

the Society, or their agents: And both parties are equally presumed to know the law. No. 3.

When a policy is originally effectual, but the risk does not take place in consequence of some intervening occurrence, the premium must be returned; but here the averment is, that the policy was illegal and null from the beginning, and, *in pari casu, melior est conditio possidentis*; Douglas, 468; King's Bench 1780, Laurie against Burdjan.

The Lord Ordinary reported the cause on informations.

Observed on the Bench: The pursuer had not sufficiently explained his object in making the insurance. He might have had an interest which might have been effectually secured by it, and the defender had no title to investigate its nature.

No bad intention has been established against him; and supposing the misapprehension to have been mutual, *in pari casu melior*, &c.

The Lords unanimously assolizied the defenders.

A petition containing reference to oath of Mr. Allan as to what passed at entering into the policy, was (18th February) refused, without answers; the questions proposed to be put to him having been considered as irrelevant.

Lord Reporter, Cullen.

Act. Ar. Campbell.

Alt. Thomson.

Clerk, Mannies.

D. D.

Fac. Coll. No. 158. p. 353.

1800. June 27.

HENDERSON, RIDDEL, and COMPANY, Attornies for Henderson, Ferguson, and Gibson, against GEORGE LOTHIAN and Others.

IN 1797, Henderson, Riddel, and Company, merchants in Glasgow, made insurance for behoof of Henderson, Ferguson, and Gibson, of Virginia, citizens of the United States of America, on tobacco, to be shipped in an *American vessel* called the *Catharine*. The voyage was to be from Virginia to Rotterdam; and the premium stipulated was ten guineas *per cent*.

Some doubts having arisen respecting the nature of the warranty, that the insured property was truly American, the following explanatory agreement was subscribed by the underwriters:

Glasgow, 20th April 1797.

“Whereas doubts have arisen, how far, by the insurance underwrote by us on tobacco for Messrs. Henderson, Ferguson and Gibson, *per* the enterprize, Two Sisters, and Catharine, *per* policies dated the 18th and 28th *ult.* there is a warranty of property, and what is to be understood by such a warranty: It is hereby declared, That in case of capture or seizure, Messrs. Henderson, Riddel, and Company, before they claim for a loss, must produce proofs of

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An insurance was effected in this country, on a vessel and cargo belonging to certain persons, citizens of America, while that state was at peace with France; and by a memorandum subjoined to the policy, it was agreed, “That in case of capture or seizure, the insured, before

No. 4. claiming a loss, should produce proof of the ship's being an American bottom, and by bills of lading shew, that the cargo had been shipped on the account and risk of certain gentlemen, American citizens." The vessel having afterward been captured by a French privateer, and condemned by the prize-courts of the French republic, "as the property of the enemies of the Republic, in respect the master was not provided with regular dispatches and papers;" the insured were nevertheless found entitled to recover the loss from the underwriters, on producing the evidence required by the memorandum.

How far the facts stated in the decree of a foreign prize-court are to be held as *probatio probata*, in the

"the ships being *American bottoms*, and by bill of lading, shew, that the tobacco shall have been shipped on account and risk of Messrs Henderson, Ferguson, and Gibson, upon which we shall settle, by granting our bills at four months date, for the amount of our subscriptions, deducting the stipulated premium, in full dependence that the insured will use their best endeavours to recover the property, as for account of the shippers."

The Catharine sailed from Virginia on the 1st April 1797. On the 17th May she was captured by the Dugué Trouin French privateer, commanded by Captain Dutache, who sent the Catharine into France.

The owner of the privateer made an application to the Tribunal of Commerce of the canton of Nantes, praying for the condemnation of the Catharine. The master of the Catharine, and the consignee of the cargo, were summoned to appear before the court. The master, mate, and two of the seamen were examined, and the ship's papers were produced, and translated by a sworn interpreter. Counsel were also heard for the parties. A judgment was afterward pronounced, which specified the grounds on which it proceeded, in the following terms:

"Considering that Captain Samuel Cazeneau has not produced any muster-roll (role d'équipage) in due form, signed and attested by public officers, appointed for that purpose, but merely a sort of ship's articles, without any signature or date, wherein are inserted the names of ten men, said to compose the crew of the said ship Catharine, without mention being made either of their native place, nor of their place of abode; and in corroboration of this list, six protections, granted by the United States to persons named John Canon, James Crowhill, George Talwell, William Armstrong, Joah Kleg, and Jonah Field, being part of the ship's crew, and which proves them to be citizens of the United States of America, and their having been so for a certain number of years: Considering that the 7th article of the law of the 13th Nivose, 3d year, which abrogated that of the 9th May 1793, cannot be recurred to, pursuant to the arret or resolution of the Executive Directory of the 12th Ventose, 5th year, and that this law remains in full vigour: Considering that this law of the 9th May 1793, Old Style, orders the ordinances and regulations of 1704, 1744, and 1778, relative to the manner of proving at sea the property of neutral ships and merchandize, to be carried into effect: Considering that the 1st article of the law of the 3d Brumaire, 4th year, ordains as follows: When a declaration of war against a nation shall cause maritime armaments to take place, the Executive Directory will draw up instructions clear and precise, the forms of which shall not leave the least doubt to the searching vessels, with respect to their duty and rights: Considering that the arret of the Executive Directory of the 12th Ventose, 5th year, in the 4th article, in terms clear and imperative, declares lawful prize, all the ships of the United States, unprovided

“ with muster-rolls, and orders them to be treated as enemies: Considering,
 “ lastly, that if any ship be declared a lawful prize, and treated as an enemy,
 “ the confiscation of her cargo is a matter of course:—The tribunal, in con-
 “ formity with the laws above quoted, and especially with the 4th article of
 “ the arret of the Executive Directory of the 12th Ventose, 5th year, decrees
 “ and declares lawful prize the ship Catharine, Samuel Cazeneau master, cap-
 “ tured by the private ship of war Dugue Trouin, commanded by Captain
 “ Dütaché, together with her apparel and furniture: Decrees and declares
 “ further lawful prize, all the goods and effects which compose the cargo
 “ of the said ship, since the whole, owing to Captain Samuel Cazeneau not
 “ being provided with proper and regular dispatches and papers, is to be
 “ deemed the property of the enemies of the Republic. Grants accordingly
 “ leave to Citizen Dessault, in the quality wherein he acts, to dispose of the
 “ said ship Catharine, as well as of the cargo, for the benefit of the owners
 “ and of the ships company of the privateer Dugue Trouin, in conformity
 “ with the laws.”

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 courts of this
 country,—
 argued, but
 not determin-
 ed.

Against this sentence, the Captain of the Catharine and the Consignee of the cargo appealed to the civil Tribunal of the Lower Loire, who affirmed the decree of condemnation by the following judgment :

“ Considering that the maritime regulations of 1704, 1744, and 1778, anteri-
 “ or and posterior to the treaty concluded between France and the United States
 “ of North America, imperiously require that all foreign ships, sailing in time
 “ of war, should have on board a rôle d’équipage, authenticated by the pub-
 “ lic officers of the neutral port from which they sailed, under pain of being
 “ considered as good prizes; considering that the model of the passport an-
 “ nexed to the treaty of February 1778, requires every Anglo-American Cap-
 “ tain who has obtained it, to deliver a list, signed and certified by witnesses,
 “ of the names, surnames, places of birth and abode of the people who com-
 “ pose his crew, and that Samuel Cazeneau had but an informal and unsigned
 “ list, decrees by judgment in the last resort, that it has been rightly deter-
 “ mined by the judgment from which he appeals: Orders that that judgment
 “ shall obtain its full and entire effect.”

Henderson Riddel and Company, on hearing of the capture of the Catharine, applied to the underwriters for a settlement of the loss. At the same time in fulfilment of what they conceived to be the warranty which they had undertaken by the agreement of the 20th April 1797, above inserted, they transmitted to the underwriters the bill of lading of the Catharine, which bore, that the tobacco was shipped on account and risk of Henderson, Ferguson, and Gibson, citizens of the United States. They also transmitted to the underwriters a certificate by the American Vice-Consul at Nantes, certifying, that Cazeneau the master, had appeared before him, and made oath that when he sailed from Virginia, “ he had all the papers and vouchers required by the laws of

No. 4. “ the United States of America, consisting in his sea-letter, register, clearance from the custom-house, bill of health, manifest, bill of lading, Mediterranean pass, and each man’s protection ; and that he never had heard of the necessity of the muster-roll, or role d’equipage, now required by the French government.”

The certificate further bore, “ That all the said papers and vouchers are deposited at the Tribunal of Commerce in this city.”

Several of the underwriters paid their shares of the loss, but a greater number of them refused to do so, on the ground that the decree of the French courts of Admiralty, by which the vessel and cargo were condemned as belonging to the enemies of the French Republic, must be held as conclusive evidence, that the pursuers had not complied with the terms of their warranty.

Upon this, Messrs. Henderson Riddel and Company brought an action against those underwriters who declined a settlement, in which the Judge-Admiral pronounced the following sentence : “ Finds it instructed by the judicial proceedings in the French courts of law, as translated and approved of by the parties in this cause, that the condemnation of the ship in question was founded on the said ship not being furnished with proper vouchers to prove the neutrality of the said ship ; sustains the defences, and assoilzies the defenders.”

Messrs. Henderson Riddel and Company brought a reduction. In defence, the underwriters

Pleaded : Both at the time the policy was effected, and at the time of the capture, America was at peace with France. The warranty of the insurers, that the ship was American bottom, was synonymous with a warranty that she was neutral. But a warrandice of neutrality implies, not merely that the ship is *de facto* neutral, but also that she is provided with all the papers and documents necessary to prove her neutrality. Now, the decree of condemnation of the French Admiralty Courts expressly bears that she was not ; and without entering into the merits of the decree, it is a fixed principle in the law of nations, that decrees pronounced by courts of prize are entitled to implicit credence from the judicatories of all other countries : Stair, B. 2. Tit. 2. § 6. Magens, Vol. 1. p. 437. Wesket, p. 182. Park, 3d edition, p. 358. S. C. Raymond, 473. Trin. 32. Car. Rot. 1229, Hugh v. Cornelius ; Cases, 14. B. Trin. Term. 1798, p. 709. Rich v. Parker ; Park, p. 356. 2d edition, Bernard v. Motteux ; Millar on Insurance, p. 499, 500. Trin. Term. 22d Geo. III. Barzillay v. Louis ; Park, 3d edition, p. 360. De Souza v. Ewer, 1789. Termly Reports, Trin. Term, 15th June 1798, Geyer v. Aguilar ; Ibid. p. 523. 10th February 1798, Colvert v. Bevill ; K. B. Reports, Vol. 8. p. 230. Easter Term, 39th Geo. III. April 23d 1799, Garrels v. Kensington ; Douglas’ Reports, p. 613. Jacob’s Law Dict. *voce* ADMIRAL ; Sid. 418. 4 Blacks. 268. July 24th, 1731, Hamilton v. Dutch East India Company,

No. 83. p. 4548; 23d July 1761, *Benton v. Brink*, No. 51. p. 11949; 22d July 1767, *Laycock v. Clerk*, No. 85. p. 4554. This rule is indeed established on obvious considerations, not merely of expediency, but of necessity; as it would, in general, be impossible for the Judge of another country to know all the facts and circumstances on which the foreign court proceeded; and besides, if, in international questions, courts of justice were to open up and review the sentences of foreign courts, it would introduce much confusion into all mercantile transactions.

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Answered: At the time the insurance in question was effected, the French Republic had begun a system of depredation on the American flag. The whole *res gesta* accordingly proves, that it was the object of the insured to avoid a general warranty of neutral property. By the agreement of the 20th April 1797, they were bound specifically; 1st, To produce proof that the *Catharine* was an American bottom; and, 2dly, To prove by her bill of lading, that the tobacco belonged to American citizens. These engagements, it is admitted, they have satisfactorily performed; and the war premium which they paid for the insurance affords real evidence that the underwriters, and not the insured, were to run the hazard of illegal capture.

Besides, it seems hardly to be disputed, that both the capture and consequent decree of condemnation were unjust. It is established by the sentence of the Commercial Tribunal of Nantes, that the law of the 13th Nivose had annulled certain arbitrary ordinances, which required a list of an American ship's company, (*role d'équipage*), to be certified in a particular manner, not authorised by the existing treaties between the countries. But by a law of the 12th Ventose, *au Sieme*, which corresponds to the 2d March 1797, the Directory had taken upon themselves to declare that the law of 13th Nivose should no longer be in force; or, in other words, that these arbitrary ordinances should be revived. The *Catharine*, however, sailed on the 1st April, and the repeal of the law of the 13th Nivose was issued at Paris only on the 2d March. At the time of her sailing, therefore, she possessed every document which was then known to be necessary to prove her to be an American vessel. The sentence of condemnation was therefore manifestly against law and justice; and this being the case, it is inconsistent with those principles of reason and good sense on which all law is founded, to hold that it should be binding on foreign courts, even *inter partes*, far less in a collateral question like the present, where the parties are not only different, but also the matter at issue, from that which was determined in the French courts. All the length that our municipal law goes, is to presume, that a foreign decree is just, till the contrary is proved; 8th March 1623, King's Advocate, No. 33. p. 14050; 29th December 1720, *Edwards*, No. 79. p. 4535; 7th January 1756, *Wilson*, No. 84. p. 4549; Case of *Cunningham of Lainshaw*, 22d July 1767, (not reported); Appeal Cases, 4th March 1771, *Sinclair*, (See APPENDIX, PART II.); 17th

No. 4. December 1793, Kerr, No. 60. p. 14078; 4th December 1789, Stein against Bonar, (not reported); Couper's Reports and State Trials, *Fabrigas v. Mostyn*; State Trials, case of the Dutchess of Kingston, 1776. Neither is the rule as to this matter different in the Admiralty Courts of England, a foreign judgment being there regarded just as in our own courts, merely as *prima facie* evidence; Park, p. 364. *Saloucci v. Johnston*, B. R. Hill, 25th George III. *Mayne v. Walter*, B. R. East, 22d George III; *Calvert v. Bovill*, K. B. 10th February 1798; Termly Reports, Vol. 8. p. 196, *Christie v. Secretan*.

The Lord Ordinary pronounced the following judgment; ' Having considered the whole circumstances of this case, the proceedings before the Court of Admiralty here, and the very ingenious memorials now given in, is of opinion, That the trial and condemnation, at Nantes, of the ship and cargo in question, upon which the decret of the Judge-Admiral, now complained of, seems wholly to rest, does not materially affect the merits of the question upon which these parties are now at issue, that being wholly a question of right between a company of merchants in America and some underwriters in Scotland: This company, Messrs. Henderson, Ferguson and Gibson of Virginia, having directed insurance to be made of a considerable cargo of tobacco, to be sent on board an American ship to Holland, on the easiest terms that could be had, some gentlemen in Glasgow became the underwriters on this cargo, on a very high premium, the same as would have been paid by any nation actually at war with France. In consequence of the execution of this policy, the cargo was embarked for Holland; but before her arrival at the intended port, she having fallen in with a French privateer, was captured, and carried into Nantes, and there condemned, as the property of the enemies of the French Republic. Upon the first intimation given to the Scotch correspondents of the American company of this capture, they immediately informed the underwriters, abandoned the capture to them as a total loss, and made a demand for indemnification in terms of the insurance. This demand the underwriters have resisted, on grounds which appear to the Lord Ordinary untenable. It has been admitted in this case, that this ship had, when captured, every document on board to prove that she was American, and the cargo American property, which American ships usually had, and every document to ascertain that fact which had been required by France on all former occasions: Therefore, any decision of the Admiralty Subaltern Court of Nantes is not entitled to that regard and *comitas* which in general regulates the law of nations. If the decision of the court of Nantes had proceeded on some late regulations, authorised by the French Directory, directing certain forms and observations, for ascertaining that all ships claiming the privilege allowed to American ships, such as having on board certain muster-rolls, or what they now call a role d'equipage, should be necessary to save their condemnation, it was a sufficient answer to this ground of condemnation, that such a regulation was not published, and could not be known in

‘ America, nor at Glasgow, where the insurance in question was made. Since, therefore, it does not appear that the sentence of condemnation at Nantes has proceeded on any violation of the treaty between France and America, but wholly on capricious particular ordinances, which were not known to other countries, and ought not to be regarded; therefore, upon the whole, sustains the reasons of reduction, reduces, decerns and declares in terms of the libel: Finds the pursuers entitled to expenses, of which allows an account to be given in.’

The defenders presented a reclaiming petition against this judgment; on advising which, with answers, the Court, considering the case to be new and of general importance, ordered memorials, and afterward a hearing in presence.

At advising the cause, it was observed on the Bench: The warranty undertaken by the insured, was not a general one of neutral property, but a special one, confined to the facts stated in the agreement of the 20th April 1797; and with this special warranty they have fully complied, by the proof which they have brought, that the Catharine was an American bottom, and her cargo the property of American citizens. On this ground alone, they are entitled to recover from the insurers; and therefore, although there is every appearance that the decrees of the French prize courts are unjust, it becomes unnecessary either to determine this point, or the degree of weight which these decrees ought to receive from the courts of this country.

The Lords unanimously pronounced the following judgment:

‘ Having considered the memorials for the parties, with the proceedings before the Court of Admiralty, and having particularly attended to the policy of insurance, and the writings relative thereto, find, That the insured in this case are entitled to recover from the insurers, on account of the loss sustained by the seizure of the ship and cargo in question, and that the sentence of condemnation in France is no bar to such recovery: Find, That there was no contravention of warranty on the part of the insured, and that they produced to the insurers all the proof which they were obliged by the tenor of the said policy and relative writing to produce: And therefore, sustain the reasons of reduction of the ~~decret~~ decrees by the Court of Admiralty in Scotland, and decern and declare in terms of the libel: Find the pursuers entitled to expenses, and allow an account thereof to be given in.’

Lord Ordinary, *Ankerville.*

Act. Solicitor-General *Blair, W. Robertson, Glasford.*

Alt. Lord Advocate *Hope, A. Campbell.*

R. D.

Fac. Coll. No. 188. fo. 428.

* * * The underwriters, having entered an appeal against the interlocutor pro-

No. 4. nounced in the Court of Session, the following judgment was pronounced in the House of Lords :

‘ 15th July, 1803.

‘ After hearing counsel, as well on Wednesday the 10th, Friday the 12th, Monday the 15th, Tuesday the 16th, and Thursday the 18th days of March, and Monday the 26th of April 1802, as on Wednesday the 18th of May, and Wednesday the 8th of June last, upon the petition and appeal of Messrs. George Lothian and others, complaining of two interlocutors of the Lord Ordinary in Scotland, of the 28th of May and 2d of July 1799, and also of two interlocutors of the Lords of Council and Session there, of the 27th of June, and signed the 4th of July and the 22d of November 1800; and praying that the same might be reversed, varied or amended, or that the appellants might have such relief in the premises as to this House, in their Lordships great wisdom, should seem meet; as also, upon the answers of Messrs. Henderson Riddel and Company of Glasgow, merchants, put in to the said appeal; and after hearing the Judges *seriatim* on Thursday the 11th of this instant July, to deliver their opinions, with their reasons upon a question of law to them proposed; and due consideration being had this day of what was offered on either side of the cause, it is declared, by the Lords Spiritual and Temporal, in Parliament assembled, That in this case it is not necessary to decide whether, upon the several grounds mentioned in the interlocutors of the 28th of May and the 2d of July 1799, the Lord Ordinary ought to have pronounced the same: And it is ordained and adjudged, That the interlocutor of the 27th of June, and signed the 4th of July 1800, complained of in the said appeal, be, and the same is hereby affirmed, with the following variation, (*viz.*) after the second (*find that*) insert the words, (according to the effect of the agreement, contained in the policy and relative writing): And it is further ordered and adjudged, That the interlocutor of the 22d of November 1800, also complained of in the said appeal, be, and the same is hereby affirmed.’

1801. November 19. YELTON and Others *against* SMITH and Others.

No. 5. In this case, No. 55. p. 11962. it was found, that re-capture by a non-commissioned ship vests an insurable interest. The cause having been appealed, The House of Lords, 21st July 1806, found, That the terms in which the salvage is described in the policy of insurance, as the subject upon which the insurance is declared to have been made, are such, in their construction, that the policy must be considered as inept and void; and find, that it is unnecessary to