THE GEORGIA.

1. A case in prize heard on further proofs, though the transcript disclosed no order for such proofs; it having been plain, from both parties having joined in taking them, that either there was such an order, or that the proofs were taken by consent.
2. A *bonâ fide* purchase for a commercial purpose by a neutral, in his own home port, of a ship of war of a belligerent that had fled to such port in order to escape from enemy vessels in pursuit, but which was *bonâ fide* dismantled prior to the sale and afterwards fitted up for the merchant service, does not pass a title above the right of capture by the other belligerent.

APPEAL from the District Court for Massachusetts, condemning as prize the steamship Georgia, captured during the late rebellion. The case, as derived from the evidence of all kinds taken in the proceedings, was thus:

The vessel had been built, as it appeared, in the years 1862–3, at Greenock, on the Clyde, as a war vessel, for the Confederate government, and called the Japan; or if not thus built, certainly passed into the hands of that government early in the spring of 1863. On the 2d of April of that year, under the guise of a trial trip, she steamed to an obscure French port near Cherbourg, where she was joined by a small steamer with armaments and a crew from Liverpool. This armament and crew were immediately transferred to the Japan, upon which the Confederate flag was hoisted, under the orders of Captain Maury, who had on board a full complement of officers. Her name was then changed to the Georgia, and she set out from port on a cruise against the commerce of the United States. After being thus employed for more than a year—having in the meantime captured and burnt many vessels belonging to citizens of the United States—she returned and entered the port of Liverpool on the 2d of May, 1864, a Confederate vessel of war, with all her armament and complement of officers and crew on board. At the time she thus entered the port of Liverpool, the United States vessels of war, Kearsarge, Niagara, and Sacramento, were cruising off the British and

French coasts in search of her, the Alabama, and other vessels of the rebel confederation. It was resolved at Liverpool that she should be sold. It appeared that Captain Bulloch, an agent of the Confederacy at the port, at first thought of selling her at private sale, together with her full armament; but failing in that, she was advertised for public sale the latter part of May and the first of June. A certain Edward Bates, a British subject and a merchant of Liverpool, dealing not unfrequently in vessels, attracted by the advertisements, entered into treaty about her. The broker concerned in making a sale of her, testified that "Bates was desirous of knowing what would buy the ship, but he wished the *armament excluded, as he did not want that.*" According to the statement of Bates himself, it had occurred to him that with her armament on board he might have difficulty in procuring a registry at the customs. All the guns, armament, and stores of that description, were taken out at Birkenhead, her dock when she first entered the port at Liverpool. The vessel had been originally strongly built, her deck especially; and this was strengthened by supports and stanchions. Though now dismantled, the deck remained as it was; the traces of pivot guns originally there still remaining. The adaptation of the vessel to her new service cost, it seemed, about £3000. How long she remained in port before she was dismantled was not distinctly in proof, though probably but a few weeks. The sale to Bates was perfected on the 11th June, 1864, by his payment of £15,000, and a bill of sale of the vessel from Bulloch, the agent of the Confederacy. He afterwards fitted her up for the merchant service, and chartered her to the government of Portugal for a voyage to Lisbon, and thence to the Portuguese settlements on the African coast. The testimony failed to show any complicity whatever of Bates with the Confederate purposes. But he had a general knowledge of the Georgia's career and history, testifying in his examination "that he knew from common report that she had been employed as a Confederate cruiser, but thought that if the United States government had any objection to the sale, they or their officers would have given

some public intimation of it, as the sale was advertised in the most public manner."

The American minister at the court of London, Mr. Adams, who was cognizant of the vessel's history from the beginning, and had kept himself informed of all her movements and changes of ownership, having, on the 14th March, 1863, called the attention of Earl Russell, the British Secretary for Foreign Affairs, to the rule of public law, affirmed by the courts of Great Britain, which rendered invalid the sale of belligerent armed ships to neutrals in time of war, and insisting on its observance during the war of the rebellion, and having remonstrated, on the 9th of May, 1864, against the use made by the Georgia of her Majesty's port of Liverpool, informed him, on the 7th of June following, and just before the completion of the transfer to Bates, that the Federal government declined "to recognize the validity of the sale of this armed vessel, heretofore engaged in carrying on war against the people of the United States, in a neutral port, and claimed the right of seizing it wherever it may be found on the high seas." Simultaneously with this note Mr. Adams addressed a circular to the commanders of the different war vessels of the United States, cruising on seas over which the Georgia was likely to pass in going to Lisbon, informing them that in his opinion "she might be made lawful prize whenever and under whatever colors she should be found."* Leaving Liverpool on the 8th August, 1864, the vessel was accordingly captured by the United States ship of war Niagara, off the coast of Portugal, on the 15th following, and sent into New Bedford, Massachusetts, for condemnation. A claim was interposed by Bates, who afterwards, on the 31st January, 1865, filed a test affidavit averring that he was the sole owner of the vessel, was a merchant in Liverpool, and a large owner of vessels, that he had fitted out the Georgia at Liverpool for sea, and chartered her to

* Correspondence between Mr. Adams and Earl Russell, and Mr. Adams and Mr. Seward, communicated with the President's messages to the first and second sessions of the Thirty-eighth Congress.

the Portuguese government for a voyage to Lisbon, and thence to the Portuguese settlements on the coast of Africa, and that while on her voyage to Lisbon in a peaceable manner, she was captured, as already stated.

The proofs in the case were not confined to the documentary evidence found on board the prize, and to the answers to the standing interrogatories in *preparatorio*, but the case was heard before the court below without restriction, and without any objection in it upon additional depositions and testimony, although, so far as the printed transcript of the record before the court showed, no order for further proof had been made. The counsel of both government and claimant, however, had joined in taking the additional testimony, and among the witnesses was Bates himself, whose deposition with its exhibits occupied fifty-six pages out of the one hundred and forty-seven which made the transcript.

The court below condemned the vessel.

Mr. Marvin, for the claimant, appellant in this case:

It was the duty of the court below, and it is the duty of this court now, to hear the case upon the documents found on the vessel, and the depositions in *preparatorio*,* as there was no order for further proof, or no other evidence. This is not a mere matter of practice, but it is the very essence of prize law.† The case not having been so heard in the court below, and no order for further proof having been granted by the court, all the other depositions should be disregarded by this court. If they are so disregarded, the captors have, we assume it to be plain, no case.

But waiving this, and taking the case as presented on the whole testimony, this question arises: "Does a neutral, who purchases from one of two belligerents, in good faith and for commercial purposes, in his own home port, a vessel lying there, which had been used by such belligerent as a

* Paper of Sir William Scott and Sir John Nicholl, addressed to his Excellency John Jay, 1 Robinson, Appendix, 390; The Haabet, 6 Id. 54.

† 3 Phillimore, 594, § 473.

vessel of war, but which had been disarmed, take a good title as against the right of capture of the other belligerent?"

We think that he does. No principle of international law prohibits a neutral, in his home port, from buying from or selling to any person, any and every species of property. In a home neutral port there is no room for the operation of international interdicts; nor does international law invalidate any sales made in such port. Indeed, sound policy requires that the enemy should be allowed and even encouraged to sell his naval vessels. They cannot be blockaded in a neutral port, and can escape out of such port when they will. The right to the *chances* of capturing them on the ocean is of much less value to a belligerent than their absence from the ocean would be.

The validity of the purchase of the enemy's merchant ships by a neutral, even where the purchase and transfer have been effected in the enemy's port, under blockade, has been fully recognized.* Can this case be distinguished in principle? We think that it cannot.

Mr. Evarts, Attorney-General, and Mr. Ashton, Assistant Attorney-General, contra:

1. This court is entitled to look into all the proofs found in the record. The depositions, by way of further proof, were obviously taken and introduced into the cause by the agreement and consent of the parties.

2. When a neutral deals with belligerent privates about private property, his dealings are generally lawful; but when he deals with a belligerent sovereign, when the subject of dealing are public vessels, public funds, public property of any kind, it is unlawful. While neutrals have rights, so too they have obligations; obligations founded on the rights of belligerents. Thus neutrals cannot give assistance to one belligerent when reduced by the other to distress. Hence it is that a neutral may be captured and condemned if at-

* The Sechs Geschwistern, 4 Robinson, 101; The Virilantia, 6 Id. 123; The Bernon, 1 Id. 102.

tempting to run a blockade, or if carrying contraband; and hence, too, that articles not otherwise contraband of war become so when sent to aid an enemy reduced to distress. This is the principle which we seek to apply. Suppose an armed vessel driven into a neutral port by cruisers who lie outside, and who would capture her the moment she came out. In such a case any truly neutral government would refuse to have its ports used as places of refuge. The vessel would have to sail out, and would sail of course into the jaws of capture. But if the hard-pressed enemy can dismantle and sell, how is neutrality maintained? The purchase-money can be taken at once and applied to other warlike purposes; to the purchase or building of new ships in new places. The law of nations cannot be charged with the inconsistency of prohibiting a neutral from permitting the use of his territory by a belligerent as an asylum for his vessels of war, and on the other, of suffering the sale of such vessels within neutral protection, by which the same advantage may be gained by the belligerent as if he had an absolute right to employ the neutral territory as a place of safe resort from his successful enemy. A title may indeed pass in a case of sale like this, but it passes subject to the right of capture.

The Minerva,* decided by Sir W. Scott, covers our ground. There was, indeed, some evidence of collusion in that case, but Sir W. Scott undoubtedly intended to say, and did say in that case, that an enemy's vessel of war, lying in a neutral port, was not an object fairly within the range of commercial speculation, and he unquestionably intended to place his judgment of condemnation as well upon this principle, as upon the independent view that, upon the special facts of that case, the purchase was collusive, and had been made with the intent to convey the vessel into the possession of the former belligerent owner. The principle was lately acted upon by that able jurist, Field, J., of the District Court of New Jersey, in the unreported case of *The Etta*, under circumstances much the same as those of the Georgia.

* 6 Robinson, 397.

Reply:

The Minerva was unlike the present case in many important particulars. It was the case of a pretended purchase of a ship of war, with eighteen guns and ammunition, captured while on her way ostensibly to the port of the purchaser, but really to a port of the enemy; fourteen guns and ammunition having been taken out for the mere convenience of conveyance. Though the vessel lay at a neutral port, the negotiations for the purchase were carried on at the enemy's port, and an enemy crew and captain were hired there and sent to bring home the ship. She was captured in possession of an enemy master and crew, and while sailing close into the enemy's coast. In fact the vessel was going, under color of purchase and sale, right back again into the enemy's navy. The vessel had not been dismantled, except in part for the convenience of transportation, the purchaser buying guns and ammunition with the vessel. There was no proof in the case that the purchaser had paid for the vessel, or that he had bought her for commercial purposes only. It was the case of a mere colorable purchase. It is true that Sir W. Scott assumes to place the decision of the case on the ground of the illegality of the purchase. But he does so unnecessarily.

Mr. Justice NELSON delivered the opinion of the court.

It is insisted by the learned counsel for the claimant, that all the depositions in the record, except those in *preparatorio*, should be stricken out, or disregarded by the court on the appeal, for the reason that it does not appear that any order had been granted on behalf of either party to take further proofs. But the obvious answer to the objection is that it comes too late. It should have been made in the court below. As both parties have taken further proofs, very much at large, bearing upon the legality of the capture, without objection, the inference is unavoidable that there must have been an order for the same, or, if not, that the depositions were taken by mutual consent. They were taken on interrogatories and cross-interrogatories, in which the counsel of

both parties joined, and, among other witnesses examined, is the claimant himself, whose deposition, with the papers accompanying it, fill more than one-third of the record.

As respects the vessel, we are satisfied, upon the proofs, that the claimant purchased the Georgia without any purpose of permitting her to be again armed and equipped for the Confederate service, and for the purpose, as avowed at the time, of converting her into a merchant vessel. He had, however, full knowledge of her antecedent character, of her armament and equipment as a vessel of war of the Confederate navy, and of her depredations on the commerce of the United States, and that, after having been thus employed by the enemies of this government upwards of a year, she had suddenly entered the port of Liverpool with all her armament and complement of officers and crew on board. He was not only aware of all this, but, according to his own statement, it had occurred to him that this condition of the vessel might afford an objection to her registry at the customs; and before he perfected the sale, he sought and obtained information from some of the officials that no objection would be interposed. He did not apply to the government on the subject.

The claimant states "that he knew from common report she (the Georgia), had been employed as a Confederate cruiser, but I thought," he says, "if the United States government had any objection to the sale, they or their officers would have given some public intimation of it, as the sale was advertised in the most public manner." If, instead of applying to an officer of the customs for information, the claimant had applied to his government, he would have learned that as early as March 14th, 1863, Mr. Adams, our minister in England, had called the attention of Lord Russell, the foreign secretary, to the rule of public law, as administered by the highest judicial authorities of his government, which forbid the purchase of ships of war, belonging to the enemy, by neutrals in time of war, and had insisted that the rule should be observed and enforced in the war

then pending between this government and the insurgent States. And also that he had addressed a remonstrance to the British government on the 9th of May, but a few days after the Georgia had entered the port of Liverpool, against her being permitted to remain longer in that port than the period specified in her Majesty's proclamation. His own government could have advised him of the responsibilities he assumed in making the purchase. Mr. Adams, after receiving information of the purchase by the claimant, in accordance with his views of public law, above stated, communicated with the commanders of our vessels cruising in the Channel, and expressed to them the opinion that, notwithstanding the purchase, the Georgia might be made lawful prize whenever and under whatever colors she should be found sailing on the high seas.

The principle here assumed by Mr. Adams as a correct one, was first adjudged by Sir William Scott in the case of *The Minerva*,* in the year 1807. The head note of the case is: "Purchase of a ship of war from an enemy whilst lying in a neutral port, to which it had fled for refuge, is invalid." It was stated in that case by counsel for the claimant, that it was a transaction which could not be shown to fall under any principle that had led to condemnation in that court or in the Court of Appeal. And Sir William Scott observed, in delivering his opinion, that he was not aware of any case in his court, or in the Court of Appeal, in which the legality of such a purchase had been recognized. He admitted there had been cases of merchant vessels driven into ports out of which they could not escape, and there sold, in which, after much discussion and some hesitation of opinion, the validity of the purchase had been sustained. But "whether the purchase of a vessel of this description, built for war and employed as such, and now rendered incapable of acting as a ship of war, by the arms of the other belligerent, and driven into a neutral port for shelter—whether the purchase of such a ship can be allowed, which shall enable the enemy, so far to secure himself from the disadvantage into which he

* 6 Robinson, 397.

has fallen, as to have the value at least restored to him by a neutral purchaser," he said, "was a question on which he would wait for the authority of the superior court, before he would admit the validity of the transfer." He denied that a vessel under these circumstances could come fairly within the range of commercial speculation.

It has been insisted in the argument here, by the counsel for the claimant, that there were facts and circumstances in the case of *The Minerva*, which went strongly to show that the sale was collusive, and that, at the time of the capture, she was on her way back to the enemy's port. This may be admitted. But the decision was placed, mainly and distinctly, upon the illegality of the purchase. And such has been the understanding of the profession and of text-writers, both in England and in this country; and as still higher evidence of the rule in England, it has since been recognized as settled law by the judicial committee of her Majesty's privy council. In the recent learned and most valuable commentaries of Mr. Phillimore (now Sir Robert Phillimore, Judge of the High Court of Admiralty of England), on international law, he observes, after stating the principles that govern the sale of enemies' ships, during war, to neutrals: "But the right of purchase by neutrals extends only to merchant ships of enemies, for the purchase of ships of war belonging to enemies is held invalid." And Mr. T. Pemberton Leigh, in delivering judgment of the judicial committee and lords of the privy council, in the case of *The Baltica*,† observes: "A neutral, while war is imminent, or after it has commenced, is at liberty to purchase either goods or ships (not being ships of war), from either belligerent, and the purchase is valid, whether the subject of it be lying in a neutral port or in an enemy's port." Mr. Justice Story lays down the same distinction in his "Notes on the Principles and Practice of Prize Courts,"*—a work that has been selected by the British government for the use of its naval officers, as the best code of instruction in the prize law.† The same principle is found

* Page 63, Pratt's London edition.

† See 11th Moore's Privy Council, 145.

in Wildman on International Rights in Time of War, a valuable English work published in 1850, and in a still more recent work, Hosack on the Rights of British and Neutral Commerce, published in London in 1854, this question is referred to in connection with sales of several Russian ships of war, which it was said had been sold in the ports of the Mediterranean to neutral purchasers, for the supposed purpose of defeating the belligerent rights of her enemies in the Crimean war, and he very naturally concludes, from the case of *The Minerva*, that no doubt could exist as to what would be the decision in case of a seizure.* This work was published before the judgment of the privy council in the case of *The Baltica*, which was a Russian vessel, sold *imminente bello;* being, however, a merchant ship, the purchase was upheld; but, as we have seen from the opinion in that case, if it had been a ship of war it would have been condemned.†

It has been suggested that, admitting the rule of law as above stated, the purchase should still be upheld, as the Georgia, in her then condition, was not a vessel of war, but had been dismantled, and all guns and munitions of war removed; that she was purchased as a merchant vessel, and fitted up, *bonâ fide*, for the merchant service. But the answer to the suggestion is, that if this change in the equipment in the neutral port, and in the contemplated employment in future of the vessel, could have the effect to take her out of the rule, and justify the purchase, it would always be in the power of the belligerent to evade it, and render futile the reasons on which it is founded. The rule is founded on the propriety and justice of taking away from the belligerent, not only the power of rescuing his vessel from pressure and impending peril of capture, by escaping into a neutral port, but also to take away the facility which would otherwise exist, by a collusive or even actual sale, of again rejoining the naval force of the enemy. The removed armament of a vessel, built for war, can be readily replaced,

* Page 82, note.

† See also Lawrence's Wheaton, note 182, p. 561, and *The Etta*, before Field, United States district judge of New Jersey.

and so can every other change be made, or equipment furnished for effective and immediate service. The Georgia may be instanced in part illustration of this truth. Her deck remained the same, from which the pivot guns and others had been taken; it had been built originally strong, in order to sustain the war armament, and further strengthened by uprights and stanchions beneath. The claimant states that the alterations, repairs, and outfit of the vessel for the merchant service, cost some £3000. Probably an equal sum would have again fitted her for the replacement of her original armament as a man of war.

The distinction between the purchase of vessels of war from the belligerent, in time of war, by neutrals, in a neutral port, and of merchant vessels, is founded on reason and justice. It prevents the abuse of the neutral by partiality towards either belligerent, when the vessels of the one are under pressure from the vessels of the others, and removes the temptation to collusive or even actual sales, under the cover of which they may find their way back again into the service of the enemy.

That the Georgia, in the present case, entered the port of Liverpool to escape from the vessels of the United States in pursuit, is manifest. The steam frigates Kearsarge, Niagara, and Sacramento were cruising off the coast of France and in the British Channel, in search of this vessel and others that had become notorious for their depredations on American commerce. It was but a few days after the purchase of the Georgia by the claimant, the Alabama was captured in the Channel, after a short and brilliant action, by the Kearsarge. The Georgia was watched from the time she entered the port of Liverpool, and was seized as soon as she left it.

The question in this case cannot arise under the French code, as, according to that law, sales even of merchant vessels to a neutral, *flagrante bello*, are forbidden. And it is understood that the same rule prevails in Russia. Their law, in this respect, differs from the established English and American adjudications on this subject.

It may not be inappropriate to remark, that Lord Russell

advised Mr. Adams, on the day the Georgia left Liverpool under the charter-party to the Portuguese government, August 8th, 1864, her Majesty's government had given directions that, "In future, no ship of war, of either belligerent, shall be allowed to be brought into any of her Majesty's ports for the purpose of being dismantled or sold."

DECREE AFFIRMED.

INSURANCE COMPANY *v.* TWEED.

1. The act of March 3d, 1865 (13 Statutes at Large, 501), which provides by its fourth section a mode by which parties who submit cases to the court, without the intervention of a jury, may have the rulings of the court reviewed here, and also what may be reviewed in such cases, binds the Federal courts sitting in Louisiana as elsewhere, and this court cannot disregard it.

   However, in a case where the counsel for both parties in this court had agreed to certain parts of the opinion of the court below as containing the material facts of the case, and to treat them here as facts found by that court, this court acted upon the agreement here as if it had been made in the court below.

2. Cotton in a warehouse was insured against fire, the policy containing an exception against fire which might happen "by means of any invasion, insurrection, riot, or civil commotion, or any military or usurped power, *explosion*, earthquake, or hurricane." An explosion took place in another warehouse, situated directly across a street, which threw down the walls of the first warehouse, scattered combustible materials in the street, and resulted in an extensive conflagration, embracing several squares of buildings, and among them the warehouse where the cotton was stored, which, with it, was wholly consumed. The fire was not communicated from the warehouse where the explosion took place directly to the warehouse where the cotton was, but came more immediately from a third building which was itself fired by the explosion. Wind was blowing (with what force did not appear) from this third building to the one in which the cotton was stored. But the whole fire was a continuous affair from the explosion, and under full headway in about half an hour. *Held*, that the insurers were not liable; the case not being one for the application of the maxim, "*Causa proxima, non remota, spectatur.*"

TWEED brought suit in the Circuit Court for the Eastern District of Louisiana against the Mutual Insurance Company, on a policy of insurance against fire, which covered