The William King

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Appellant : The William King

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15 U.S. (2 Wheat.) 148

APPEAL FROM THE CIRCUIT COURT

FOR THE DISTRICT OF NEW YORK

SYLLABUS

Under the Embargo Act of 22 December, 1807, the words an "embargo shall be laid" not only imposed upon the public officers the duty of preventing the departure of registered or sea letter vessels on a foreign voyage, but consequently rendered them liable to forfeiture under the Supplementary Act of 9 January, 1808.

In such case, if the vessel be actually and *bona fide* carried by force to a foreign port, she is not liable to forfeiture.

The Court being of opinion under the facts and circumstances of the case that the capture under which it was alleged the vessel was compelled to go to a foreign port was fictitious and collusive, the decree of condemnation in the court below was affirmed.

A libel was filed against this vessel in the District Court of New York, March, 1809, for a breach of the Act of 22 December, 1807, laying an embargo, and the several acts supplementary thereto, alleging that she proceeded from Baltimore without any clearance or permit, bound on a voyage

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to Exuma, one of the Bahama Islands, where she took in a cargo of six thousand bushels of salt, with which she returned to New York. The claimants admitted the fact of going to Exuma and bringing away the salt, but alleged that it was from necessity; that the brig was regularly bound to Boston, but, being captured soon after she left Hampton Roads, by a British privateer, was sent to Jamaica, where she sold the cargo of flour which she had on board, the government of that colony not allowing it to be brought off. That she then went to Exuma.

The testimony in the case exhibits the following summary:

About the middle of October, 1808, the vessel arrived at Baltimore from Boston. At Baltimore she took on board a cargo of upwards of sixteen hundred barrels of flour, and sailed again, ostensibly for Boston, about the first of November. On reaching Hampton Roads, she stopped a few days, being, as was asserted, wind-bound. While there, a British privateer of ten guns and twelve men called the *Ino* arrived in the Roads. On the eighth of the month, the brig put to sea, the *Ino* following her. On the afternoon of the same day the *Ino* captured her within ten leagues of the shore, putting a prize master and one man on board. The vessels then proceeded for the West Indies. During the voyage, no attempt was made by the crew either to retake the brig or to escape, though favorable opportunities were

not wanting. Her crew consisted of nine persons. After a short separation from the privateer, the brig arrived off St. Nichola Mole.

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Here the privateer joined her, and thence the two went to Kingston. No prize proceedings were instituted against the brig, but on the contrary the supposed captors relinquished all claim to their prize, on reaching Kingston. From Kingston she went to Exuma, as above stated. The district court, on the hearing, pronounced a sentence of condemnation. A decree of affirmance *pro forma* was entered in the circuit court, from which the cause was brought by appeal. Mr. Hoffman, for the appellants and claimants, stated that this case was governed by the authority of the *Short Staple,* the *William King* having sailed from Hampton roads in company with that vessel, and both were seized by the British privateer *Ino* and compelled to go to the West Indies. The two cases are perfectly coincident in their circumstances, and restitution having been decreed in the case of the *Short Staple,* the same judgment must consequently be pronounced in the present case. He argued that the whole plan and system of the revenue laws indicated that it was not the legislative intention to cumulate a forfeiture of the ship (being a registered vessel) upon the penalty of the bond, which had been given for relanding the cargo in the United States.

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MR. JUSTICE JOHNSON delivered the opinion of the Court.

The vessel is the same which makes her appearance in the case of the *Short Staple,* decided in this Court at February term, 1815, and it has been contended that the acquittal in that case is conclusive upon this.

But we think otherwise. It might with more propriety be contended that had the hearing of this cause come on together with that of the *Short Staple,* the latter would have found much more difficulty in escaping. As it was, the division of the Court and the acknowledgment of the judge who delivered the opinion show that

the vessel in that case was "hardly saved." In the present cause, there is very material evidence which did not appear in, and could not affect the former. We shall therefore dispose of this case altogether upon the evidence that is peculiar to it.

It will be recollected that this vessel, as well as the *Short Staple,* were libeled for a violation of the Embargo Act of 22 December, 1807, and the Supplementary Act of 9f January, 1808, the former of which enacts "that an embargo shall be laid on all ships and vessels in the ports of the United States, bound on a foreign voyage," and the latter forfeits the vessel that shall proceed to any foreign port or place "contrary to the provisions of this act or of the act of which this is a supplement." As the majority of the Court was of opinion that no offense was committed in the case of the *Short Staple,*

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it was unnecessary to express any opinion on the application of the law. They therefore waived it.

But in this case it becomes necessary to lay down the following principles. There can be no doubt that if the *William King* was carried off to Jamaica by actual force, it was an act which wanted the concurrence of the will, and, therefore innocent. But whatever is done in fraud of a law is done in violation of it, and if a vessel with an original intention to go to a foreign port complied with the requisition necessary to obtain a clearance on a voyage coastwise, this is but the device by which she eludes the force that would otherwise have prevented her departure from the port. Was, then, the sailing to a foreign port a prohibited act under the embargo law to a registered or sea letter vessel? If so, the commission of such an act was a cause of forfeiture under the Act of January 9, 1808. And here the only doubt is whether the words "an embargo shall be laid" operate any further than to impose a duty upon the public officers to prevent the departure of a registered or sea letter vessel on a foreign voyage. The language of the act is certainly not very happily chosen, but when we look into the definition of the word "embargo," we find it to mean "a prohibition to sail." Substituting this paraphrase for the word

"embargo," it reads "a prohibition to sail shall be imposed," &c.;, or in other words, "such vessels shall be prohibited to sail," which words, had they been used in the act, would have left no scope for doubt.

The only facts which it will be necessary to notice

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in this case in order to show the grounds of our decision are these:

The *Ino,* the supposed capturing vessel, sailed from Guernsey for Boston in September, 1808. She bore an English commission, and is commonly called a British privateer. But as there exists no distinction that we know of between a privateer and letter of marque but what results from their equipments and habits, and as although she mounted ten guns, she had but twelve men and confessedly came to Boston for a cargo, we are induced to think that her habits were rather commercial than roving. These three vessels lay in Boston harbor some time together. The two brigs sailed within a few days of each other, bound to Baltimore for a cargo of flour, and the *Ino* sailed soon after. As the embargo prevented her taking in a cargo as such, the master cleared out for the Cape of Good Hope and was permitted to take in a large stock of provisions as for a long voyage. But the master admits that he was in fact bound to Jamaica, and sailed for that port, and affected to be destined to the Cape in order to get permission to take in a large stock of provisions, because he knew provisions in the West Indies to be dear. In the meantime, the two brigs had taken in a cargo at Baltimore and cleared out for Boston. But, as they allege, on account of contrary winds, they put into Hampton Roads, where they remained from 1 November to the 8th of the same month. Whilst the two brigs lay in Hampton Roads, the *Ino* also put into the same port, and the reason alleged for doing so

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is that after leaving the port of Boston, she encountered high winds which carried away her main boom, and finding herself in the latitude of the Capes of Virginia, she put in to obtain a spar for a boom. But it is not a little remarkable here that

both Betts, the lieutenant of the *Ino,* and Southcote, the owner, who was on board, agree that the prevailing winds were north and west. And how a vessel bound from Boston to Jamaica, a course nearly southeast, should, after several days under high northwesterly winds, find herself in the latitude of the Capes of Virginia seems unaccountable unless we suppose that she was beating up with intent to touch at Norfolk instead of bearing away for her port of destination.

Three days after the arrival of the *Ino,* the two brigs sailed; the *Ino* immediately pursued, overhauled them before night, put a prize master and one man on board the *William King,* a prize master and two men in the other, and ordered them for Jamaica with instructions to rendezvous at St. Nicholas Mole if separated. Being overhauled on this voyage by the *Garland* frigate, the *Ino* fled, and the brigs were examined. But being liberated, they proceeded to Cape Nicholas Mole, where the *Ino* joined them, and leaving the *Short Staple* there, the *Ino* and this vessel proceeded off Jamaica. Off that place, the *Ino* restored a man which she had taken from the William King, and putting also the owner, Southcote, into her, she bore away, whilst the *William King* entered the harbor of Kingston. There she was given up to the master, who, as it is

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alleged, was refused permission by the government to sail with his cargo, was obliged to sell it, and obtained about twenty dollars clear per barrel for what had cost five or six dollars at Baltimore.

So far the evidence stands unimpeached; it constituted, in fact, the defense of the claimant. But at the trial below in this cause, a witness was produced in behalf of the prosecution of the name of Gustaff Forsberg, who went out mate of the *William King* and who, among a variety of facts, testifies to the following:

That when the *William King* sailed from Boston, she carried off a Vineyard pilot, not having been able to land him, and that previous to her leaving Baltimore, this pilot was put on board the *Federal George,* Captain Field, then taking in a cargo of flour for Boston, with a request from the master of the *William King* to return

him to Boston, and the brig then sailed without a Boston pilot.

That after putting into Hampton Roads, the masters of the two brigs went up to Norfolk, and did not return until the evening before they sailed; that this was the true cause of their detention in that port, as vessels went to sea whilst they lay there, and the winds would have admitted of their doing the same.

That after the capture by the *Ino,* this witness intimated his intention to do no more duty, as he was then a prisoner, and was prevailed upon by the master to return to duty by having his wages raised from nine to twenty dollars, which alteration was entered on the shipping articles.

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That the man put on board with the prize master was called Colonel Kirkland, was not a seaman, and that Captain R. Daniel, of the *William King,* still navigated the vessel, the prize master exercising no authority, and this witness keeping the log book, under the directions of the captain.

That at sea in calm weather, the master and owner of the *Ino* and the masters of the two brigs met and amused themselves in each others vessels; that, on their sailing from Jamaica, they took on board a number of articles, some of which were marked *Ino;* that Southcote, the owner of the *Ino,* came out with them as passenger; that the day after they left Kingston, they fell in with the *Ino,* and put on board of her owner and the articles taken on board at Kingston, with the exception of certain parcels of bagging which they took out with them to Exuma for the purpose of taking in salt.

And lastly that after their arrival in New York, the master decoyed him on board a packet and hurried him off, without his clothes, to Boston, and particularly cautioned him to be on his guard to say nothing to anyone but what had been entered on the log book, and informing him that if he remained in New York, he would be put in jail.

It is evident that these circumstances, taken together, afford very ample ground for condemnation. There could be no reason urged for putting the Vineyard pilot on board another vessel which was not yet ready for sea if the master of this vessel had really intended to return to Boston, and abandoning their vessels for five or six days in Hampton

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Roads looks too much like waiting for the expected convoy, whilst leaving the navigation of this vessel, and the keeping of the log book, to the original master and mate, presents a state of confidence inconsistent with all idea of hostility. And this confidence is further conspicuous in all the subsequent occurrences to which this witness testifies. Independently of his testimony, the case is loaded with suspicious circumstances, but his testimony leads to conviction.

Aware of this, the counsel for the claimants have contented themselves with attacking his credibility. But after duly weighing all the circumstances insisted on in the argument, we are of opinion that as to several material facts, his testimony pointed out the means of detection if it was not consistent with the truth. If the Vineyard pilot, for instance, was not put on board the *Federal George,* the pilot and the master of the *George* might both have been resorted to to detect the falsehood. Or if the change of wages, from $9 to $20 did not take place, nothing was easier than to refer to the shipping articles themselves to disprove the fact. On settling his account with the owners (the present claimants), that document, or a copy of it, or a charge founded on it, would necessarily have been put in their possession. If the brig was not converted from the prize into the handmaid of the *Ino* after leaving Jamaica, the owner and officers of the *Ino,* who appear to have been "nothing loath" to appear in behalf of this claim, could have been resorted to to deny it. And if there was no foundation for the

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charge of hurrying the witness off from New York in the manner he has sworn to, it would have been easy for Captain Daniel to have resorted to witnesses to prove

that he left that place under other, and what, circumstances, or if in a packet, to prove by someone on board the packet that there was no foundation for the story.

Admitting this last fact to be true, it casts suspicion over the whole conduct of Capt. Daniel and lessens the weight of his testimony so far as it stands contradicted by this witness. This point was much considered and admitted by this Court in the case of the *General Blake,* which I find is omitted from the reports of the last term.

Yet it cannot be denied that the claimants have one very just ground for attacking the credibility of Forsberg. We do not attach much importance to his having omitted most of the facts sworn to on his last examination, because it does not appear that he was ever interrogated to them, and he might well have been unconscious of their having any material bearing on the case. But both in the protest at Jamaica and on his examination in the district court he swears that the detention in Hampton Roads was produced by contrary winds. Whatever objections may be made to the protest in this case, that he gave this evidence in the district court there could be no doubt. It is a feeble excuse for a witness to allege that he swore incautiously, or under the influence or instruction of anyone, in whatever relation they may have stood to each other. The Court therefore has hesitated upon the question whether it should

not on this ground reject altogether the testimony of this witness. And nothing has induced it to sustain it but the consideration that on all other points the testimony itself pointed to the means of its own detection, and on this point it is not very material if it be true, as he swears, that the master was all the time at Norfolk, without the ship's boat, instead of being on board to take advantage of the first wind that offered.

This circumstance shows but little anxiety on the subject of the wind, and leads to the supposition that some other object sanctioned this detention in the eyes of his owner. If this fact also had not been true, although the course of the winds could

not, with much facility, have been proven, there could have been but little difficulty in proving the falsehood of such a charge relative to a voyage which was so much a subject of conversation at that time.

Upon the whole, the Court is of opinion that the capture was fictitious and that the decision below must be affirmed.

Decree affirmed.