The Edward

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Appellant : The Edward

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The Edward

14 U.S. (1 Wheat.) 261

APPEAL FROM THE CIRCUIT COURT FOR

THE DISTRICT OF MASSACHUSETTS

SYLLABUS

In revenue or instance causes, the circuit court may, upon appeal, allow the introduction of a new allegation into the information by way of amendment.

Where merits clearly appear on the record in an admiralty cause, it is the settled practice not to dismiss the libel, but to remand the cause and to allow the party to

assert his rights in a new allegation.

But where a libel for a forfeiture is so informal and incorrect that the court cannot enter up a decree upon it, and the evidence discloses a case of forfeiture, this Court will remand the cause to the court below with directions to allow it to be amended.

Under the 3d section of the Act of 28 June, 1809, c. 217, every vessel bound to a foreign permitted port was obliged to give bond with condition not to proceed to any port with which commercial intercourse was not permitted, nor to trade with such port.

The offense charged in the information filed in this case in the District Court of Massachusetts is that the ship *Edward,* on 12 February, 1810, departed from the port of Savannah

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with a cargo, bound to a foreign port with which commercial intercourse was not permitted, without a clearance and without giving a bond in conformity with the provisions of the Act of Congress of 28 June, 1809. A claim was interposed by George Scott of Savannah in which he alleged that the ship did not depart from Savannah bound to a foreign port in manner and form as stated in the information. The district court condemned the ship, from which sentence an appeal was taken to the circuit court, where the district attorney was permitted by the court to amend the information by filing a new allegation that Liverpool, in Great Britain, was the foreign port to which the ship was bound when she departed from Savannah, and that she did so depart without having a clearance, agreeably to law. The circuit court affirmed the sentence, and the cause was brought before this Court upon an appeal.

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WASHINGTON, J., delivered the opinion of the Court, and after stating the facts, proceeded as follows:

Three questions have been made and discussed by the counsel:

1st. Whether the circuit court could, upon the appeal, allow the introduction of a new allegation into the information by way of amendment.

2d. Whether the omission to give the bond required by the 3d section of the Act of 28 June, 1809, subjected the vessel to forfeiture? and if it did, then

3d. Whether the information, which alleges the voyage to Liverpool to have commenced at Savannah, is supported by the evidence in the cause, and whether the sentence below ought not to be reversed for this reason although the court should be satisfied that the ship departed from Charleston for Liverpool without giving the bond required.

Upon the first question it is contended for the claimant that the circuit court has only appellate jurisdiction in cases of this nature, and that to allow the introduction of a new allegation would be in fact to originate the cause in the circuit court. This question appears to be fully decided by the cases of the *Caroline and Emily,* determined in this Court. These were informations *in rem* under the slave trade act, and the opinion of this Court was that the evidence was sufficient to show a breach of the law, but that the informations were not sufficiently certain

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to authorize a decree. The sentence of the circuit court was therefore reversed and the cause remanded to that court with directions to allow the informations to be amended. But even if an amendment would be improper if it stated a different case from that which was presented to the district court, the objection would not apply to this case, in which the offense, though more definitely laid in the second allegation than it was in the first, is yet substantially the same. In both of them, the charge is departing from Savannah to a foreign interdicted port without giving bond, and the amendment in substance merely states the particular foreign port to which the vessel was destined.

The next question is whether the omission to give the bond required by the third section of the Act of the 28 June, 1809, subjected the vessel to forfeiture. It is contended by the claimant's counsel that after the end of the session of Congress in which this law passed, there were no foreign ports either permitted or interdicted by law, inasmuch as the embargo laws which prohibited exportations from the United States to foreign countries would then stand repealed by force of the 19th section of the Act of 1 March, 1809, to interdict the commercial intercourse with Great Britain and France, and the 2d section of the above Act of 28 June. That all the ports of the world being thus permitted to the commerce of the United States, no subject would remain on which the 3d section would operate, and consequently there could be no necessity for giving a bond not to go to an interdicted port.

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An attentive consideration, however, of the two acts above mentioned will show that the argument is not well founded. The 3d section of the Act of 28 June, 1809, declares that during the continuance of that act, no vessel not within the exceptions therein stated shall be permitted to depart for a foreign port with which commercial intercourse has not been or may not be permitted by virtue of this act or the Act of 1 March, 1809. And if bound to a foreign port with which commercial intercourse has been or may be, permitted, still she shall not be allowed to depart without bond being given with condition not to proceed to any port with which commercial intercourse is not thus permitted, nor be directly or indirectly engaged during the voyage in any trade with such port. This law was in full force at the time the offense charged in this information is alleged to have been committed.

If, then, there was any country with which commercial intercourse was interdicted and would continue to be so after the end of the session during which this law was passed, it seems to be admitted in the argument that a vessel destined to a foreign permitted port would be liable to forfeiture unless the above bond had been given. To ascertain whether there was any such country, it will be necessary to inquire what is the true meaning of the term commercial intercourse? No higher or more satisfactory authority upon this subject need be resorted to than the legislature

itself, by which this act was passed.

The Act of 1 March, 1809, which is entitled, "An act to interdict the commercial intercourse

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between the United States and Great Britain . . . ," contains nineteen sections. The first ten (exclusive of the first, which denies to the vessels of those countries the privilege of entering the ports and harbors of the United States) forbid the importation into the United States of the products and manufactures of Great Britain and France or of any other part of the world if brought from the ports of either of those countries. The 12th section repeals, after 15 March, 1809, all the embargo laws except as they relate to Great Britain and France, and the 19th section repeals them after the end of the succeeding session of Congress as to all the world. The 13th, 14th, 15th, 16th, and 18th sections are intended to provide securities for enforcing the nonimportation system established by this law, and the 17th section repeals the former nonimportation law of April, 1806.

Hence it appears that the commercial intercourse which this law was intended to interdict consisted of importations from Great Britain and France, and of the products and manufactures of those countries and of exportations to them. In the 11th section it is called the trade of the United States, suspended by that act and the embargo laws, which trade the President is authorized to renew by his proclamation upon a certain contingency, and in pursuance of this power, he did accordingly renew it with Great Britain in April, 1809.

Thus stood the commercial intercourse of the United States with foreign nations at the commencement of the extraordinary session of Congress which

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commenced in May, 1809, permitted by the above law, both as to exportations and importations with all the world except Great Britain and France and their dependencies, and as to them interdicted in both respects as to France and

permitted with Great Britain by virtue of the President's proclamation. But, as the law of 1 March would expire by its own limitation after the end of the May session, whereby not only exportations but the importations forbidden by that act in relation to France would become lawful, the lst section of the Act of 28 June, 1809, revives the whole nonimportation system except so far as it had been permitted to Great Britian by the proclamation, and the 2d section declares in effect that the embargo laws, which were repealed by the 12th and 19th sections of the act of 1 March, shall be and remain repealed, notwithstanding the expiration of that law by its own limitation.

From this view of the subject it appears that the nonimportation system of 1 March was to continue in force until the end of the session of Congress, which would succeed that of May, 1809, except as to Great Britain, and that after the end of that session the embargo laws would cease to operate against any nation.

If, then, importation be a branch of commercial intercourse in the avowed meaning of Congress, and if, on 28 June and from thence until the end of the next session of Congress, it was to continue in force as to France (unless the President should declare by proclamation the revocation of

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her offensive edicts), but were inoperative as to Great Britain, it follows inevitably that, in February or March, 1810, when the offense is charged to have been committed by this vessel, there were foreign ports permitted, and others interdicted, to the commerce of the United States, and consequently that the destination of this vessel being to Liverpool, a bond ought to have been given such as the 3d section of the Act of 28 June required not to go to an interdicted port.

This construction of the law has frequently been given to it by this Court, but the serious opposition made to it by the counsel for the claimant will account for the deliberate examination of the question which is contained in this opinion.

As to the last question, a majority of the Court being of opinion, upon a view of the whole evidence, that the voyage to Liverpool had its inception at Savannah, the

objection as to the form of the information in this respect has nothing to stand upon. Were the evidence on this point more doubtful than it is, the Court would remand the cause with directions to the circuit court to allow an amendment, by inserting Charleston instead of Savannah, from which the claimant could derive no benefit, since it is not denied that the ship departed from Charleston directly for Liverpool, without giving bond.

LIVINGSTON, J.

This ship was proceeded against under the 3d section of the Act of the 28 June, 1809, for sailing from the United States to a foreign port with which commercial intercourse had not

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been nor was then permitted by virtue of that act, or of the act to interdict commercial intercourse between the United States and Great Britain and France, without a clearance and without a bond's having been given, in conformity to the provisions of the said act, not to proceed to any port with which commercial intercourse was not then, by law, permitted, nor be directly or indirectly engaged, during the voyage, in any trade or traffic with such place.

The only question on this part of the case is whether, at the time of the departure of the *Edward* from Savannah, which was in February, 1810, there existed any law subjecting her to forfeiture if the owner omitted giving the bond prescribed by the 3d section of the act above mentioned.

By the claimant it is contended that after the end of the session of Congress in which this act passed, which occurred on 28 June, 1809, there ceased to exist in the United States any distinction between prohibited and permitted ports within the meaning of the restrictive system; that the embargo laws, which alone restricted exportations to foreign countries, had at that time become repealed by the operation of the last section of the Act of 1 March, 1809, as well as by that of the 2d section of the Act of 28 June of the same year; that by this repeal, the whole

world, as far as could depend on our own laws, was open to the vessels of the United States, and consequently that it could not be illegal to neglect giving a bond not to go to an interdicted port if at the time of sailing there was

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no port in the world to which that interdiction could apply.

In examining this question my attention will be confined to a consideration of the two acts which have just been mentioned, because if the interdiction which is supposed to have existed when the Edward left Savannah is not to be found in either of these laws, no other has been referred to as creating it. Let us then see what has been done, and if there be no ambiguity in the provisions of these two acts on the subject before us, it will be safer, in a case so highly penal, to adhere to the letter of them than to incur the danger of falling into error by indulging in a mode of interpretation which was adopted at the bar, and which was too conjectural to be in any degree satisfactory.

By the 12th section of the Act of 1 March, 1800, the embargo law was repealed as to all nations except Great Britain and France and their dependencies. This repeal necessarily and immediately created a distinction between ports with which commercial intercourse was permitted and those to which it was interdicted, and we accordingly find Congress, in the very next section of this act, providing for this new state of things by requiring bonds to be given when vessels were going to ports which had now become permitted ports not to proceed to any port or place in Great Britain or France, &c.; No such regulation had been prescribed in consequence merely of the nonimportation law, and for the plainest reason, for while they prohibited an introduction into the United

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States from any part of the world of the produce and manufactures of France and England, our vessels were allowed to go to those countries, and thus continue a commercial intercourse with either or both of them -- limited, it is true, as to the articles which might be brought from thence, but uncontrolled as to the

commodities which might be carried thither, or as to the port to which they might go. This partial trade between the two countries, whether originating in the acts of the one government or the other, may frequently take place, but cannot when it does, with any propriety, be termed an interdiction or suspension of commercial intercourse, which, *ex vi termini,* means an entire cessation for the time being of all trade whatever. It was under the embargo laws alone that intercourse was interdicted between this country and Great Britain and France, as it was also with the rest of the world, which interdiction, as it arose out of those laws, so it is expressly continued as it regards those two kingdoms by excepting them out of the operation of the 12th section of the Act of 1 March, 1809, which repealed the embargo laws as to all other parts of the world. It would seem, then, that after this, no other inquiry would remain than to ascertain whether the commercial intercourse thus interdicted by the act laying an embargo, and continued, or rather not repealed, as it respected Great Britain and France, by the 12th section just mentioned, was still in force at the time this offense is alleged to have been committed. Without leaving the act now under consideration, we find that it was

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to continue in force only until the end of the next session of Congress, and that the act itself, which lays the embargo, was to expire at the same time. This event took place on 28 June, 1809. Now unless some law were passed before that time to continue the embargo longer or after that period to revive it, how can it be said that after that day a distinction could still continue between prohibited and permitted ports?

This brings us to see whether anything was done by Congress at the extraordinary session which commenced in May, 1809. By an act which they passed on 28 June of that year, they continued in force until the end of the next session, which happened on 1 May, 1810, the 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 17th, and 18th sections of the Act of March, 1809, and they declare, that all the acts repealed by the said act shall remain repealed notwithstanding any part of that act might expire by its own limitation. Now if we return to the sections which are revived, we find them containing nothing more than an interdiction of the harbors

and waters of the United States to vessels sailing under the flag of Great Britain or France or owned by subjects of either, accompanied with a prohibition to import from any foreign port whatever into the United States any goods, &c.;, being of the growth, produce, or manufacture of those countries or their dependencies. In not one of them is found a prohibition to our citizens against trading with either of those countries. Their revival, then, does not operate so as to create a single interdicted port in the whole commercial world.

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Such interdiction, as has already been said, was a creature of and owed its existence solely and exclusively to the embargo laws. If it be said that such prohibition necessarily flowed from the revival of these sections, notwithstanding their entire silence on the subject, then would our vessels have been under a disability of going to any part of the world, because they were no more at liberty to bring British and French goods from other countries than from Great Britain and France; and yet the 12th section of this act, by only taking the embargo out of their way, permitted them to go to any port of the world except to Great Britain and France.

But in availing themselves of this permission, they were still under a restraint not to bring to this country any British or French goods. The 11th section of the Act of March, 1809, which is continued by that of June of the same year, authorizes the President in certain cases to issue his proclamation, after which the trade of the United States, suspended by that act and by the embargo law, may be renewed with Great Britain or with France, as the case may be. In this section we are presented with a distinction taken by the legislature itself and which indeed pervades the whole system between the suspension of trade created by that act and by the embargo laws. The two systems were entirely different, and enforced by different and distinct penalties. By the one our vessels were at liberty to go where they pleased; by the other, they were prevented from going to any foreign port whatever. The revival, then, of these sections did not preclude

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our vessels from going to any part of the world, but only forbid their bringing to this country the articles whose importation was prohibited. If the 12th section had also been revived, then no vessel of the United States could have gone to Great Britain or France, and the distinction of permitted and forbidden ports would have continued until 1 May, 1810. But as the whole embargo system expired in June, 1809, not only by the 19th section of the Act of March, 1809, but also by the express provision of the Act of June of the same year, the conclusion is inevitable that when the *Edward* sailed there was no law in force by which any distinction of prohibited and permitted ports existed, and that therefore the not giving the bond in question was no violation of law.

No notice has been taken of either of the proclamations of the President, because if the view here presented be correct, neither of them has any bearing on the question. Admitting the validity of both of them, the latter would not make the ports of England prohibited ports if the laws which created the distinction had done it away by opening to the citizens of the United States the ports of every nation on the globe. The President's power could only exist while such a state of things continued as suggested the necessity of, and would render an interference on his part proper and useful, and no longer.

It may be, and has been, said that the opinion here expressed is at variance with the public opinion on this subject, as well as with the understanding

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of the collectors and some other officers of government, and that even this Court has, at its present term, condemned property for the same offense with which the *Edward* is charged. The answer to all this is that the condemnation alluded to passed *sub silentio,* without bringing the point distinctly to our view, and is therefore no precedent, and that, as to public opinion or that of the officers of government, however respectable they may be, it can furnish no good grounds for enforcing so heavy a penalty unless on investigation it shall appear to have been correctly formed. It was also urged that Congress must have supposed the law to be as it is now contended for by the Attorney General, or they would not have

passed the 3d section of the Act of 28 June, 1809, when there was no state of things to which its provisions could apply. To this the answer which was given at the bar is satisfactory. At the time of the bringing in of that bill, the embargo laws were still in force, and would continue so until the end of that session. Now as it could not then be foreseen that the bill would not become a law until the last day of the session, a prohibition not to go to prohibited ports was necessary, but became nugatory by the law not passing until the time prescribed for the extinction of the whole system.

Upon the whole, it appears to me clear that there was no law in force when the *Edward* left Savannah interdicting her from going to any foreign port whatever, or requiring from her owners any bond not to go to such port, and under this persuasion,

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I have thought it a duty to express my dissent from the judgment which has been just rendered.

But were the case doubtful, I should still arrive at the same conclusion, rather than execute a law so excessively penal about whose existence and meaning such various opinions have been entertained.

To satisfy ourselves that great difficulties must exist in relation to this law, we have only to look at the progress of the case now before us. The offense with which the *Edward* is charged in the information is going, without giving bond, to a prohibited foreign port. The condemnation in the circuit court, however, proceeded on the ground of all the ports of Great Britain (to one of which it was alleged she was going) being permitted ports. In the very able argument which was made here in support of the prosecution it was attempted to be shown that Liverpool was not a permitted, but an interdicted, port. This state of uncertainty, which it would seem could hardly exist if the legislature had expressed itself with that precision and perspicuity which are always expected in criminal cases, would, with me, independent of my own convictions that there was no such prohibiting law, have

been a sufficient reason for restoring this property to the claimants.

Sentence of the circuit court affirmed.