loyal man, attempting to escape from the Confederacy, which he had never aided with his property [*and to take the same into the loyal States, by*

* 12 Stat. at Large, 255.

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way of Havana, if his vessel should prove fit for the voyage], in order to meet his wife and family, whom he had sent out of the Confederacy by another channel, and for whom he had arranged to live at the house of his mother, in the State of Maine;" that the petition thus drawn, and without the words in italics and brackets, was filed and submitted by the Secretary of the Treasury to the Attorney-General, who objected to it, to that officer, "that it contained no allegation so as to bring it within the act of July 13, 1861, that the cargo was proceeding, when captured, from a revolted State *into other parts of the United States.*" The requisite words, indicated above in the brackets and italics, appeared as an interlined amendment.

The court allowed this remission by the Secretary to be received as part of the case; which therefore, as it now stood before this court, presented three questions:

1. How far the judgment should be affected by Meaher's oath of loyalty, in connection with the proclamation of the President giving full pardon and with restoration of all rights of property, except "in property cases where rights of third parties shall have intervened?"

2. How far it should be affected by the remission now allowed to be read and relied on, from the Secretary of the Treasury?

3. Whether, if it was unchanged by these, the case was one for further proof?

Mr. Ashton, Assistant Attorney-General, for the United States, and Mr. Eames, for the captors:

I. Meaher declares that he was at all times a loyal citizen of the United States, and yet relies on the proclamation of President Lincoln in favor of those "who have participated in the existing rebellion;" declares that he has ever acted a patriotic part, and then sets up a "full pardon" for treason.

The proclamation and pardon was never meant for persons such as Meaher describes himself to be.

But for whomever meant, it excepts "property cases where

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the right of third parties had intervened." Here the right of the captors, by the act of seizure, intervened. The case is in terms excepted.

Neither has Meaher proved that he is not within the classes excepted from the benefit of the proclamation. He asserts, indeed, in his *ex parte* affidavit, that he is not; but that is no proof of the fact.

II. The case is no better on the remission from the Treasury. The vessel was not "found" at sea within one section of the act of July 13, 1861. She was captured when sailing, a flag flying, her officers and crew aboard; nothing derelict about her; seized, not found. Neither were the vessel and cargo coming from a rebellious State or section "into the other parts of the United States" so as to come within the other section. The voyage was unquestionably to Havana. Going from Mobile to Maine, *viâ* Havana, the plan finally set up, was plainly all an afterthought.

Besides, the present condemnation was incurred by virtue of the public law of war, and not under the statute of July 13, 1861, and is therefore, by the terms of the warrant, excluded from its operation.

Even if this were not so, the Secretary's power to remit forfeitures incurred by virtue of the statute of 1861 is limited by the words of the statute to cases of seizure and proceedings to enforce forfeitures *under the statute*, and does not extend to and cannot be exercised in cases of maritime captures of vessels and cargoes under the law of war, adjudicated under that law, and in the prize jurisdiction, and then condemned as prize of war on account of breach of blockade.

Recent cases in this court show vessels captured and condemned as prize of war, though at the time of capture, and until so captured, liable also to seizure and forfeiture under the statute of 13th July, 1861, as belonging, in whole or in part, to citizens or inhabitants of the insurrectionary States, and found at sea. Among these, the Baigory and the Andromeda;* the Cornelius and the Bermuda.†

* 2 Wallace, 481, 489.

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† 3 Id. 214, 553.

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III. *Is the case one for further proof?*

1. Whatever Meaher's general feelings or views were in regard to the rebellion, there is no doubt, we submit, that this voyage was a speculation, a fraud on the blockade. He was captured on the high seas, outside the line of the blockading vessels, steering to Havana, trying, as the captors report, and, as seems obvious, to escape. If he could bring a host of witnesses to show what he was and what he meant before sailing; that he was then a loyal man, wishing to return to loyal regions and loyal friends, these facts contradict them all, in a way past any power of refutation. Why did he not first *seek* the blockading squadron? Indeed, the matters set up in his affidavits seem to have been quite an afterthought. There is nothing even in *his* deposition taken *in preparatorio*, which so much as adumbrates the scheme subsequently set up as the true history. If ever a claimant showed a character and a case where further proof ought *not* to be allowed, it is Meaher. He has shown that he can make proof *ad libitum*. He first gives evidence and files an answer, showing one case, sufficient, as he supposes, for the then necessity. But the mate contradicts him as to ownership, and the government produces the document found on board, which confirms what the mate had declared. He then files a second affidavit, setting up a further case, and explaining away the evidence against him. He next petitions the Secretary of the Treasury, setting forth his case as he thought needful. Objection is made by the Attorney-General that his case is radically defective in its facts, the non-existing facts being pointed out. And lo! Meaher immediately interlines and states the required facts. Allowance for further proof in such a case would be a direct encouragement to perjury. Courts of admiralty are most careful not to lay snares in this way for defective consciences.

We may, moreover, well doubt whether Meaher was an honest or a loyal man at all. He confesses that he meant to cheat the Confederacy for his own benefit, not for the nation's. And why does he state that his allegiance was due

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to the State of Alabama? Did he not know that Alabama was then in rebellion against the nation? But—

2. If he were ever so loyal, and if his narrative, in its last elaborated and interlineated form, were true, it would be no defence:

(a) The law of war denounces, as being a trading with the enemy, the withdrawal by a citizen of this country of any property without license, from the enemies' territory after a considerable time has elapsed since the beginning of hostilities.* In that case, this court held that goods purchased in England before hostilities, and shipped to the purchaser in this country by his agent, eleven months after the declaration of war, were confiscable in a prize court.

(b) In Meaher's affidavits his purpose of removing this property "*to a place of security*, beyond the power and control of the States in rebellion," is presented in such a way as that an intention to return to his residence and business in Mobile is consistent with it; nor are there any facts alleged in that document tending to show a dissolution of the commercial establishment and domicil in Mobile (proved by Flynn's deposition *in preparatorio* to have existed), prior to or at the time of his sailing on this voyage, or any suspension of the mercantile pursuits in which he had been engaged during the entire period of war. If the claimant was a member of a house of trade in Mobile, engaged in the enemy's commerce, then, independently of personal residence, a continued connection with such a house would operate in law to prevent any divestiture of that enemy quality impressed upon him by residence and commerce during the war in Alabama.

(c) Meaher alleges that this cotton, "had been produced on his own plantation." Now, no doctrine is better settled than that the produce of a person's own plantation in the enemy's country is considered, in a prize court, as the property of the enemy, independent of his own personal residence and occupation.

Every way the case is against the claimant.

* Penniman's claim, *The St. Lawrence*, 9 Cranch, 121.

Argument for the claimant.

Mr. B. F. Butler, for the claimant: Mr. C. Cushing, being allowed leave to appear for the Treasury department:

I. *The proclamation of December 8th, 1863, was a proclaimed license to every sort of enemy within its terms, those by construction as well as those in fact, those who by mere presence and necessity had participated in the rebellion as well as to those who were actual belligerents, to come within the Union lines, with full restoration of all rights and property.**

No "right of third parties"—neither *jus ad rem* nor *jus in re*—had "intervened" by a simple seizure; nor could any intervene, at best, before a decree of condemnation. The case was not "a property case." Even if "a right" had intervened it was initiate only, and defeasible by the party's taking the oath of loyalty as soon as he could and, certainly, before decree should fix the right.

Indeed the government has power to release all penalties and forfeitures and all maritime captures, irrespective of the claims of captors or informers, up to the moment of distribution of proceeds. Such is the settled doctrine of the prize courts.†

II. *The remission by the Secretary of the Treasury.*

1. The vessel was "found at sea" and the property of an inhabitant of an insurgent State. When found, *eo instanti*, by force of the statute she became forfeited to the United States, and the title of the United States could not be divested either by capture or by sale to an innocent purchaser.‡ There is no indication of the acts referring to derelict or abandoned vessels only. The vessel then comes within the terms of the act.

But the cargo must go with the vessel and partake of its character, especially where there is the same owner to both.

The remission is a license coupled with a final adjudica-

* The *Herstelder*, 1 *Robinson*, 117.

† The *Elsebe*, 5 *Robinson*, 172; *H. M. S. Thetis*, 3 *Haggard*, 231; *French Guiana*, 2 *Dodson*, 156-158; *The Diligentia*, 1 *Id.* 404; *The Nassau*, *Blatchford's Prize Cases*, 601; *Fifty-two Bales of Cotton*, *Id.* 310.

‡ *United States v. 1960 Bags of Coffee*, 8 *Cranch*, 398; *Same v. Grundy*, 3 *Id.* 351.

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tion of the *bona fides* of the licensee in his acts under it, and must relate back to the inception of the voyage.

All licenses, either express or implied, are to be construed with the greatest liberality.* Such is the present doctrine, though not the old one.

2. This is a case of Treasury forfeiture, and not of maritime prize.†

This power of making remissions has been exercised by every Secretary of the Treasury since the war. In the *Florida*, by Secretary Chase; in the *Cyclops*, by Secretary Fessenden; in the case at bar, by Secretary McCulloch.

In the Revolution of 1775 the British Parliament passed an act of non-intercourse and forfeiture of rebel property, from which the act of July 13th, 1861, was drawn, and its necessity was argued from the same consideration as in this rebellion.‡

The British act contained no relief from forfeitures under it, so that there was the strongest disposition to hold the captures maritime prizes; yet in every instance the forfeitures were adjudged to the Exchequer and not to captors, or as "Droits of Admiralty," save in the first case arising;§ and in that case, the judge, Sir George Hay, publicly declared that he repented of that decision.|| Ever after the decisions were made as forfeitures. We have caused the "Paper books of the Appeals to the Lords" to be examined, and find all cases were brought on the Instance side of the court, although the act denominates the property as that of "open enemies," and to be proceeded against "*as lawful prize.*"

The blockade, which was declared by proclamation of April 19, 1861, is a *pacifie*, and not a *belligerent*, blockade. It is made so in terms:

* The *Jonge Klassina*, 5 Robinson, 265; The *Clio*, 6 Id. 67; The *Eolus*, 1 Dodson, 300; Duer on Insurance, 595.

† See on this subject generally the opinion of Treat, J., of the Eastern District of Missouri, 8vo. pp. 78; Washington, Treasury Department, 1866.

‡ See letter of Mr. Secretary Chase explanatory of act of 1861. *Cong. Globe*, 37th Cong., 1st sess., p. 55.

§ The Dickenson, Marriot's Decisions, page 1.

|| Marriot, 74, 197, 222.

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“To the protection of the public peace, and the lives and property of quiet and orderly citizens pursuing their lawful occupations, until Congress shall have assembled and deliberated on the said unlawful proceedings, or until the same shall have ceased, have further deemed it advisable to set on foot a blockade of the ports within the States aforesaid, in pursuance of the laws of the United States, and of the law of nations in such case provided.”

The blockade was made specifically “under the laws of the *United States* and the laws of nations.” A *belligerent* blockade could have been only under the laws of nations, *jure belli*, in such case provided.

Congress did deliberate thereon, and the act of July 13, 1861 (already quoted), was one result of these deliberations, with authority to the President to make a new proclamation on the subject of commercial intercourse with the rebellious States.*

A proclamation was issued August 16, 1861, reciting the act of July 13, and declaring, among other things, that “all ships and vessels belonging in whole or in part to any citizen or inhabitant of any of said States, found at sea, &c., will be forfeited to the United States.” It proceeded:

“And I hereby enjoin upon all district attorneys, marshals, and officers of the revenue, and of the military and naval forces of the *United States*, to be vigilant in the execution of said act, and in the enforcement of the penalties and forfeitures imposed or declared by it; leaving any party who may think himself aggrieved thereby to his application to the Secretary of the Treasury for the remission of any penalty or forfeiture, which the said Secretary is *authorized* by law to grant, if, in his judgment, the special circumstances of any case shall require such remission.”

From notification of that proclamation the blockading fleet became, by the authority of Congress and by order of the President, employed on the revenue service, so far as the acts of trade of the insurgents were concerned, and

* 12 Stat. at Large, 257; Id. 319.

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a "blockading force" *quoad* neutral or hostile nations; the rights and wrongs of the rebels to be adjudged by the municipal laws of their country, which alone were applicable to them, and the neutral or hostile offenders to be tried by the prize courts of the country under the law of nations, to which alone they were amenable. This course was taken by Congress in order to meet meritorious cases like that at bar, instead of leaving the citizen to the rigors of blockade and prize capture; "and when hardships shall arise provision is made by law for affording relief under authority much more competent to deal in such cases than this court ever can be."*

The Executive has ordered "all military and naval officers, district attorneys, and marshals, to be vigilant in enforcing that act." Can a naval officer and a district attorney, by colluding to bring the cause on the prize side instead of the instance side of a United States Admiralty Court, thus avoiding their proclaimed duty, oust the United States of its forfeiture and property, and involve it perhaps in serious inconvenience?

On this whole subject Sir William Scott speaks with force and clearness in *The Elsebe*:†

"Prize is altogether a creature of the crown. No man has, or can have, any interest but what he takes as the mere gift of the crown. Beyond the extent of that gift he has nothing. This is the principle of law on the subject, founded on the wisest reasons. The right of making war and peace is exclusively in the crown. *The acquisitions of war belong to the crown*, and the disposal of these acquisitions may be of the utmost importance for the purposes both of war and peace. This is no peculiar doctrine of our constitution; it is universally received as a necessary principle of public jurisprudence by all writers on the subject. *Bello parta cedunt republicæ*."

"And I must add, that though I have suffered a party to stand before the court for the purpose of arguing the question, I do not know the party who can legally stand before it, pray-

* Per Johnson, J., 1960 Bags of Coffee, 8 Cranch, 405.

† 5 Robinson, 173-192.

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ing a condemnation to the crown, which the crown itself publicly renounces.

“When I state the position contended for on the part of the captors to be in effect this, that it shall be in the power of every man who has made a capture,—of the pettiest commander of the pettiest privateer,—to force on, in spite of all the prudence of the crown, opposed to such an attempt, the discussion and decision of the most delicate questions, the discussion and decision of which may involve the country in the most ruinous hostilities, I state a proposition that must awaken the apprehension of every man who hears me as to the extent of the danger which would attend the establishment of such a principle.”

III. *Is the case one for further proof?* Opposing counsel argue that it is now attempted to show a different case from that presented by the proofs *in preparatorio*. This is not so; though we may wish to show a fuller one.

The standing interrogatories are not adapted to reach the facts in all cases of capture, in a war so special as ours. What are these standing interrogatories?

To ascertain the legal *status* of a vessel in relation to her neutrality, a limited number of questions called “standing interrogatories” were prepared many years ago by Sir William Scott, and have been adopted by the courts of the United States without substantial change. No better illustration of their occasional ill adaptation to elicit the facts necessary to the understanding a capture arising under a rebellion, such as was ours, can be had than the answer they cause Meaher to give in reply to the first interrogatory when the question is not read in connection therewith. On that answer the captors found an argument of disloyalty. The answer which the witness makes is :

“I was born in Maine ; I live in Mobile, and have lived there thirty years ; I am a citizen of the State of Alabama, to which I owe my allegiance.”

The matter is explained when you see to what question the answer is made. It is :

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“Where were you born, and where do you now live, and how long have you lived there? Of what prince or *state* are you a subject or citizen, and to which do you owe allegiance?”

So it is with all the proofs *in preparatorio*. They are responsive to specific questions, and are not adapted to get out a history in a case where a history may well exist. Any exfoliation of the responsive facts—that which would make the history—would, as responsive to these interrogatories, be irregular.

We concede that, in a foreign war and a blockade of a foreign port, where there are no circumstances of license or withdrawal of friendly property to be proved, there would be no such doubtful *status* of the *res* as would allow further proof. But the case, we repeat, is not one of this sort. It is the case of an insurrection by certain people in certain parts of one nation; a case where many people in the insurrectionary district remained loyal, and wished to leave the district. Certainly a capture here presents a different case from one of an enemy's vessel, and enemy property, of a claimant enemy by domicile in enemy country, pursuing a voyage in the interest of the enemy government.

The few discrepancies in the testimony are easily reconcilable. Meaher testifies that he owns the whole vessel and cargo. Flynn testifies that it belongs to Meaher, that the owners were Meaher & Brother. The explanation is that Meaher knew the fact that he was sole owner, and that Flynn did not know. Meaher knew that he put his own cotton on board, and, although forced to consent to ship half on government account, this did not change the ownership, and it, in fact, was all his own. This he now offers to prove, and has proved, to the satisfaction of the Secretary of the Treasury.

So as to the paper found on board.

The document is not signed by the claimant, and therefore ought not to affect him unless it is shown that he agreed to it. It is an offer by the Confederate government to furnish the whole cargo on joint account with Meaher Brothers, upon certain conditions. This was under date of October

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22d, 1863, more than two months before the voyage, while the vessel was fitting out. That this contract was not accepted nor acted on is shown by Flynn :

“ I understood they built this vessel expressly to carry their own cotton to Havana, but they had to allow government an interest of one-half in the cargo, otherwise they would not have been permitted to leave. Meaher had necessarily to *appear* to accept it.”

The claimant makes no contradictory cases. The facts which he seeks to prove are only those which he set forth in his claim and answer, explained, and by proper filling up, enlarged. No one of them is contradictory to anything he testified to in his deposition *in preparatorio*.

IV. *Is the history, if it were in proof, no defence?* We submit, in opposition to the captor's counsel, that it is :

(a) The right of withdrawal of person and goods by a citizen from hostile territory, has always been recognized, and applauded as an act of loyalty. The only question has been, what is a *reasonable* time? That question must always be decided by the circumstances of each case. Nothing can be deduced from rules in a foreign war, as applicable to this rebellion. The citizen had a right to suppose that his government would put down the rebellion within a reasonable time, so that he would not be obliged to quit home and property, as was hoped by all, and so wait. The Confederacy did not allow their citizens to leave it if the intention so to do was known. All were retained for conscription and taxation. Undeniably, a reasonable time is to be given to collect property, but here the very collection of it tended to lead to suspicion and confiscation. The war was carried on by the rebels in an unusual and barbarous manner towards persons disposed to be loyal. If this course of the rebels furnishes no reason for relaxation of the rule by the courts, it certainly tends to excuse delays, and accounts for inconsistencies in the conduct of the claimant not to be judged by the rules of foreign warfare.*

* The Ocean, 5 Robinson, 84.

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In the case of *The St. Lawrence*, cited on the other side, although eleven months, under the facts, was considered an unreasonable delay, it being a foreign war, yet the Supreme Court granted motion for further proofs. In the case of a rebellion the rule should be that it is a reasonable time, whenever the *withdrawal is made in good faith*; an issue to be determined by the facts of each case.

(b) The captors assert that "an intention on the part of the claimant to return to his residence and business in Mobile is consistent with the contents of this affidavit; and that there are no facts in the affidavit tending to show any dissolution of the claimant's commercial establishment and domicile in Mobile prior to or at the time of his sailing on this voyage, or any suspension of the mercantile pursuits in which he had been engaged during the war."

But the affidavit does set forth that the claimant desired to "withdraw the property he was in possession of, or as considerable a portion of it as was practicable, from the so-called Confederate States, to a place of security, and get into such a position that he might realize the value of it and return to the State of Maine, where his mother now lives, and where he has property and many relations and friends; that with this object and intention, as well known to several of his confidential friends, he built the steamer Gray Jacket with his own means, with the design of lading her with cotton belonging to himself."

And "that it was at first his intention to have taken his wife and children with him on board the said steamer, on the said proposed voyage to Havana, but that he was afterwards deterred from attempting to do so lest it should strengthen the suspicion which already existed against him in the minds of the rebel authorities, and prevent his getting away at all, and that he at last unwillingly abandoned the idea, and left them, after having made an arrangement with his brother, J. M. Meaher, to send them as soon afterwards as he could find a suitable opportunity to Havana, where they were to place themselves under the care of the com-

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mercial house of Santa Maria, with whom he, Timothy Meaher, was to have made an arrangement."

(c) *The res is not enemy property.* Being simply domiciled in rebellious territory, without any act shown, does not make a loyal citizen an enemy, within the legal definition of enemy, without some declaratory act by his sovereign; certainly not so as to remit his rights to be tried by the laws of nations in a prize court.*

The property of rebels is not confiscable as prize of war, but by forfeiture.†

Being, at worst, only an enemy by construction of domicile—a *quasi* enemy—his *status* changed as soon as he formed the intention of returning to his allegiance, and did any act carrying out that intention.‡ He had escaped from the enemy country with his property, and was on the high seas, on his own deck, under the American flag, which he had a right to raise, having protected it through the rebellion. His domicile *eo instante* changed; he was no longer an enemy, even by construction, but an American citizen. His property, being enemy only because of his *status*, partook of the change with him. The flag determined the character of the vessel and cargo in absence of all papers.§

The question, in short, is, "Shall the court be left to grope among inferences, circumstances, misrecollections, or misconceptions of witnesses, to find facts upon which to confiscate a loyal man's property, when, by admitting further proof, the claimant will prove, to the satisfaction of the court, as he has done to one branch of the government, that every answer or allegation that he has made is true, and that he was a loyal citizen, trying to take his property from the grasp of the enemies of the government, who ought to

* Judge Treat's opinion, p. 24, citing opinions of Nelson and Swayne, J.J.; The Dickenson, Marriot's Decisions, 1-46; The Venus, 8 Cranch, 280, 294, 301.

† The William and Grace, Marriot, 76; The Rebecca, Id. 197-210; The Renard, Id. 222-225.

‡ Lawrence's Wheaton, 564-567; The Indian Chief, 3 Robinson, 17-22; The Venus, 8 Cranch, 280.

§ The Vrow Elizabeth, 5 Robinson, 11.

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be aided and protected in so doing, and not an alien enemy, whose property is to be condemned under the law of nations?"

Mr. Justice SWAYNE delivered the opinion of the court.

This case comes before us by appeal from the District Court of the United States for the Eastern District of Louisiana.

In the night of the 30th of December, 1863, the steamer Gray Jacket was discovered running out of Mobile Bay by the gunboat Kennebec, one of the blockading fleet. The darkness of the night enabled the steamer to avoid the pursuing vessel. In the morning she was seen endeavoring to escape to the southward and eastward. The Kennebec fired a gun across her bows. She hauled down her colors and hove to. The captors took possession of her. Her cargo was found to consist of about five hundred bales of cotton and a few other articles of small value. She was put in charge of a prize crew and sent to New Orleans for adjudication. The claimant, Meaher, was examined *in preparatorio*. He states that he was born in Maine; he had lived thirty years in Mobile; he was a citizen of Alabama, and owed his allegiance to that State; he was captain of the Gray Jacket, and owned the vessel and cargo; the vessel was bound for Havana; he built her near Mobile; the cotton with which she was loaded was raised in Alabama.

Flynn, the mate, was also examined. According to his affidavit, she sailed under English colors; her machinery had broken down, and she was in a disabled condition when captured. He says, "She was taken running the blockade."

"The owners of the vessel were Captain Meaher and brother." . . . "They also owned half the cargo. The balance was for Confederate government account."

"I know the Gray Jacket, on the trip on which she was captured, had attempted to sail covertly and secretly from Mobile, then under a blockade. She could not have left otherwise than secretly." . . . "J. M. and T. Meaher

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owned the vessel and half the cargo. The Confederate government owned the other half."

Among the papers found on board was an agreement between the claimant and Meyers, a military officer and agent of the rebel government, whereby it was stipulated that "the government will furnish the whole cargo of cotton, and will make over to the owners of the vessel one-half of the cotton, in consideration of which the owners do agree to deliver the other half belonging to the government at Havana, free of charge, except half of the expenses of pressing and storing incurred at Mobile."

That "the said steamer is to return to Mobile, if practicable; if not, then to some other Confederate port; and the government is to be allowed one-half of the carrying capacity of the steamer on the return voyage," at rates specified.

And that "in the event of a partial loss of the outward cargo, the portion of cotton saved is to be equally divided between the parties at the port of destination; and any loss on the inward cargo to be settled on the principle of general average, so far as the cargo is concerned." Meaher's affidavit *in preparatorio* was taken on the 26th of February, 1864. It ignored the interest of his brother in the vessel and cargo, and alleged the property of both to be in himself. It concealed the ownership of half the cargo by the rebel government and the contract between him and the rebel military agent. Upon these subjects not a word was uttered. On the 21st of March he filed an answer and claim, which do not differ materially from his affidavit *in preparatorio*.

The court ordered the paper to be stricken from the files, but gave him leave to file an affidavit, which was accordingly done on the 29th of August following. This affidavit sets up an entirely new state of facts. According to its averments, he never sympathized with nor gave any aid to the rebellion; the steamer was built to enable him to get away with as much as possible of his property; he did not take his family with him, lest it might excite suspicion and defeat his object; the rebel government furnished none of the cot-

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ton with which his vessel was laden; he was compelled to agree that one-half of it should be taken on account of that government, and also to assent to the provisions of the contract with the rebel military agent; otherwise, he would not have been allowed to depart; it was his intention, upon reaching Havana, to claim all the cotton as his property, and to appropriate the proceeds entirely to himself; on the 18th of March, 1864, he took the oath prescribed by the President's proclamation of the 8th of December, 1863; he is not within any of its exceptions, and is entitled, by its provisions, to the restoration of the property.

The court below condemned the vessel and cargo as prize of war, and the decree is before us for review.

In this court a motion was made at the hearing, and argued at length, for an order for further proof, to enable the claimant to establish the facts set forth in the affidavit as to his loyalty to the United States, and the motives and object of his departure from Mobile with the vessel and cargo, and also to enable him to bring before this court the remission by the Secretary of the Treasury, bearing date of the 26th of March, 1866, of all right and claim to the property as forfeited to the United States, "so far as such forfeiture was incurred under the provisions of the act of July 13, 1861, and not otherwise."

The court consented at once to receive this paper without further proof, and it is properly in the case.

The questions for our consideration are:

The effect of the amnesty proclamation of the 8th of December, 1863, in connection with the oath of the claimant?

The propriety of making an order for further proof?

And whether the remission by the Secretary of the Treasury entitles the claimant to the restoration of the vessel and cargo?

The proposition as to the proclamation and oath was not pressed in the argument here. If it were relied upon, the answers are obvious and conclusive.

There is no satisfactory proof that the claimant is not in

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one of the classes of excepted persons. His own affidavit under the circumstances, is clearly insufficient to establish the negative. "Property cases, where the rights of third persons shall have intervened," are excluded in terms by the proclamation.

The proclamation is founded upon the act of July 17, 1862, and has reference only to property subject to confiscation as there denounced.

Both the statute and proclamation are wholly silent as to maritime captures like the one before us, and neither has any application to that class of cases. In no view of the subject can this proclamation be held to extinguish the liability of a vessel and cargo running the blockade, and seized *in flagrante delicto*. It would be a strange result in such a case if the subsequent oath of the claimant were allowed to establish his innocence and compel the restitution of the property.

This is not a proper case for an order for further proof. The order is always made with extreme caution, and only where the ends of justice clearly require it. The claimant forfeited all right to ask it by the guilty concealment in his first affidavit, and in his subsequent affidavit and claim. The allowance would hold out the strongest temptation to subornation of perjury. There is nothing to warrant such an exercise of our discretion. We are entirely satisfied with the testimony in the case, and entertain no doubt of the correctness of the conclusions we draw from it. If the allegations of the claimant are true, he postponed his effort to escape too long to derive any benefit from it. The law does not tolerate such delay. The motion is overruled.

The order of the Secretary of the Treasury does not affect the case. It is limited in its terms to the rights of the United States, arising from forfeiture under the act of July 13, 1861. That act provides "that all goods and chattels, wares, and merchandise, coming from a State or part of a State in rebellion" into the other parts of the United States, "by land or water," "shall, together with the

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vessel or vehicle conveying the same," "be forfeited to the United States." It contains nothing as to goods and vessels going from a rebel to a foreign or neutral port.

The Gray Jacket was not proceeding to a loyal State. It is true that after this objection was taken by the Attorney-General to the authority of the Secretary to interpose, the claimant amended his petition by interlining the averment that he was attempting to take the property "into the loyal States by way of Havana, if his vessel should prove fit for the voyage." But this does not recall what he had before sworn, nor change the facts as they are disclosed in the record. In his first affidavit he said, "The voyage began in Mobile and was to have ended at Havana." "In case we had arrived at our destined port, I think I should have re-shipped the cargo to some port where I could have obtained a better price for it than I could obtain there." The mate also testified "that the voyage began at Mobile and was to have ended at Havana." The claimant in his affidavit speaks of going to Havana, but was silent as to going beyond there, to any of the loyal States; and nowhere disclosed such a purpose until he amended his petition to the Secretary under the pressure of the occasion. We are satisfied that at the time of the capture no such intention existed. This brings the vessel and cargo within the exception prescribed by the Secretary. The order does not reach the case. But if the order of the Secretary were unqualified that the property should be released and discharged, the result would be the same. The power of the Secretary to remit forfeitures and penalties is defined and limited by law. The jurisdiction is a special one and he may not transcend it. If he do, his act is void. He has no power to remit in any case of property captured as maritime prize of war. The subject lies wholly beyond the sphere of his authority. The liability of the property is irrespective of the *status domicili*, guilt or innocence of the owner. If it come from enemy territory, it bears the impress of enemy property. If it belong to a loyal citizen of the country of the captors, it is nevertheless as much liable to condemnation as if owned by a citizen or sub-

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ject of the hostile country or by the hostile government itself. The only qualification of these rules is, that where, upon the breaking out of hostilities, or as soon after as possible, the owner escapes with such property as he can take with him, or in good faith thus early removes his property, with the view of putting it beyond the dominion of the hostile power, the property in such cases is exempt from the liability which would otherwise attend it.

Such, with this limitation, is the settled law of this and of all other prize courts.

The case before us, as we view it, has no redeeming feature. It has no claim to the benefit of the exception we have mentioned. The vessel and cargo were properly condemned as enemy property and for breach of the blockade. There is nothing persuasive to a different conclusion.

The decree of the court below is

AFFIRMED.

THE GRAY JACKET

(MOTION.)

As a general rule, where the United States is a party to a cause and is represented by the Attorney-General, or the Assistant Attorney-General, or by special counsel employed by the Attorney-General, no counsel can be heard in opposition on behalf of any other of the departments of the government.

The rule departed from in this instance, the circumstances being special.

THE case of the Gray Jacket, reported on the last preceding pages, was argued partly on one occasion and partly on another, *Mr. Eames*, who spoke for the captors, having been taken suddenly and, as the unfortunate issue proved, fatally ill while addressing the court, and the case having been adjourned in the midst of the argument.

The case being subsequently called with a view of seeing how far counsel were ready to go on, it was mentioned that

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Mr. Cushing would appear in behalf of the Treasury Department, to justify the remission, which the preceding report shows had been granted, of the right accrued to the United States and captors *by a decree* of condemnation of the vessel as prize. Some remark being made by the court as to the circumstance that the United States were on the side of the captors while the Treasury Department appeared in an antagonistic position, and a doubt being expressed whether it was quite allowable that the Treasury should thus appear, *Mr. Cushing* referred the matter of his taking part to the pleasure of the court; observing only that he was prepared to speak in support of the act of the Secretary of the Treasury, if desired.

Before the case came to be finally argued in conclusion—

The CHIEF JUSTICE delivered the opinion of the court on this point :

The court has considered the question whether counsel shall be heard in this cause on behalf of the Treasury Department, and has instructed me to say that in causes where the United States is a party, and is represented by the Attorney-General or the Assistant Attorney-General, or special counsel employed by the Attorney-General, no counsel can be heard in opposition on behalf of any other of the departments of the government.

In the present case, however, the argument has doubtless proceeded under the impression at the bar that counsel would be heard on behalf of the Treasury Department, and the court is desirous of all the light that can be derived from the fullest discussion. The counsel for the Treasury Department may be heard, therefore, if he sees fit, on behalf of the claimant, and two hours will be allowed for the argument, without prejudice to the time which remains to the counsel who opened the cause, for reply to the Attorney-General and the counsel for the captors.