The Amiable Isabella

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U.S. Supreme Court The Amiable Isabella, 19 U.S. 1 (1821)

The Amiable Isabella

19 U.S. 1

APPEAL FROM THE CIRCUIT

COURT OF NORTH CAROLINA

SYLLABUS

Whether the capture is made by a duly commissioned captor or not is a question between the government and the captor with which the claimant has nothing to do. If the capture be made by a noncommissioned captor, the government may contest the right of the captor after a decree of condemnation and before a distribution of the prize proceeds, and the condemnation must be to the

government.

The seventeenth article of the Spanish treaty of 1795, so far as it purports to give any effect to passports, is imperfect and inoperative in consequence of the omission to annex the form of passport to the treaty.

Quaere whether, if the form had been annexed and the passport were obtained by fraud and upon false suggestions, it would have the conclusive effect attributed to it by the treaty?

Quaere whether sailing under enemy's convoy be a substantive cause of condemnation?

By the Spanish treaty of 1795, *free hips make free goods,* but the form of the passport, by which the freedom of the ship was to have been conclusively established, never having been duly annexed to the treaty, the proprietary interest of the *ship* is to be proved according to the ordinary rules of the prize court, and if thus shown to be Spanish, will protect the cargo on board, to whomsoever the latter may belong.

By the rules of the prize court, the *onus probandi* of a neutral interest rests on the claimant.

The evidence to acquit or condemn must come in the first instance from the ship's papers and the examination of the captured persons.

Where these are not satisfactory, further proof may be admitted if the claimant has not forfeited his right to it by a breach of good faith. On the production of further proof, if the neutrality of the property is not established beyond reasonable doubt, condemnation follows.

The assertion of a false claim in whole or in part by an agent or in connivance with the real owner is a substantive cause of condemnation.

This was the case of a ship and cargo sailing under Spanish colors and captured by the privateer *Roger,* Quarles, master, on an ostensible voyage

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from Havana to Hamburg, but really destined for London or with an alternative destination and orders to touch in England for information as to markets and further instructions. The ship sailed from the Havana on 24 November, 1814, under

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convoy of the British frigate *Ister,* with which she parted company on 1 December, the frigate having gone in chase of an American privateer, and on 3 December was captured by the privateer *Roger* and carried into Wilmington, North Carolina, for adjudication. The ship and cargo were condemned as prize of war in the District Court of North Carolina, and the sentence was, after the admission of further proof in the circuit court, affirmed by that court. An appeal was then allowed to this Court, with permission to introduce new proof here if this Court should choose to receive it.

The original evidence consisted of the papers found on board the captured vessel and delivered up to the captors by the master at the time of the capture, and of certain other documents afterwards found concealed on board or in the possession of Rahlives, the supercargo, or of one Masuco, alias Burr, a passenger on board the *Isabella.* Some of the ship's papers were mutilated and attempted to be destroyed, and others were thrown overboard and spoliated.

The paper of which the following is a translation, was the only one delivered up by the master at the time of the capture:

"Don Jose Sedano, Administrator General of the Royal Revenues of this port of Havana in the Island of Cuba &c.;, certify that by authority and knowledge of the General Administrator of the Revenues under my charge, permission has been given to ship in the Spanish ship called the *Isabel,* Captain Don Francisco Cacho,

with destination for Hamburg, *viz.,:* "

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"Don Alonzo Benigno Munos, registered on the day of this date, six hundred and seventy-six boxes brown sugar, two hundred and twenty-eight boxes white ditto, and two hundred quintals dyewood, which he has shipped on his own account and risk, consigned to Don Juan Carlos Rahlives, and paid 6,290, and that it may so appear, I sign the present."

"SEDANO"

"Dated Havana, 10 Nov., 1814"

Among the papers found on board, and brought into the Registry, with an explanation of the circumstances under which they were discovered, were

1. A passport or license granted by the governor and Captain General of the Island of Cuba, of which the following is a translation:

"Number 94. PROVINCE OF THE HAVANA. Don Juan Ruiz de Apodaca y Eliza, President, Governor, Captain General of the place of Havana and Island of Cuba, Commandant General of the Naval Forces of the Apostedero, &c.;"

"For want of royal passports, I dispatch this document in favor of Captain Don Francisco Cacho, inhabitant of the City of Havana, that with his Spanish

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merchant ship called *Amable Isabel,* of the burden of 208 1/2 tons, he may sail from this port, with cargo and register of free trade, and proceed to that of Hamburg, there to trade and return to his port of departure, with the express condition of performing his voyage outward and inward, directly to the fixed places of his destination, without deviating or touching at any port, national or foreign, in the islands or continent of the Indies unless compelled by inevitable accident. APODACA. Gratis. Sebastian de la Cadena. "

2. A clearance granted by Don Pedro Acevido, Captain of the Port of Havana, permitting the said Cacho "to proceed with the Spanish ship *La Amable Isabel* from this port to England," with a muster roll of the officers and crew annexed.

3. A letter of instructions from Munos, the claimant, to Cacho, of which the following is a translation:

"Havana, 10 Nov., 1814. Don Francisco Cacho. SIR: Entrusted as you are with my ship *La Amable Isabel,* which sails bound for Hamburg or some other port of that continent or for those of England, I hope that you will perform your duty with the exactness you have always used, and which was my motive for making choice of you. Consequently I will omit all further advice, particularly as there goes in the vessel the supercargo, Don Juan Rahlives, with my full power and instructions. You will observe all his directions as if they were dictated by myself. Wishing you a prosperous voyage, &c.; MUNOS."

4. Articles of agreement between Munos and the master and crew of the ship.

5. A general procuration from Munos to one Von Harten of London, dated at Havana, May 29, 1812, with a substitution by the latter to Rahlives the supercargo, executed at London.

6. A letter from one Tieson, dated London, November 4, 1813, to his brother F. Tieson at Rio Janiero, introducing Rahlives

as the conductor of certain commercial operations which he had concerted with several friends, referring his correspondent to Rahlives himself for the details.

7. A letter from one Rhodes, dated London, to Messrs. Glover & Co. at Rio Janeiro, introducing Rahlives, who the writer states "goes as supercargo in the ship *Isis* and acts for Mr. John Goble of Havana and Mr. Von Harten of London," &c.;

8. A letter from Hawkes & Malloret, dated Liverpool, October 28, 1803, to Brown & Co. at Rio Janiero, introducing Rahlives as

"particularly connected with our intimate and respectable friend Mr. George Von Harten of London, and John Gobel of Havanna, on whose behalf he will probably visit you very shortly. It is probable Mr. Rahlives may entrust to your management some transactions for account of said friends and others, and we beg to assure you we feel convinced every satisfaction will result from such business as he may have to conduct."

9. The following circular:

"Havana, 1 May, 1812. On 15 May, we took the liberty of addressing our friends from London, requesting their countenance to an establishment we intended to form in this city under the firm of Von Harten, Gobel & Co. We now have the satisfaction to inform you of our complete success in organizing and consolidating the same, and that we are in every respect enabled to procure to our correspondents all those advantages which may result from intelligence, activity, and the most respectable connections in this island. Political considerations, however, induce us to carry on our affairs for the future under the sole

name and firm of Mr. John Gobel, who is permanently to reside in this country,"

&c.;

10. An account of sales, dated Havana, November 16, 1814, signed by J. Gobel, of the cargo of the English brig *Portsea,* received from Rio de Janeiro on account of Messrs. Brown, Weston & Co. and of Rahlives, amounting to $20,313 net proceeds, leaving to the credit of Rahlives, in Gobel's hands, half of that sum.

11. A charter party executed at Rio de Janeiro, May 11, 1814, between Weston and Gobel, letting to him the Portsea, and consigning the cargo to the charterer.

12. The following letter from Munos to Rahlives:

"Havana, 10 Nov., 1814. Sir, I enclose you invoice and bill of lading showing to have shipped in my ship called *La Amable Isabel,* Capt. Don Francisco Cacho, 1,104 boxes of sugar, and 40 half boxes of ditto, and 200 quintals of dye-wood, the principal amount of which and charges amounts to $60,642.03, which cargo consigned to you, you will please to take charge of on your arrival at Hamburg, or at any other port you may find convenient to go, proceeding to sell it on the most advantageous terms you can obtain, that with the proceeds you may make the returns according to the instructions I have verbally communicated to you. In like manner I recommend to you and place under your care my said vessel in order that the adventure may have the most favorable termination, to which end I have given definitive orders to the Captain, Don Francisco Cacho, that he may observe the instructions you may communicate to him in my name. As I am so well satisfied with

your care and diligence, and the friendship my house entertains for you, I shall omit any further advice, wishing you a prosperous voyage and that you may duly advise me of your proceedings and communicate such instructions as you may think fit. Yours, &c.;"

13. A bill of lading signed by the master, Cacho, acknowledging the receipt of the cargo and engaging to deliver it to Rahlives at Hamburg or at the port where his register might be verified.

14. A manifest entitled "Manifest of the cargo of the Spanish ship *La Amable Isabel* in its voyage from this port of Havana to that of London," and signed by the master, being stated in the margin that he had signed bills of lading therefor "to Don Alonzo Benigno Munos, which he has registered on his own account and risk, and to the consignment of Horace Solly of London."

Among the mutilated papers found on board were (1) various accounts between Rahlives and F. Thieson. (2) An invoice of jerked beef and tallow, shipped from Rio de Janeiro to Havana. (3) Another invoice of the same, "for account and risk of

Mr. Alonzo Benigno Munos at Havana," per brig *Isis,* Capt. Brenmer, amounting to $22,371. (4) Invoice of sugars, &c.;, shipped on board the *Isis* at Havana by order of Rahlives, signed by Gobel, and amounting to $50,671. (5) Another invoice of the same, shipped on board the *Isis,* "for Falmouth and a market, to the orders of G. Van Harten, Esq. in London," signed by Rahlives, and various accounts between the different parties.

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A claim was given in for the ship and cargo, as the property of Don Alonzo Benigno Munos, by Rahlives, the supercargo, as agent for the alleged owner, and the captured persons were examined on the standing interrogatories.

Upon the order for further proof, the affidavits of the claimant and his clerks, to the proprietary interest of the ship and cargo in him were produced, and the proceedings before the tribunal of the Consulado at the Havana under which the ship, which had arrived at that port from New Providence, was sold under the bottomry bond alleged to be given for repairs by one John Cook to the claimant and was naturalized as a Spanish vessel. A great mass of testimony was also produced tending (among other things) to show that the claimant, who was father-in-law of Gobel, had not been actively engaged in trade for many years before this shipment was made, and that Gobel, not being a Spanish subject, all his foreign business, and his transactions with the custom house, had constantly been carried on in the name of Munos.

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MR. JUSTICE STORY.

This cause was heard upon the whole evidence, introduced by both parties at the last term, and as it embraced several points of great importance and difficulty, the Court, *ex mero motu,* directed one of those points to be reargued, and another, including a final construction of the Spanish treaty in matters of deep and universal interest, was reargued upon the application of the government itself. The last

argument was heard at so late a period of the session that it was found impracticable for all of us to prepare deliberate opinions, and the cause was ordered by the Court to be

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continued for advisement. The Court has now come to a result which I am directed to pronounce.

A preliminary question was raised at the original argument that the libel ought to be dismissed because the capture was made without public authority and by a noncommissioned vessel. Whether this be so or not we do not think it material now to inquire. It is a question between the government and the captors, with which the claimant has nothing to do. If the ship and cargo be enemy's property, it cannot be restored to the claimant. If the captors made the capture without any legal commission and it is decreed good prize, the condemnation must, under such circumstances, be to the government itself. If with a commission, then it may be to the captors. But in any view the question is matter of subsequent inquiry after the principal question of prize is disposed of, and the government may, if it chooses, contest the right of the captors by an interlocutory application after a decree of condemnation has passed and before distribution is decreed. The claimant can have no just interest in that question, and cannot be permitted to moot it before this Court.

Having disposed of this point, which indeed has been long recognized as a settled principle of the law of prize, the path is open for the consideration of the other points of the cause.

The captors contend that the whole evidence establishes that the ship and cargo are enemies' property, the property of British subjects disguised under Spanish documents, and bound to a British port;

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that the voyage had its origin in London and was to terminate there and that the usual frauds of false papers, false destination, and suppression of evidence have been resorted to for the purpose of giving a neutral character to hostile interests.

The counsel for the claimant deny the matter of fact and assert that the proprietary interest of ship and cargo is *bona fide* Spanish, and endeavor with great ingenuity and force to explain away the difficulties with which it is admitted on all sides this part of the cause is surrounded. If this ground should be thought not to be entirely and satisfactorily made out, the counsel for the claimant further contend that the ship was duly documented as a Spanish ship, according to the stipulations of the Spanish treaty of 1795, and that the effect of those stipulations is to preclude all inquiry into the proprietary interest of ship and cargo. Of the former, because the passport is conclusive evidence of the national character and ownership of the ship, which all persons are estopped to deny; of the latter because, by the treaty, free ships make free goods, and the national character of the cargo becomes wholly immaterial.

To this point, which, if settled one way, is decisive of the cause, the counsel for the captors have given several answers. 1. That the passport of this ship was obtained by fraud, and this is always inquirable into, and vitiates all, even the most sacred instruments and records. 2. That the passport is not conformable to the treaty, not having been issued by royal authority or authenticated by the royal government,

but issued by a mere colonial governor, and that, such as it is, it does not state the ship to be owned by Spanish subjects, which is indispensable under the treaty. 3. That the substituted proof required by the 17th article of the treaty where the passport is not regular must be such as is subject to the thorough examination of the prize court. 4. That the form of the passport, referred to in the 17th article of the treaty, never having been annexed to it by the contracting parties, that article, so far as it purports to give any effect to passports, is inoperative and imperfect, and the imperfection cannot be supplied by any judicial tribunal.

Such are the leading propositions, pressed with great ability and earnestness into the discussion of this cause by the respective parties. They embrace principles of international law of vast importance; they embrace private interests of no inconsiderable magnitude, and they embrace the interpretation of a treaty which we are bound to observe with the most scrupulous good faith, and which our government could not violate without disgrace, and which this Court could not disregard without betraying its duty. It need not be said, therefore, that we feel the responsibility of our stations on this occasion and that, in delivering our opinion to the world, we have pondered on it with great solicitude and deliberation and have looked to consequences no further than the sound principles of interpretation and international justice required us to look.

The point to which the Court will first direct its attention is that last made, *viz.,* whether the 17th

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article of the treaty of 1795, so far as it respects passports, is inoperative and imperfect in consequence of the omission to annex the form of the passport to the treaty. This is a very delicate and interesting question.

The 17th article provides

"That in case either of the parties hereto shall be engaged in a war, the ships and vessels belonging to the subjects or people of the other party must be furnished with sea letters or passports *(patentes de mar o pasaportes)* expressing the name, property *(propiedad),* and bulk of the ship, as also the name and place of habitation of the master or commander of the said ship, that it may appear thereby, that the ship really and truly belongs to the subjects of one of the parties, which passports *(dichos pasaportes)* shall be made out and granted according to the form annexed to this treaty."

The article proceeds to declare,

"That such ships, being laden, are to be provided not only with passports as above mentioned, but also with certificates containing the several particulars of the cargo, the place whence the ship sailed, that so it may be known whether any forbidden or contraband goods be on board the same, which certificates shall be made out by the officers of the place whence the ship sailed in the accustomed form, and if anyone shall think it fit or advisable to express in the said certificate the person to whom the goods on board belong, he may freely do so, without which requisites they may be sent to one of the ports of the other contracting party and adjudged

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by the competent tribunal according to what is above set forth, that all the circumstances of the above omission having been well examined, they shall be adjudged to be legal prizes unless they shall give legal satisfaction of their property by testimony entirely equivalent."

In point of fact no form of a passport was made out and annexed to the treaty. The case, then, now before us is not within the letter of the treaty, for as no form is prescribed, the documents found on board cannot be compared with any form, and until that comparison is made it is impossible to say whether the stipulations originally intended by the treaty have been exactly and literally complied with or not. There is no room here left for interpretation on account of ambiguous language of the parties. They have expressed themselves in the clearest manner, and it is to the passport whose form is to be annexed to the treaty, and to none other, that the effect intended by the treaty, whatever that may be, either as conclusive or *prima facie* evidence of proprietary interest, is attributed. Into the reasons why this form was omitted to be annexed to the treaty we are not permitted judicially to inquire. It may have been by accident or by design, from difference of opinion as to what should be the solemnities accompanying it, or from a willingness to leave it to future negotiation. Can this Court annex a form to the treaty? Can it supply the deficiency of the treaty and give effect to it in the same manner as if no form were referred to? Can it look to the stipulations and decide for itself what the parties regarded as substance, and what as mere form?

Can it say that the stipulations in the text would have been agreed to without the auxiliary from of the passport? Can it decide judicially that under no circumstances the form of the passport could be of the essence of the stipulations? These are grave questions, and are not to be lightly answered. They deserve and require deliberate consideration. We have given it, and our opinion will now be delivered.

In the first place, this Court does not possess any treatymaking power. That power belongs by the Constitution to another department of the government, and to alter, amend, or add to any treaty by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power and not an exercise of judicial functions. It would be to make, and not to construe, a treaty. Neither can this Court supply a *casus omissus* in a treaty any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter, and having found that, our duty is to follow it as far as it goes, and to stop where that stops -- whatever may be the imperfections or difficulties which it leaves behind. The parties who formed this treaty, and they alone, have a right to annex the form of the passport. It is a high act of sovereignty -- as high as the formation of any other stipulation of the treaty. It is a matter of negotiation between the governments. The treaty does not leave it to the discretion of either party to annex the form of the passport; it requires it to be the joint act of both, and that act

is to be expressed by both parties in the only manner known between independent nations -- by a solemn compact through agents specially delegated, and by a formal ratification.

Nor is there anything strange or singular in leaving matters of this sort to be settled by future negotiations. In our treaty with Prussia of 1785, the 14th article contains a provision as to passports in substance like that of the 17th article of our treaty with Spain, except that it declares that these "passports shall be made out in good

and due form, to be settled by conventions between the parties whenever occasion shall require." This stipulation manifestly contemplates that the form of the passport is to be a solemn act of the treatymaking power of both governments, and that neither government has authority in its discretion to use a form which shall be binding, without its consent, upon the other contracting party.

In the next place, this Court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty or to take away any qualification or integral part of any stipulation upon any notion of equity or general convenience or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the modal

parts of the treaty equally give the rule to judicial tribunals. The same powers which have contracted are alone competent to change or dispense with any formality. The doctrine of a performance *cy pres,* so just and appropriate in the civil concerns of private persons, belongs not to the solemn compacts of nations so far as judicial tribunals are called upon to interpret or enforce them. We can as little dispense with forms as with substance.

In the next place, we cannot admit that the annexation of the form of the passport was in itself (supposing we had a right to inquire into it) a matter of small moment or importance, so that the omission could be dispensed with as not belonging to the substance of the treaty. It was competent to the parties, by the particularity of the form, to have qualified the general expressions of the article and to have made that determinate which, upon the face of the article, stands indeterminate. It is, for instance, indeterminate upon the face of the article whether there is to be a specification of the names of the owners of the ship, or only a general declaration that the owners are Americans or Spaniards. It has also been contended here, and

is certainly susceptible of doubt, whether the passport was to express the individual ownership, or the national character of the ship. So the solemnities to be observed in granting the passport, the oaths to be made by the parties, the persons by whom they were to be verified, are all left indeterminate by the treaty. These might have been, and looking to the requisitions of other treaties, must have been explained and settled by the form annexed

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to this treaty. The 25th article of the Dutch treaty of 1782 is substantially the same as the 17th article of the Spanish treaty, and the form of the passport, certificate, and sea letter annexed to that treaty reduce to a perfect certainty every circumstance which has been already mentioned. Other qualifications and limitations might have been added in the pleasure of the parties. It is impossible, therefore, for this Court judicially to say what such passport might or would have contained. We may indeed conjecture, but in this conjecture we may err, and to assert what it would be, *in literis* would be to exercise a sovereign control over the compact itself.

Nor are the circumstances already stated mere form or diplomatic ceremony. They might well have entered into the very substance of the stipulation. The counsel for the claimant alleges that the passport intended by the treaty was to import perfect unimpeachable verity; that it was to have a sanctity beyond that which is granted to any other solemn instrument. Fraud would not vitiate it, nor the most direct unequivocal breach of good faith or abuse of the passport bring its protecting virtue into question. Assuming for the purpose of argument that this is true, the form of the passport, and the solemnities accompanying it were of the deepest interest and importance to both nations. It was vital to the treaty -- vital to the acknowledged rights derived under the law of nations. The immunity intended by the treaty, in this view of it, was a derogation from the general belligerent rights of both parties. They might be willing to confide the issuing

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of such passports to the Spanish high officers of state with the royal approbation and signature, or with the corresponding signatures of our own Secretary of State and President. They might have full faith and confidence that under such guards, the danger of abuses would be very much diminished, if not entirely checked. But they might not be willing to trust to the integrity, discretion, and watchfulness of subordinate agents; to officers of the customs; to colonial governors, or commanders in distant Provinces. In point of fact, our own passports have issued under the authority and signatures of our highest executive officers. What reason has this Court to presume that our government would accept of a verification by inferior officers of Spain? What reason has this Court to presume that our government would have been satisfied with a passport signed by a colonial governor for want of royal passports? It has not been so stipulated in the treaty. It has not in terms dispensed with the annexation of the form of the passport to the treaty. Even if one government had been willing to dispense with it, it remains to be shown that the other was also willing. And if both were willing, it would still remain to be shown that the act of dispensation was consummated by a solemn renunciation, for the obligations of the treaty could not be changed or varied but by the same formalities with which they were introduced, or at least by some act of as high an import and of as unequivocal an authority. All that can be said in the present case is that the subject of the annexation of the passport was taken *ad*

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referendam by the parties. They had competent authority so to do, and this Court is bound to presume that they had good reasons for their conduct. It is far more consistent with every fair interpretation of the acts of the government to suppose that the form of the passport was postponed with a view to the suspension of the article until the subject was more deliberately considered or could be more conveniently attended to than to suppose that words of reference were used without meaning, and forms carrying with them such important and interesting solemnities, and such obligatory force and dignity, were hastily abandoned at the very moment they were studiously sealed to the text. Unless this Court is prepared to say that all forms and solemnities were useless and immaterial, that neither

government had a right to insist upon a form after having assented to the terms of the article, that a judicial tribunal may dispense with what its own notions of equity may deem unimportant in a treaty, though the parties have chosen to require it, it cannot consider the 17th article of this treaty as complete or operative until the form of the passport is incorporated into it by the joint act of both governments.

Upon the whole it is the opinion of the Court, in which opinion six judges agree, that the form of the passport not having been annexed to the 17th article of the treaty, the immunity, whatever it was, intended by that article, never took effect, and therefore, in examining and deciding on the case before us, we must be governed by the general law of prize.

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This view of the case renders it unnecessary to consider the other points made by the counsel for the captors as to the effect of the treaty, and we therefore give no opinion upon them.

It remains then to consider whether the ship and cargo, now in judgment, are in fact neutral or hostile property. The facts are extremely complicated, and the evidence in many instances clashes so as to forbid all hopes of reconciling it. It cannot be disguised, too, that the claim is involved in much perplexity and is shaded by some circumstances that have not been entirely cleared away. If it were not a task from which we could derive no general instruction, the whole evidence might be minutely examined as to the questions of false destination, suppression of papers, and use of false papers. But the labor would be very great, and after all would conduce to no important purpose. We shall content ourselves, therefore, with a brief statement of the result of our opinion.

It is to be recollected that by the settled rule of prize courts, the *onus probandi* of a neutral interest rests on the claimant. This rule is tempered by another, whose liberality will not be denied, that the evidence to acquit or condemn shall in the first instance come from the ship's papers and persons on board, and where these are not satisfactory, if the claimant has not violated good faith, he shall be admitted to

maintain his claim by further proof. But if, in the event, after full time and opportunity to adduce proofs, the claim is still left in uncertainty and the neutrality of the property is not established

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beyond reasonable doubt, it is the invariable rule of prize courts to reject the claim, and to decree condemnation of the property. There is another rule too, founded in the most salutary and benign principles of justice, that the assertion of a false claim, in whole or in part by an agent of, or in connivance with the real owners, is a substantive cause of forfeiture, leading to condemnation of the property. These principles are not alluded to in this case for the purpose of founding our present judgment upon them, for we do not rely upon it as a case merely of reasonable doubt, but to show that a case less strong might justly have supported the decree we feel ourselves bound to pronounce -- of condemnation.

We cannot resist the conclusion, looking to the whole evidence, that this is a case where the whole mercantile adventure had its origin in the house of trade of Messrs. Von Harten & Gobel, a house domiciled in London. The ship was beyond all question a foreign ship, but of what nation and in whose ownership at the time when she acquired her ostensible Spanish character is studiously concealed. She came just before her naturalization from New Providence, and that naturalization was procured, as we feel ourselves constrained to believe, by an imposition practiced upon the Spanish judicial authorities by means of a pretended lien under a bottomry bond supposed to be given for repairs. The holder of the bond procured a judicial sale of the vessel, became himself the purchaser, and afterwards obtained the Spanish character by a negotiation with the Spanish Colonial government,

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making awkward apologies for his asserted ignorance of the former ownership and endeavoring to allay the well founded distrust of that government. To this very hour, the claimant has observed a profound silence on this point, a source of just

and pregnant suspicion, although he has loaded the cause with documentary proofs and affidavits on other points. He has not chosen to give any information as to the origin of the bottomry bond or former ownership of the vessel, or of the circumstances under which the supposed lien was acquired. Yet these facts would seem to have lain immediately within his reach. On board, too, of the vessel at the time of the capture was the special and confidential agent of Messrs. Von Harten & Gobel, and also the brother-in-law of Mr. Von Harten. Some papers were thrown over board, others were concealed, and others spoliated. The testimony of the witnesses upon the standing interrogatories was far from satisfactory, and it is extremely difficult to exempt the agents on board the vessel from the imputation of designed suppression of facts and prevarication. The claimant, Mr. Munos, is the father-in-law of Mr. Gobel and claims this very valuable shipment as his own property, asserting himself to be a merchant now engaged in business. And yet it is proved by a weight of testimony that seems difficult to resist that Mr. Munos has not been known to be engaged in commercial business on his own account for at least fifteen years before the time of this shipment. And it is established in the most satisfactory manner, and is indeed admitted by the claimant himself,

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that on account of the foreign character of Mr. Gobel, the son-in-law of Mr. Munos, all the foreign business of Mr. Gobel has been constantly carried on for several years under the cover of Mr. Munos. These are a few of the extraordinary facts of this case, and combining them with the indications of the papers found on board and the suppressed documents which have reached the light, the vehement presumption and almost written proof that Mr. Gobel, the admitted partner of the English house of Von Harten & Gobel, was the stationed agent of that house at the Havana, and the fact that the destination was alternative, or double, to London or Hamburg, or both, the conclusion is difficult to overcome that the cargo was the property of Messrs. Von Harten & Gobel or some other unknown enemy proprietor, and covered by the Spanish character of Mr. Munos. And the Court is constrained to consider the proceeding at the Havana as mere machinery to naturalize an enemy's ship, and that the ship either previously belonged to Messrs.

Von Harten & Gobel or some other enemy proprietor or was purchased at New Providence on his or their account. It is perfectly immaterial whether Mr. Munos had any subordinate interest in the ship and cargo or not. If his claim be substantially false in the manner in which it is framed, having been adopted by him, he has justly incurred a forfeiture of any such interest, by attempting an imposition upon the prize court.

It is the judgment of the Court that the decree of the circuit court condemning the ship and cargo

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be affirmed with costs. From so much of this opinion as respects the question of proprietary interest of vessel and cargo, three judges dissent.

MR. JUSTICE JOHNSON.

This is an appeal from the sentence of the Circuit Court of North Carolina, condemning this vessel and cargo as prize of war to the *Roger* privateer.

The condemnation below appears to have proceeded on evidence of an hostile interest existing in the ship. For as to the cargo it is not denied that the proprietary interest is immaterial, since, if the ship be Spanish, the existence of an enemy interest in the cargo does not affect it. Yet much of the evidence and argument have been introduced to prove the existence of an hostile interest in the cargo; but it has been with a view to maintain two positions: 1st, that it is a strong circumstance to prove the vessel to be British property, and 2d, that though it be not enemy owned, yet, as both vessel and cargo are claimed by the neutral, if it be proved that he has attempted a fraud, the penal consequence is the forfeiture of his own interest.

It cannot be denied that there are many circumstances in the case going strongly to prove too intimate a connection between this adventure and the mercantile transactions of the house of Gobel, consisting of Gobel and Von Harten, a British merchant. Nor is it entirely clear that Rahlives, who appears in the machinery as

supercargo, is not himself a participator in interest. If I felt myself now called upon to decide this case on the ordinary principles

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which govern the decisions of prize courts on neutral claims, it must be acknowledged that there is a good deal of evidence which must be rejected in order to clear it from the tissue of difficulties in which the circumstances involve it. Yet there is one important consideration which rides over all the unaccountable combinations of interest which present themselves to the view of the Court. Why should British property on board a Spanish vessel have been distinguished as Spanish? There are obvious reasons why Spanish property should have been disguised as British, for it would have afforded protection against the only enemy a Spaniard had to fear -- the patriot privateer. But as England was at peace with all the world except America and enemy property secure from American capture in a Spanish vessel, it is difficult to conceive a reason why this disguise should have been thrown over a British cargo. The course, however, which I will pursue in coming to a conclusion precludes the necessity of disentangling the web in which the interests of the claimant are wound up by the various circumstances of the destruction, mutilation, and concealment of papers and the questionable shape in which several of the actors in the drama present themselves to the view of this Court.

The claimant founds his right to restitution on his Spanish character and the sufficiency of his Spanish documents under the treaty. The captor contends that the documents found on board were not of the first order under the treaty, and that when let in to

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the production of substitutes, a plenary inquiry is opened into proprietary interest.

Before entering upon these more general questions, it is necessary to take notice of a preliminary ground of condemnation, which, if it can be sustained, anticipates every other inquiry. It appears, that the vessel left the Havana under convoy of a

British frigate, and it is contended that this circumstance is *per se* a ground of condemnation.

This is at least a new ground in this Court, and it cannot be expected that it will meet with a very favorable admission from a court which has manifested no disposition to multiply causes of condemnation. Without being supposed to express any inclination to adopt the principle, I deem it sufficient to remark that if it could be admitted, it ought not to be applied to a nation which needed that protection against an existing and enterprising enemy and which ought therefore to be considered as having sought it for that purpose, and not against a neutral, whose principles of conduct it had then no reason to distrust. The Gulf of Florida, at that time, swarmed with patriot privateers, and the convoying ship had, moreover, parted from the fleet before this capture was made. The conduct of this vessel was perfectly pacific when overhauled by the American cruiser. The utmost to which the courts of Great Britain have gone has been to affect the merchant vessel actually taken under convoy with the resistance or character of the convoying ship, and when such a case shall occur it will be time enough for this Court to determine on the course it

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will adopt. At present, I feel no inclination to go so much beyond those decisions as has been here contended for.

One the principal question, it appears that this vessel was provided, at the time of her sailing, both with a passport and certificate of her cargo. That these papers were on board at the time of the capture cannot be doubted; they were both delivered by the captain to the registrar of the district court, the former marked A. No. 7; the latter, B. No. 1. Some doubt arises whether they were both exhibited prior to the capture, but this is wholly immaterial in the question of condemnation.

In behalf of the claimant it is contended that on the production of the passport and certificate, or bill of lading of the cargo, he is entitled to restitution. To this the captor objects that the 17th article of the treaty with Spain contemplated a form of

passport intended to be attached to that treaty; that as no such form was settled by the two nations, the claim must rest altogether upon the provisions of the 15th article, and the proprietary interest is to be inquired into as in ordinary cases. But if the contracting parties are to be permitted to devise forms of passports for themselves severally, then that this is not a passport in the language of the treaty, but a substitute for one, and is defective in not expressing unequivocally that the ship was Spanish property.

On this part of the case it is proper to remark that it is not always easy for the criticizing eye of the common law to expand to the enlarged views and

remote perceptions which should govern the mind in the construction of treaties. Yet nothing could be more inconsistent with international law than to apply to such instruments those scrutinizing principles which enter into the construction of a special plea or a criminal statute. From history, analogy, and policy as well as language are to be gathered the views of the contracting parties, and however either may be pressed by the application of conventional stipulations to particular cases, or under particular circumstances, not less is the obligation to execute them in a spirit not only of good faith, but of liberality. Where no coercive power exists for compelling the observance of contracts but the force of arms, honor, and liberality are the only bonds of union between the contracting parties, and all minor considerations are to be sacrificed to the great interests of mankind.

In the case before us, I see no reason for nullifying the operation of the 17th article, for want of the form which was in contemplation to be drawn up and attached to the treaty. The substance of the passport intended to be prescribed is so copiously exhibited as to render it a matter of the simplest effort to throw it into form. This, no doubt, was the cause why the contracting parties manifested so much indifference about carrying their intention into effect. I am therefore content to give the same effect to any instrument complying substantially with this article as ought to have been given to a passport in a prescribed form. What is that effect?

This is easily ascertained by comparing the provisions of the 15th, 17th, and 18th articles. By the 15th the principle is established that free ships shall make free goods, and that several branches of commerce which the modern law of nations has prohibited to neutrals shall notwithstanding be freely prosecuted. But knowing the endless litigation which questions of proprietary interest give rise to and the sad depravity of morals exhibited by witnesses in prize courts, the enlightened statesmen who formed that treaty resolved, by the 17th and 18th articles, to make the freedom of the ship to rest upon documentary evidence in the first instance, and evidence of property in those cases only in which the vessel was unprovided with the necessary documents; that each nation should be sovereign to judge for itself in conferring upon its own vessels the immunity secured by the treaty, and that the acknowledged right of adjudication in the courts of the capturing power should be superseded when a vessel was found on the ocean provided with the documentary evidence stipulated for by treaty, and only revert when the vessel, being unprovided with such documents, was obliged to resort to evidence of property of a less solemn nature.

It is contended that this is yielding an important national right. What if it is? It is a mutual relinquishment, and one made by the government, not by this Court. And although it operates against us now, the time may come when the comity of Spain or her colonies may extend the benefits of it to the commerce of this country. But be that as it may,

if the relinquishment has been made, it is incumbent on us to observe it. And although it may not be so sensibly felt at present, the time is scarce gone by when it was thought a highly beneficial stipulation to this country. Spain was, at the date of that treaty, a respectable naval power. Her relations with Europe and the Barbary powers often involved her in wars. America abounded with ships and seamen, and her prospects were favorable for the enjoyment of peace. To carry

on the commerce of the West Indies and Mediterranean as the favorite carriers of belligerent cargoes was therefore, to us, a highly flattering object. And though occasional impositions might be practiced, it was comparatively a trivial consideration, and the chances mutual. When abuses should become flagrant and intolerable, it would have presented a just cause for dissolving the treaty, but it does not rest with courts of justice to dissolve a treaty.

As to considerations drawn from the impolicy of discouraging the spirit of cruising, I attach to them very little importance. The most serious doubts may well be entertained of the policy of giving encouragement to that species of enterprise. Certain it is that no nation can pursue it long without feeling its demoralizing influence. It draws together a race of men from every quarter who want for nothing but a legal pretext for indulging their appetite for blood and violence, and while their habits and examples become popular, the rapid fortunes which are occasionally acquired render the most valuable classes of a community dissatisfied with seeking

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competence by the slow progress of useful labor. It will not perhaps be too much to say that this country is, at this time, experiencing something of the baneful effects which flow to the world from letting loose the passions of men to gratify themselves with plunder. But be this as it may, it is the direct object of these articles, of this treaty, to cover commerce from capture, and if a treaty is to be construed with a view to effectuate its intent, that construction which will afford the most ample protection to commerce will be most consistent with the views which dictated this treaty. Could the language of the treaty leave a doubt on this subject, it is historically known that the policy of the United States at the time of its date was, if possible, to annihilate the right of cruising against commerce. With many ships and a most flourishing trade, she had not a vessel of war, and while every other nation was likely to be embroiled in wars, her policy was peace, and her prospects favorable to the enjoyment of it. To become the carriers of the world was the object to which her negotiations were directed, and could she have obtained the same stipulation from all the rest of the European nations, she must

have succeeded greatly.

The example of other nations in the construction of treaties is brought to the notice of this Court. But besides that the analogy in the cases referred to is very remote, I cannot admit the force of any example that contravenes general principles. It is a melancholy truth that nations and their courts are too often inclined to restrict or enlarge construction

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under a temporizing policy suggested by the pressure or allurement of present circumstances. I will endeavor to give this treaty the same construction against an American captor as ought to be given it in the courts of the opposite contracting party. And the day may arrive when American commerce will have no cause to regret that our courts have pursued liberal and enlarged views in adopting this construction.

On the exceptions taken to the form of the passport, it is to be observed that on the face of the instrument, it is declared to be issued in default of royal passports. From this circumstance, a doubt arose whether it was an instrument of the highest authority. This led to an inquiry at the highest sources of information relative to the powers of the governor of Cuba to issue such passports. From the information thus obtained, I am satisfied that his powers are amply sufficient to support the authority of that document. Some very serious doubts also have been raised relative to the form of the instrument, particularly that passage of it which has relation to the national character of the ship. The treaty requires that it should set forth the name, property, and bulk of the ship; also the name and habitation of the master, or commander. These requisites are all minutely complied with unless we except that part which relates to the property of the vessel. The words used with that view are simply *fragata mercante Espanola,* and a doubt has existed whether this be a sufficient affirmance of the property or national character of the vessel. Nor has this doubt

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been removed without a careful reference to the passports of various nations. The result is that in all of them the affirmance is general, without specifying the individual proprietor. It is also in evidence that this is the form known and used in Spain and her colonies as the passport of regularly documented and acknowledged Spanish vessels, and I feel myself bound to receive and acknowledge it as sufficient in form and substance.

Thus far the opinion was written and prepared to be delivered prior to the argument ordered at the instance of the Executive. I have seen no reason to change a word of it from anything since heard. On the contrary, the last argument has fully confirmed me in its correctness. Thousands of imaginary cases of fraud and collusion have been suggested to alarm the Court, and it may be that our government, having now a prospect of becoming a respectable naval power and having experienced the activity and enterprise of our privateers in the late war, may feel less disposed to promote the principles of the armed neutrality than it did formerly. This conviction of former error has generally grown out of the same change of circumstances in other states. But it is not through the medium of courts of justice that this change of sentiment is to develop itself. If this treaty was ever binding, it is equally binding now, and in adjudicating between individuals, the same rules which would ever have been applicable ought to be religiously adhered to under all possible changes of interest or policy.

But the interests and apprehensions so eloquently

pressed upon the notice of this Court are not real. They are factitious, and may have their effect on a client's cause, but they are not the well understood interest or the well founded apprehensions of the government. The execution of one treaty in a spirit of liberality and good faith is a higher interest than all the predatory claims of a fleet of privateers.

What has this country to fear? A practical answer is always most satisfactory on such a question; with similar treaties existing with various other powers, what real

injury was sustained in the late war? The truth is, and everyone conversant in national policy well knows, that there is always less danger of imposition in reality than a limited view of the operation of such a stipulation would suggest. It is not the interest of the belligerent to foster the carrying trade of a commercial rival; hence, Great Britain would rather, in time of war, compel her own vessels to sail under convoy than permit her merchants to use a neutral bottom. Nations are generally jealous of permitting foreigners to hold domestic tonnage or use domestic names. There are commonly privileges of trade attached to the ship's character and severe laws enacted against a practice which is always viewed as a fraud upon the government whose flag is thus acquired. Witness the severity of our own laws in such cases.

If there is any nation in the world more interested than all others in the liberal support of the doctrine contended for by this claimant, it is the United States. Our chances of enjoying peace are much greater than any other, and if there be a tendency

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to war, it is with a nation which will not be driven to the necessity of making use of neutral bottoms. I cannot, therefore, really see why our administration should have been so seriously alarmed at the prospect of our deciding in favor of this Spaniard, as has been urged upon this Court.

But considerations of policy or the views of the administration are wholly out of the question in this Court. What is the just construction of the treaty is the only question here. And whether it chime in with the views of the government or not, this individual is entitled to the benefit of that construction.

The more I have examined this subject, the more thoroughly I have been convinced that my view of the construction of the treaty is the correct one, *viz.,* that national protection was to depend upon authentic documents, and not proprietary interest -- or more correctly, that each nation should be restricted from looking beyond those documents. There is one provision contained in all these

treaties which sets this point, in my opinion, beyond all doubt. Which is that in the case of convoy, the word of the commander of the convoying ship is to be taken conclusively for the neutral character of every vessel in the fleet. This is the substitute in the case of a fleet for the passport of a single vessel. I speak of authentic documents, for the absurdity never was imagined that a passport stolen or seized by violence was to have the force of one regularly issued.

But it is contended that it is due to Spain to pursue these inquiries into proprietary interest, and due to the peace of both nations that such questions

should be examined in courts of justice, rather than leave them to be the subjects of diplomatic remonstrance. This is a specious but very unsound argument. Have not the vexations of courts of vice-admiralty and the violence of armed cruisers been the pregnant sources of half the commercial altercations of the last century? This was the evil intended to be remedied, and whatever impositions might flow from the remedy, it was well understood that the benefits of a commerce uninterrupted by the cupidity of cruising vessels would more than compensate. There is one consideration which, on this subject, is conclusive. No sovereign can appear in courts of justice to defend his subjects, and it was therefore that a method was devised for taking such questions from courts of justice, if possible, and referring them to another tribunal. Every stipulation in the treaties of that day teems with the project of ridding commerce of vexatious capture, and more vexatious litigation. A better practical illustration of the wisdom of such a measure cannot be imagined than that which the present case presents.

But it has been earnestly and successfully contended that if such was the intention of the treaty, it must fail altogether for want of the form of a passport contemplated in the 17th article.

Yet if there is any one question more clear of doubt than all others, I think it is this. For the fallacy of the proposition admits almost of mathematical demonstration. This omission must have been the result of either accident or design. It may have

proceeded from accident between the negotiators in Europe, but after the receipt of the treaty and its submission to the Cabinet and the Senate here, the omission could not have been the result of accident when it received the sanction of our government. It must then have been designedly omitted by our constituted authorities. And for what purpose? Will anyone presume to suggest that it was a deliberate fraud upon the other government calculated to leave our courts at liberty, on some subsequent day, to declare the 17th and 18th articles in effect void? Did we hold out to them the idea of having adopted the provisions of those articles into our national code when we were conscious that they contained an innate vice calculated to defeat every beneficial effect? If the argument on this point could meet the sanction of our government, I would blush for it. From the advocate of a captor, it might have been expected, but cannot lay claim to the sanction or countenance of the American government. I am sensible that the Cabinet would disavow such a doctrine.

But it is urged with much emphasis that we have no right to annex a form or to add a clause to the treaty. It is not contended that we have. No member of this bench entertains such a thought. But why may not the contracting parties supply one? All the requisites being prescribed in language, the form and the substance are the same thing. If the contract is complied with, what matters form? Whether it is substantially complied with or not must be a question for the courts of the contracting parties. But how ridiculous would it be to be trying

form and shape and size like the ignorant Arab where the treaty is substantially complied with. Had it merely stipulated that a passport in a form prescribed should be given mutually, there would have been something in the argument, but in expressing with precision the substance of the instrument to be given, it renders the devising of a form a mere work of supererogation. If no other conclusion is to be drawn from its omission, certainly this may -- that it was too trivial to be remembered.

In order to support the argument that the absence of the form nullifies the 17th and 18th articles of this treaty, the attention of this Court has been drawn to the provisions of the 14th article of the treaty with Prussia. And it has been contended that until a form of a passport be adjusted between the two nations, that article is also a dead letter. The construction is one which could not be supported even on a common law instrument. The words are "which passports shall be made out in good and due forms (to be settled by conventions between the parties whenever occasion shall require)." If the Spanish treaty is to be construed by analogy to this, the argument is directly on the other side. For these words obviously leave "the good and due forms" of these instruments to be devised by the parties severally, and only stipulate for settling a form by convention "whenever occasion shall require" -- that is, whenever either shall be dissatisfied with the form used by the other. The nations which in the very same article could repose such implicit faith in each other's candor as to leave the neutrality of

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whole fleets to be determined on the word of the convoying officer merit more the confidence of each other than to have imputed to them an evasion so obvious.

As it became indispensable to assign some reason for retaining these two articles in the treaty if they were to be held a dead letter for want of the form, it has been suggested that the only operation intended by them was to prescribe a law to the caprice or violence of cruisers and subject them to more exemplary punishment than in ordinary cases.

No one who reads and compares these four articles, the 15th, 16th, 17th, and 18th, and considers the historical events in which they originated can for a moment suppose that this was the object which led to the insertion of the two latter of those articles. The intention was to engraft into the law of nations a great and a new principle. And although power and cupidity may affect to sneer at it, and melancholy experience cannot dismiss the apprehension that it is too ethereal to subsist in this nether atmosphere, yet it is one which philanthropy will ever cling to and justice cherish. To engraft into this treaty the principles of the armed neutrality

was the object, and for this purpose the 15th article declares those principles in detail. The 16th furnishes the exceptions to them; the 17th prescribes the evidence on which those privileges shall be conceded; and the 18th, after regulating the conduct of cruisers towards vessels so protected, proceeds to declare that

"the ship, when she shall have showed such passport, shall be free and at liberty

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to pursue her voyage, so as it shall not be lawful to molest or give her chase in any manner or force her to quit her intended course."

It is impossible for language to be stronger. That the violation of these stipulated privileges would aggravate the punishment to be inflicted on cruisers is a consequence of the thing provided for, not the thing itself.

Upon the whole I am decidedly of opinion that the claimant is entitled to restitution. Nor should I find much difficulty in supporting his right on the ground of proprietary interest. But entertaining the opinion that I do on this preliminary point, there is no necessity to examine into this part of the case.

Sentence affirmed.

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MR. JUSTICE STORY.

Without giving any opinion upon the sufficiency of the evidence to establish the

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probability that the forms of passport now offered to the inspection of the court were ever authoritatively

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annexed to the original treaty in the possession of the Spanish government, the Court is of opinion that the motion for a continuance must be denied. The passport found on board the Isabella is materially variant, both in form and substance, from the forms of passport now produced, and to the form of the passport actually annexed to the treaty, and to no other, was the effect intended by the treaty, whatever that effect may be, meant to be attributed. The possession of that form, and not of any other passport which might be substituted for it, was of the very essence of the treaty. It is clear, therefore, that even if the case were as the claimant's counsel supposes, he could derive no benefit whatever from it, because the treaty passport was not on board, and the case must therefore in this respect be judged by the rules of the prize court, independent of the conventional law.

Motion denied.