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where a bankrupt is friendless and penniless, your Lordships must see at once that he had better submit. Indeed, he must submit to the attempt to deprive him of his discharge, whether there be any sound reason for it or not, instead of coming to the bar to support his claim to that discharge, which four-fifths of his creditors, and the unanimous opinion of the Court of Session, have declared he is well entitled to."

It was ordered and adjudged that the interlocutors complained of be affirmed, with £150 costs.

For Appellants, *C. Hope, Wm. Alexander.*

For Respondent, *Wm. Adam, Henry Erskine, John Clerk.*

[M. App. Insurance, No. 4.]

MESSRS. GEORGE LOTHIAN, ANDREW PATON, JOHN TELFER, ANDREW MACMILLAN, JAMES MILLER, HUGH LOVE, and Others, Merchants in Glasgow, all Underwriters, } *Appellants;*

MESSRS. HENDERSON, RIDDLE, & Co., Merchants in Glasgow, Agents and Attorneys of Messrs. Henderson, Ferguson, and Gibson, Merchants and Partners in the State of Virginia, Citizens of New York, America, } *Respondents.*

House of Lords, 8th June, 11th and 13th July 1803.

INSURANCE—WARRANTY—FOREIGN SENTENCE OF CONDEMNATION—COMITAS—RELATIVE AGREEMENT.—The appellants, as underwriters in Glasgow, insured the respondents' ship as an *American vessel*, belonging to them, as American citizens, which was then in America, together with her cargo, on voyage from America to Rotterdam. The war with France was then pending. She sailed from America to Rotterdam, with all the necessary documents on board which American vessels were in use to carry in terms of existing treaties between America and France, as well as the law of nations applicable to neutrals. But it not being known at Glasgow, when the insurance was effected, or in America when the ship sailed, that a Muster Roll, or Role d'Equipage, which, by a recent ordinance or Arrêt of the French Government, was also necessary to be carried by such vessels, she was captured in the course of the voyage, and condemned in the French prize courts as enemies' property, in consequence of not having this document. In an action for the sum in the policy, three questions were argued, 1st. Whether the policy itself contained a warranty

of American documented, as well as American property. 2d, Whether the sentence of condemnation of a Foreign Prize court must be conclusive in negativing a warranty of neutrality; and, 3. How far a relative agreement, entered into by the parties, explanatory of the warranty in the policy, qualified that warranty. Held in the Court of Session the insurers liable. Affirmed in the House of Lords, after taking the opinion of the whole judges of England (who were divided) on the questions submitted. Lord Eldon, after consulting these judges, held that this case must be decided on its own circumstances, and that the relative agreement qualified the warranty in the policy, and made the insurers liable in all events, on proving that the ship was American property only.

The appellants insured the respondents' ship, the Catherine, an American vessel, belonging to the respondents, as American citizens, and then in America, together with her cargo of tobacco, by two policies for £4900, in the following terms: "From 1797.
" a port or ports in Potowmack and Patuxent Rivers to Hel-
" voetsluys, and from thence to Rotterdam, or a port to the
" northward, upon any kind of goods and merchandizes, and
" also upon the body, tackle, apparel, ordnance, munitions,
" artillery, boat, and other furniture, of and in the good
" ship or vessel called the Catherine, an *American vessel*,
" whereof is master, under God, for this present voyage, Sa-
" muel Casneaw, beginning the adventure upon the said
" goods and merchandizes, from the loading therof aboard
" the said ship Catherine, as aforesaid, upon the said ship,
" &c., and so shall continue and endure during her abode
" there upon the said ship, &c., and further, until the said
" ship, with all her ordnance, tackle, apparel, &c., and goods,
" and merchandizes whatsomever, shall be arrived at Rotter-
" dam, or at a port to the northward, upon the said ship,
" &c. until she have moored at anchor twenty-four hours in
" good safety; and upon the goods and merchandize until
" the same be there discharged and safely landed." Then followed this clause, "Touching the adventures and perils, which
" we, the assurers, are contented to bear and do take upon
" us in this voyage, they are of the seas, men of war, fire,
" enemies, pirates, rovers, thieves, jettisons, letters of mart
" and countermart, surprisals, takings at sea, arrests, re-
" straints, and detainments of all kinds, princes and people
" of what nation, condition, or quality soever, barratry of
" the master and mariners, and all perils, losses, misfortunes
" that shall count to the hurt, detriment or damage of the
" said goods and merchandize, and ship, &c., or any part

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" thereof. And in case of loss or misfortune, it shall be law-
" ful to the assureds, their factors, servants, and assigns,
" to sue, labour, and travel for, in, and about the defence,
" safeguard, and recovery of the said goods and merchan-
" dize, and ship, &c., or any part thereof, without prejudice
" to this insurance, to the charges whereof we, the assurers,
" will contribute each one according to the rate and quantity
" of his sum herein assured. And it is agreed by us, the in-
" surers, that this writing or policy shall be of as much force
" as the surest writing or policy of insurance heretofore was
" in Lombard Street, or in the Royal Exchange. And so
" we, the assurers, are contented to, and do hereby promise
" and bind ourselves each one, for his own part, our heirs
" and executors, to the assured, for the true performance of
" the premises."

Some doubts having arisen as to the warranty in the policies; the underwriters subscribed this relative agreement with reference to them. " Whereas doubts have arisen
" how far, by the insurances underwrote, 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, Riddle and Company, before
" they claim for a loss, must produce proof of the ship's
" being American bottom, and by bills of lading show, 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, deducting the stipulated premium, in the
" full dependance that the insured will use their best en-
" deavours to recover the property as for account of the
" shippers."

The Catherine left Nottingham, in Virginia, on 1st April; but, on 17th May, while in the course of her voyage, she was captured by a French privateer, and was condemned, notwithstanding opposition and claim made for the ship and cargo, as a lawful prize, by decreet of the French courts, which was produced. The ground on which this condemnation proceeded was, that she had not on board a *Role d'Equipage*, as required by an Arrêt of the Executive Directory of the French Government.

This Arrêt was not published, and could not be known in America nor in Glasgow when the insurance was effected.

The captain of the vessel appealed against this condemnation to the superior court, the civil tribunal of the de-

partment of the Lower Loire, sitting at Nantes; but it pronounced a decree affirming this sentence of condemnation.

The insured then made their claim against the insurers as for a total loss on the policies, adducing the decree of condemnation; and some refusing to pay, they were obliged to raise the present action before the Judge Admiral, who assoilzied the defenders, on the ground, "that the condem- Mar. 2, 1798.
"nation of the ship in question was founded upon the said
"ship not being furnished with proper vouchers to prove
"the neutrality of said ship."

Of this decree a reduction was brought.

The Lord Ordinary pronounced this interlocutor: "This May 28, 1799.
"demand the underwriters have resisted, on grounds which
"appear to the Lord Ordinary untenable. It has been ad-
"mitted in this case, that this ship had, when captured,
"every document on board to prove that she was Ameri-
"can, 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 subal-
"tern 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 has proceeded on
"some late regulation authorised by the French Directory,
"directing certain forms and observances, 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 neces-
"sary to save their condemnation: it is sufficient answer to
"this ground of condemnation, that such a regulation was
"not published, and could not be known in America, nor in
"Glasgow, when the insurance in question was made; and
"therefore, it does not appear that the sentence of condem-
"nation at *Nantes* has proceeded on any violation of the
"treaty between France and America, but wholly on ca-
"pricious particular ordinances, which were not known to
"other countries, and ought not to be regarded; therefore,
"upon the whole, sustains the reasons of reduction."

On representation the Lord Ordinary adhered. July 2, 1799.

On reclaiming petition the Court, who pronounced an interlocutor, ordering the decrees or *Arrêts* of the French Jan. 17, 1800.
court of Admiralty to be printed and produced, and thereafter, of this date, pronounced this interlocutor: "Having June 27, and July 4, 1800.

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" particularly attended to the policy of insurance, and the " writing 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 terms of the said policy and re- " lative writing to produce, and therefore sustain the rea- " sons of reduction of the decree pronounced by the Court " of Admiralty in Scotland; decern and declare in terms of " the libel; find the pursuers entitled to expenses."*

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* Opinions of the Judges :—

LORD PRESIDENT CAMPBELL said.—" The effect of a decree of a Court of Admiralty in France, condemning an American vessel as prize, in a question of insurance, is the important point to be decided. There is no warranty of the ship's being American property, attended with all the privileges of neutrality as such. The policy and relative letter contain merely a description; and the insured undertake only to produce evidence that she is an American bottom if required. They purposely avoid any other sort of warranty or undertaking, that they might not be involved in such a question as the present. The risk of capture by the French, on the pretence of being enemies' property, or not American property, so far from being undertaken by the insured, is one of the risks insured against.

" True, it was necessary, independently of any special warranty, that the master should be furnished with the necessary papers and dispatches, and not to sail as pirates or smugglers. But so he was provided according to the then standing treaty. The capture therefore was a robbery, and the condemnation of the vessel as prize a gross breach of existing treaty and of the law of nations, which no court can give countenance to, without participating in the crime.

" I therefore go on two grounds; 1st. No warranty. 2d. Suppose there was a warranty, yet the French decree being against the law of nations, and of treaties, upon the face of it, is not to be regarded. We have the authority of the French themselves, that the treaty 1798 is the rule."

LORD MEADOWBANK.—" In certain cases the judgment of a foreign Court is conclusive, *e. g.* where it is made a question only, Whether the foreign decree did right or wrong, and where the jurisdiction is not disputed. In the present case, the decree is conclusive as to the transfer of the property. Suppose, after condemnation, it had been purchased by a Dane, and brought into Leith. Could the original

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—By the unanimous consent of all civilized nations, and of all the writers and authorities on public law, the decrees of the Courts of Admiralty, pro-

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owners have claimed it? I think not. But here it is not the same question, but a question incidental, and between different parties. The interest of an American cannot be affected by such judgment. An American is not obliged to acquiesce, and may issue reprisals. The confiscation is final; but there remains a right of reprisal competent, *ergo* they do not hold the condemnation legal. Can we, therefore, by this question of insurance, hold it legal, when the Americans have actually gone to war upon that very ground? The French law seized this, and other American vessels, as an act of state policy, and not truly as a legal capture, justifiable by the law of nations. Can we therefore hold the decree of condemnation conclusive in such circumstances? I think not.

"Besides, here there was no breach of warranty incurred: for they find it to be American property, and only condemned because she had not the additional paper on board, which, at the time the Arrêt was passed, it could not be known to the parties was necessary. I therefore think the insurers liable."

LORD HERMAND.—"I am of the same opinion. A warranty is of strict interpretation. The insured undertook nothing but what is contained in the letter. There is nothing said about peace or war; and even if the condemnation were legal, it would not avail the insurers. It was an insurance against capture, right or wrong. It was enough to be provided with such papers, as by the law of nations and existing treaties, were necessary and required at the time of sailing."

LORD BALMUTO.—"There was a high premium, *ergo* a great risk in view, although no war."

LORD JUSTICE CLERK.—"I think them bound to a certain extent by the foreign decree, but not in all the circumstances. It is clear, *ex facie*, that the decree is inconsistent with the law upon which it professes to decide. The fact of their being American property is material in the policy, because it might increase or lessen the risk. Accordingly it is settled, and that is enough,—enough to prove any how that it was American property."

LORD METHVEN.—"See clause by which the insured are entitled to recover, even before condemnation. I think the insurers are liable."

LORD BANNATYNE.—"I am of the same opinion."

Vide President Campbell's Session Papers.

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ceeding according to the law of nations as to all matters decided by such decrees, cannot be opened or brought into question in the courts of another country. 2. Here, in the present case, by the policies of insurance, the Catherine is stated to be an American ship, and the cargo to be the property of citizens of the United States of America; and the decree of the French court, finding that the *whole* is to be deemed the property of the enemies of the Republic, is a conclusion which completely negatives the neutrality specified in the policies. In the face of this decree, this question cannot be again raised in another court, because the decree of the foreign court must be respected, and be held conclusive on the subject. 3. The *Role d'Equipage*, or muster roll, the want of which, in the present case, was given by the foreign court as one of the reasons for arriving at the conclusion of enemies' property, was specially required in the treaty 1778 between France and America, to all ships of both countries, in navigating in time of war, its form being laid down in the model of the passport annexed to that treaty, and such *Role d'Equipage*, or muster roll, is alluded to in the 9th article of the consular convention between France and America in 1788. That although such muster roll may have fallen into disuse, the French ordinance requiring it to be carried by all American ships, was not an ordinance contrary to the law of nations, and a detention of the ship, and carrying her into France, for the want of such roll, was a deviation that released the underwriters.

4. Nor can the agreement relative to, or explanatory of the policies, in the present case, make any alteration of the rights of parties; as such an agreement cannot release the assured from the obligation of being furnished with all the requisite papers in sailing the ship, to protect her as an American ship; and to prove that she and her cargo were the property of citizens of the United States; and such agreement is also completely negatived by the condemnation of the ship and cargo as enemies' property.

Pleaded for the Respondents.—The assured did not, by the terms of the policy, warrant the neutrality of the vessel, or any thing else. The ship was stated to be an *American*, agreeably to the fact, but that was merely descriptive; and it is well known that something farther is constantly inserted in policies, when the assured are understood to undertake that the vessel is entitled to the benefit of neutrality. The terms used in such case are, *warranted neutral*, or

warranted neutral property. Here nothing of that kind was done; and the respondents apprehend, that describing the ship as an American, cannot possibly admit of such a construction. Supposing the description of the vessel as being an American amounted to a warranty, not only that the ship was in truth an American bottom, but that she sailed with all the requisite and usual documents to prove her neutrality in case of seizure, they have complied with the warranty, the proofs being incontestible that both ship and cargo did belong to citizens of the United States. The vessel was stated to be American, because, as such, she was not free from danger from the French ships. A premium for a greater risk was charged (in truth a war premium) and paid. And the assurers undertook the risk of *takings at sea, arrests and detainments of kings, princes, and people of every nation;* and it is *jus tertii* in them now to argue, after the vessel is taken a lawful prize, that the assured must be held by implication to have warranted that the vessel should not be arrested, detained, or condemned by the French, under any pretence. The respondents apprehend, that, describing the ship as an American, cannot possibly admit of such a construction. Further, even supposing, over and above such warranty, there had been an implied warranty that she was to sail with the usual documents which an American vessel ought to have had, still it was in the power of the parties, by agreement, to pass from the warranty, or to explain and limit it. This was effectually done by the instrument signed on 20th April 1797, which declared, that on seizure of the vessel they should pay the loss, on proof that the ship was an American bottom.

After hearing counsel,

THE LORD CHANCELLOR ELDON said,

" My Lords,

" This case came to a hearing before your Lordships in the last Session of Parliament. It was then argued on both sides, and several of your Lordships, thinking it involved questions of great importance to the public, required the aid of the learned judges, before pronouncing a decision upon it. It is for the purpose of following out this, your Lordships' suggestion, that I now address you.

" The question arises on a policy of insurance, underwritten on the Catherine, an American vessel. (Here his Lordship read the date, parties' names, and import of the policy.) Nothing is stated in this policy as to the ownership of the cargo; but it was stated that it had been held, in repeated instances, decided by the Court, that the

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words used with regard to the ship, amounted to a warranty that she was an American vessel, and as such, bound to be documented as American vessels ought to be documented.

" At the period when the insurance was effected, nobody could form an opinion what species of prize law would be administered in France. The parties, sensible of this difficulty, seem to have considered it advisable that the policy should be farther explained, and construed by a separate agreement. Accordingly, on the 20th April 1797, they entered into an agreement relative to the policy. (Agreement read.) The parties appear to have had two grounds of doubt, 1st. Whether the policy implied any warranty at all?—and, 2dly. Whether, if there was warranty, how it was to be understood? This agreement is varied in some degree from the policy. In the policy, the Catherine is stated to be an *American vessel;* in the agreement, the insured were taken bound to produce proof that the ship was an *American bottom.*

" Under such insurance, the Catherine sailed from an American port. I must here notice, that according to the forms of the Scotch Courts, when an averment is made by one party, and not denied by the other, such averment is held to be admitted. In this form, it was admitted in the action between the present parties, ' that this ' ship had, when captured, every document on board to prove that ' she was American, and the cargo American property, which Ameri- ' can ships *usually* had, and every document to ascertain that fact, ' which had been required by France on all former occasions, and ' which were known in America to have been required by France at ' the time.' About this period, France made certain ordinances, directing courts of prize in that country to treat all ships as enemies, which had not on board certain papers mentioned in these ordinances.

" In the course of her voyage, the Catherine was captured, and carried into France, where she was condemned by the tribunals of that country, on certain grounds specified in the sentence of condemnation. One part of the dispute in the present cause is, Whether the ship was condemned as *enemies' property;* or *treated* as enemies' property, though *quoad* the ownership, they remained American?

" It appears, that upon the capture, the assured made application to the underwriters to indemnify them for the loss, offering to prove the ship to be an American; and they produced the bills of lading to show that the tobacco was shipped on account of Messrs. Henderson, Ferguson, and Gibson. They therefore called upon the underwriters to settle, by granting bills at four months' date, in terms, as they stated, of the relative agreement.

" The underwriters (as underwriters in such cases usually do,) looked about them, to see if they were bound to pay or not. In the meantime, the sentence of condemnation took place; and the underwriters taking hold of it, declined to settle as required. They stated

that the policy having described the Catherine as an American vessel, implied a warranty, not only that she was American property, and American documented, but also so documented as that she should be free from capture and condemnation:—but, as a judgment condemnatory had been pronounced, they insisted that this was also conclusive against the insured.

"On the other side it was answered, 1st. That even though, in this case, the policy might imply a warranty that the ship should be documented in every particular as an American should document his ship, still the sentence was not conclusive, even though it proceeded on the ground of enemies' property. 2d. They contended that, in point of fact, it did not proceed upon that ground. And, 3d. That if it had, the separate agreement clothed the insured with a right to call on the insurers to settle, upon showing that the property was American. It was further urged, that the true meaning of the agreement was, that the underwriters should immediately have granted their bills at four months' date, and if these had been paid before the sentence of condemnation, the money never could have been recovered back on the ground of that sentence.

"The arguments maintained on both sides seem to have been submitted with a degree of learning and assiduity that I must notice as highly honourable. They were taken up with no less attention by the bench, who entered into a painful consideration of the cases decided in Scotland,—of the law of nations, as bearing upon this point,—and afterwards of the cases which had been decided in this country.

"The interlocutors pronounced were, (the same read.) From these an appeal was brought here. I must notice, that if the judgment can be supported upon all, or any of the points contained in these interlocutors, the usual course is to affirm them. If none of these points are well founded, the interlocutors must then be reversed.

"This case contains questions of very great importance to the public. One of these is, Whether the sentence of the courts in France, which held the property to be enemies' property, should be conclusive or not, not only between captors and proprietors, but between insurers and insured. In one view of the case, the learned judges, before whom I suggest the case should go, may have to determine this question; in another, it will not be before them. Upon this Mr. Attorney-General stated a most important fact, namely, that judgments have been given in this way for forty years past. In the first of the cases so decided, the ground of decision put is, that the underwriters might have gone into the Court of Admiralty, and sisted themselves as parties. It appears, however, that this could not have been done in the Courts of Admiralty in this country.

"A noble and learned Lord, now absent, entertained great doubts of the soundness of that ground of decision. I also, if such a matter had been agitated forty years ago, must have entertained doubts upon the subject. But, if I could have presumed to think that the

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judgment proceeded originally on wrong grounds, yet if such practice had followed upon it as has taken place, I should deem it most dangerous to disturb matters so long at rest.

" I must express regret at seeing so many of the decisions in question pronounced upon special cases, and that such a form of proceeding in matters of insurance is so much in fashion. Yet I must say, that such a course of decisions, where one judgment has exactly followed another, though not brought under the appellate jurisdiction of this House, must be held to be conclusive. I therefore conceive, that your Lordships would scarcely say, in contradiction to the judgments of this Court, that the foreign courts do not determine, what they expressly state on the face of the sentences that they do determine.

" The next question is, on what points must such sentences be held to be conclusive, and, Whether they have proceeded on the ground of enemies' property, or on other grounds? Are such other grounds to be founded on the law of nations? And can the courts here interfere in a question, as to whether they be founded on the law of nations or not? This is more open than the former question, as to length of time, and the number of decisions pronounced.

" This point, in the present case, the Judges may also have to consider, and whether every condemnation or prize, be not an adjudication of enemies' property. In the case of neutrals carrying the colonial produce of an enemy, resisting search, and a great variety of others that might be mentioned, the property might still remain neutral, and the condemnation for behaving as enemies, *pro hac vice*, be perfectly consonant to the law of nations.

" Another doubt had arisen with regard to these decisions, whether, when bad reasons are given, in the sentences of condemnation pronounced by the foreign courts, the courts of this country can enter into a consideration of these sentences. Upon this we have heard, that a sort of distinction has been taken, and that the courts will sometimes enter into them, if they think them not according to the law of nations. In some cases it has been held, that if, in direct terms, the sentence adjudges the property to be enemies' property, the courts will not enter into their sentences, though they appear to be founded upon bad grounds. In other cases, the Court will enter into such sentences, if the judgment has only held the property to be *good prize*, and had founded such judgment upon unjust reasons.

" Several difficulties suggest themselves on this subject. 1. What can be meant by a judgment condemning as *good prize*, if it does not also mean enemies' property? 2. What would be the effect of sentences like these, in questions of trover, or where the direct property is called in question? 3. How far is it consistent with the convenience of nations, if I may so speak, that the municipal courts should examine the sentences of this nature? These points are of very great importance, and at present I only notice them thus briefly.

" We have further to attend to the sentence of condemnation, in the present case, in this light. Has the ship been condemned as enemies' property, or has it only been treated as such, and held as prize, upon other grounds?

" But whatever might have been the determination upon this point, if the case had stood upon the policy alone, the next question is, What is the measure of justice that is due to the parties upon this separate agreement? This may narrow your Lordships' judgment greatly; for however consonant it might be to public convenience, to decide all the grounds of this case, yet your Lordships act wisely in going no farther than is necessary to settle the several interests of the parties in every cause. This, it has been found, best serves the due administration of justice.

" I must now, therefore, call your particular attention to the explanatory agreement. One party says, that it puts all the other topics out of the case:—this the other party denies. It is a question with me, if the assured did not see the chance of disputes like the present, and say that they would not be involved in them. They said, 'we will settle with you on certain grounds, in case of capture; but as to the question of property, whether yours or ours, in that event, we will not meddle with it.' We call upon you to decide two doubts; 1. Whether there be any warranty whatever in the policy? and, 2. As to the nature of such warranty? Such, I think, may have been the reason of entering into this separate agreement.

" It has been already noticed, that the policy describes the ship to be an American vessel, and that this, it has been decided, requires the ship to be American documented. It is now too late to inquire whether such decision was well or ill founded, though I might have well entertained doubts upon the subject.

" It was argued, that if the underwriters meant to insist that the ship should be American documented, they should have not varied this in the agreement from the words of the policy; that when the parties agreed to settle on certain terms, in case of capture, they surely must have meant that such settlement might be before condemnation. It was also to be held, that, if a condemnation was to have varied this settlement, they would have said so. Upon the whole, it was insisted, that the proof of an American bottom might have meant something less than American documented, and that if the bills had been given, and payment made on them, that the underwriters could not have demanded back the money after a sentence of condemnation.

" Put the case, that the bills had been granted, payable in four months, that the condemnation had taken place two months before they fell due. If they had gone into the hands of third parties, no doubt the amount of them might have been recovered; but if they remained in the granters' hands, it comes to be a question, whether the granters could recover in an action brought upon these

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bills. The Attorney-General contends, that the condemnation negatives the consideration for which the bills were granted. But if the true meaning of the agreement was, that the proofs that could be given in four months, were the proofs that should be taken, it appears that the amount of the bills must have been recovered.

"It appears to me proper to consider the case first in this view, which will let us into the question made by Mr. Attorney-General, if this be a legal agreement or not.

"These points appear to me to embrace the whole case. If the judges shall think that this explanatory agreement shuts out the large views of the case, they will have to give their opinion upon it alone. If not, they will have to consider the other important points of the case.

"I shall first, therefore, move that a question be put to the judges upon this point. I am sorry that I have been obliged to state this at some length; but the reason has been, that, after some consideration, I found that I could not curtail it with propriety."

The following question was put to the judges:—

Whether, in this case, taking it to be admitted that the ship *Catherine,* when captured, had every document on board to prove that she was an American, and the cargo to be American property, which American ships usually had, and which had been required by France on all former occasions to ascertain such facts, and which, at the time of her sailing from America, were known in America to have been required by France for that purpose, if, upon proof having been made that the ship Catherine was American bottom, as belonging to American owners, and upon it having been shown by bills of lading that the tobacco insured had been shipped on account and risque of Messrs. Henderson, Ferguson, and Gibson, bills payable at four months' date, had, after the capture of the ship Catherine, been given to the assured by the underwriters, for the amount of their subscriptions upon the policy of the 8th March 1797, deducting the stipulated premium, and such bills had remained in the hands of the assured until after the sentence of condemnation of the said vessel, the assured could have recovered against the underwriters in actions brought upon such bills, after and notwithstanding such sentence of condemnation, regard being had to the legal meaning and effect of the said policy and sentence. And of the agreement of the 20th April 1797?

Opinions of the judges of England.

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BARON GRAHAM.—(His Lordship commenced by stating the circumstances of the case, the policy of insurance, and relative agreements, and read the interlocutors of Court, and then proceeded.)

"From these interlocutors an appeal has been brought to your Lordships, and thereupon a question has been put for the opinion of the judges.—(Reads the question.)—By resolving this question into several propositions, it appears to be exceedingly simple. The principal question for our consideration is, Whether the insured could have recovered upon the bills that might have been granted, in terms of the relative agreement, after such a judgment of condemnation as was pronounced in the present case?

"If the underwriters had granted these bills absolutely, and as a final settlement, no doubt they bound themselves to make payment of them. There was no *express* warranty either of ship or cargo. The agreement seems to have been made in a spirit of candour. The underwriters require to have it shown that the ship was an American bottom, and, by bills of lading, that the cargo was American property. By the agreement, they must have meant to concede something; but I am at a loss to know what that was, except as to the mode of proof.

"This was a period when it was well known that many arbitrary and wanton acts of power were committed in the French Courts. There is little doubt but the underwriters were aware of this, and meant to relieve the assured of its consequences. They said, we only require certain acts to be done on your part, and take upon us the risk of unlawful force and violence.

"They do not say, that in case of condemnation, the bills granted should be delivered back; they stipulate merely, that the insured should come forward, in their neutral character, to use their best endeavours to recover the property as for themselves, but in trust for the underwriters. This must mean after condemnation. It could mean nothing before judgment to that purpose, as the insured otherwise, and except in case of condemnation, would have got back the ship.

"But it was said, that the underwriters were to be let into a contrary proof. It must have been the meaning of the parties, however, that a condemnation negativing the bills of lading was not to be received. I therefore think that the insured have done everything required on their part by the underwriters.

"I am therefore relieved from giving any opinion upon these disgraceful sentences. The sentence, in the present case, says, almost in plain terms, 'The ship and goods are no doubt proved to us to be American property; but as the captain had not on board a certain paper, which he was bound by no treaty or otherwise to have on board, therefore we condemn the ship and cargo.'

"As to the argument urged, that if the interlocutors were affirm-

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ed, neutrals would be prevented from exerting themselves, that is not a ground on which to form a legal objection to a contract in a court of law.

"I therefore hold the opinion that the insured might have recovered on the bills."

JUSTICE CHAMBRE.—"In offering my opinion, I shall first consider the legal meaning of the explanatory agreement. If it was meant by it that the underwriters should be liable in all events, then, no doubt, they are not liberated by the decree of condemnation.

"At the time when this agreement was made, it is clear that the assured had right, on the description in the policy, to all the advantages of a warranty, as has been long since determined, and uniformly acted on since, in this country. As to this the parties, in the explanatory agreement, express their *doubts*, 1. If there was such a warranty? and, 2. What was to be understood by such a warranty? This shows that they had little experience in such matters, and that the agreement may receive an interpretation different from what it must do, if they had been fully conversant upon the subject. (Here he read the agreement).

"It is contended, that by this agreement, the underwriters are bound to take the proofs here stated, as conclusive even in the case of condemnation. I cannot assent to this. Proof means legal proof. If the underwriters were satisfied, they might pay. But if, in case of dispute, the parties went into a court of law, were the underwriters to be precluded from giving evidence of a sentence, condemning as enemies' property, as of a fraud, or other such thing? I should hold it necessary to have very clear words to such an agreement.

"I see no difference upon this point, and view it as if no agreement had been made at all. The Court had cognizance of the ship's being American, and conclusive evidence as to this has arrived in due time to regulate this decree.

"It seems impossible to say, that the obligation to grant bills at four months' date can alter this. If there had been no such obligation, the money was instantly due, and, as such, might have been sued for.

"As to the assured being bound to use their best endeavours to recover the property, I see nothing in this on which to alter my opinion. In many cases, the endeavours of the assured might be of use to the underwriters. As in the case of capture and recapture, or of capture and acquittal, and the like, the underwriters being liable, under the policy, to all the consequences of the detention. On consideration of the whole agreement, and the want of information of the parties apparent on the face of it, I think the effect of a decree of condemnation on the warranty did not enter into their contemplation. If it had, and if it had been their intention that the

underwriters should pay, notwithstanding the decree of any court, nothing would have been more easy than to have been explicit upon that point.

"The most interesting question upon the case is, with regard to the effect of a sentence of condemnation in a foreign prize court. Upon this I shall be very short. It has been decided in a multitude of cases, that such judgments shall be held to be conclusive as to what appears on the face of them. This doctrine commenced with the case of Cornelius and Hughes, reported by Shower, by Holts, and other great names. It is true, this was a case of trover, where the direct property only was in question; but it has been uniformly applied to every case of insurance since the question was first agitated as to such matters.—(Here his Lordship quoted a great many cases, from that of Bernardi and Motteaux, down to what he termed 'that most admirable judgment,' pronounced by the present Master of the Rolls, in the case of Kindersley and Chafe, at the Cockpit, which he read. He also read the words of the judgment of the French courts in this case, to show that they had distinctly come to the conclusion that the ship and cargo were enemies' property).

Shower, 2d. p. 232.

Doug. 575. Park Insur. p. 353.

"Another part of the question put still remains to be considered, namely, if, in the circumstances of this case, payment could have been resisted, if the notes or bills, payable at four months' date, had been granted in terms of the agreement? If these bills had, *bona fide*, got into other hands, the parties could not have resisted payment. But if they had remained in the hands of the assured, my humble opinion is, that the underwriters might have defended themselves.

"If these sentences be conclusive, they must be so to all intents and purposes whatever. They overturn every fact which the assured were to make out. The bills therefore would have been given on a mistake in point of fact, and therefore would have failed in the consideration. If so, as in other similar cases of a failure of the consideration, the holders would have been barred from suing on the bills."

Justice Le Blanc.—"The questions for our consideration in this case are, the legal consequences; 1. Of the policy of insurance. 2. Of the foreign sentences; and, 3. Of the relative agreement. If we had been agreed as to the last of these, it would have been unnecessary to have entered into the two first points.

Justice Le Blanc's Opinion.

"It was scarcely denied at the bar, that the description in the policy was an express warranty. It is an established proposition, that every positive averment in an instrument of this nature amounts to a warranty or condition on which the policy depends. (His Lordship cited sundry cases that had found to this effect.)

"The next question is, as to the effect of the sentences of the Admiralty courts of France. The uniform language of the courts of this country has been, that such sentences are conclusive as to what they meant to decide. Let us see what was decided

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in the present case." (Here his Lordship read great part of the judgment of the Prize Court and Court of Appeal.) "Is it not clear that these courts condemned the ship and cargo as enemies' property, or as considered to be such by them, and therefore liable to condemnation? If so, the sentence falsifies the warranty, and no case can be produced where our courts have decided otherwise. If it appear doubtful what the foreign court may have decided, as if judgment has been given on other grounds than that of enemies' property, then the courts of this country have sometimes opened up such sentences. (Here his Lordship cited several of this class of cases.)

"But the language in these uniformly was, we will not go into the sentence further than to see what it really contains. The cases decided upon these grounds have been numberless, and the property immense. Many of them might have been brought before your Lordships by writs of error, if any doubt had been entertained as to them.

"The only other question is, as to the effect of the explanatory or relative agreement. Independently of it, the insured were bound to prove that the ship was an American vessel. Does this averment clearly show that the underwriters meant to narrow the warranty? I cannot think it does. It recites that doubts had arisen, &c. It says, the assured were to produce proof of the ship's being an American bottom, without specifying the particular species of proof. If notice of the capture and condemnation had arrived at the same time, would the underwriters have been precluded from saying that the judgment of the foreign court was conclusive in their favour? I think that they would not have been so precluded.

"With respect to the goods, the agreement says, that the assured were to show by the bills of lading the property of the tobacco. If the question had related solely to the goods, it might have been one of more doubtful solution; because as to them a proof is pointed out by bills of lading; but as to the ship, it is left to proof generally. It is contended, that this shows that the underwriters were to ask no more. The argument upon this head would have been much stronger, if there had been no case of capture or seizure, or a capture and seizure without condemnation; but there might have been many such cases.

"Upon the whole, I incline to think that the underwriters did not mean to part with their legal rights of holding such sentences to be conclusive against the warranty, at least I cannot, on the doubtful words of this agreement, hold that they did, in a matter which it appears the parties had not fully understood."

Justice Laurence's Opinion.

JUSTICE LAURENCE.—"The question put for our consideration is principally, if the assured could have recovered on the bills which might have been granted them payable at four months' date for the sum in the policy. I think the assured could have recovered on such bills. The bills would have been given without ground, or in

ignorance of the fact, but on the voluntary act of the parties. *That*, in my opinion, would have supported the consideration of the bills.

"But to take up the question on this narrow ground would not be to satisfy the intention of your Lordships. I shall therefore consider, 1. Whether the agreement shuts out the sentence of condemnation? and, 2. What is the effect of such a sentence?

"As to the first, it is probable that neither party understood the matter sufficiently. It is by no means clear that the underwriters meant to vary the terms of what the policy really inferred as to warranty. Had there been no such agreement, it is clear that there could have been no such demand against the underwriters." (Here his Lordship read the relative agreement, making observations on it as he passed along.)

"By the stipulation of proof, that the ship is an American bottom, &c. the parties seem to have meant, rather to narrow the extent of the warranty than to alter the nature of the proof. The agreeing to settle by granting bills at four months' date does not vary the obligation on the underwriters. I think it may be held, that if the agreement had been to pay the money, instead of granting such bills, even in that case the underwriters would not have been obliged to pay it. The assured were to produce proofs; and the underwriters were to be let into contrary proof. Is the latter's evidence by production of the foreign sentence conclusive against all other proof?

"Then it is said the assured were to use their best endeavours to recover the property as for account of the shippers. It appears to me that there is a fallacy in the assured founding any thing on this. In many cases, the endeavours of the assured might have been of use, but, in case of condemnation following hostile capture, they could have been of none.

"The main point to be considered is, therefore, the effect of the judgment of the prize courts, not only *in rem*, but collaterally. It is now too late to inquire what the effect of these ought to be. For a long series of years a uniform course of decision has obtained with regard to these, and contracts of insurance have been entered into with respect to such cases. A warranty of necessity must now, I think, be held to contain a proposition, that if it be negatived by the sentence of a foreign court of proper jurisdiction, it is then gone.

"The courts in this country have never gone into such sentences, but with a view to discover their grounds. If the sentences are pronounced by courts having no jurisdiction, then *that* may be matter for opening up; but, in cases of hostile capture, and where no such objection to the jurisdiction is pleadable, that of itself is sufficient. From the style of the courts in this case, it would seem that they had a larger jurisdiction than merely relative to hostile capture.

"It was not denied by Mr. Attorney-General, that sentences might be looked into, to see if the condemnation was not on the

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transgression of some revenue law. By the same parity of reasoning, they may be looked into on other points, as where this point of enemies' property is not distinctly stated. The first case of this kind was that of Bernardi *v.* Motteaux, Doug. p. 575; Park Ins. p. 353. (This case his Lordship particularly stated.)

"The authority of Lord Mansfield, in such a case, is very great. It was well known, that when he was Solicitor-General, he had particularly considered questions of prize. In the case of Geyer *v.* Aguilar, which is so similar to the present, the Court acted in the same manner, of looking into the sentence to see what it contained.

7 Term, Rep. p. 681.

"Having said this much, it only remains to examine the grounds of the sentence in this case. (Here he read the sentence.) I think it is clearly stated that the tribunals condemned the ship and cargo as enemies' property. This being so declared, the other parts of the sentence cannot be looked into.

"For these reasons, my opinion is, that the agreement does not shut out the sentence of condemnation."

Justice Rooke's Opinion.

JUSTICE ROOKE.—"In the policy, the Catherine is called an American ship, which amounted to a warranty. The explanatory agreement was afterwards made, which has the signature of the underwriters alone. By the rules of law, if it be doubtful or incorrect, it must be interpreted favourably for the assured rather than against them. (Reads the agreement.) This agreement is made with a view to capture and seizure only, and that the property might be recovered back.

"The whole doubt in this case arises upon the word proof. I think it means such proof as should be satisfactory between man and man. I cannot see a case where no endeavours could be used for recovering back the ship and cargo, but that of condemnation. If so, I can never set up the judgment of condemnation against the proof that I have just stated.

"I put this construction upon the word proof, as similar stipulations occur in policies of insurance from fire, which are thus understood and acted upon. Having regard to this agreement, therefore, I think the assured could have recovered on the bills in question.

"But if you think me wrong upon the agreement, then I am clear, from all the cases, from Hughes *v.* Cornelius, downwards to that of Geyer *v.* Aguilar, that, on the soundest policy, the sentences of foreign courts of Admiralty are held to be conclusive as to what they declared upon the face of them."

Baron Thomson's Opinion.

BARON THOMSON.—"I shall *first* consider how far the policy must be held to be a warranty; and, 2*nd*, How far it is varied by the explanatory agreement.

"Now, whatever doubt the parties had, it is clear that the description was equivalent to a warranty. The counsel for the respondents did not contend for the contrary.

"That subsequent instrument recites that doubts had arisen

about the warranty. On the best consideration I have been able to give to this agreement, I do not think that it was meant that implicit credit was to be given to the proofs there mentioned, without giving leave to prove the contrary. With regard to the ship, no proof whatever is specified, but only as to the cargo.

"The using endeavours to recover the ship seems to me to mean no more than the words of style, which appear to a similar effect in the policy itself.

"If this explanatory agreement does not narrow the warranty, it appears to me to be clearly established, from many decisions quoted at the bar, that when a warranty is negatived by a sentence of condemnation of a foreign court, this relieves the assurers. When the courts have entered into such sentences, it has been, in cases where they did not appear to negative the facts which the policy warranted. The sentence in this case is the same as in that of Geyer *v.* Aguilar.

"If right in thinking that the agreement did not negative the warranty in the policy, I think, if the bills had been granted after a sentence of condemnation negativing this warranty, the granters would not have been bound to pay them."

Justice Gross' Opinion.

Justice Gross.—(He spoke in so low a tone of voice that he could only be heard at intervals.)

"Previous to the date of the present policy, a war had taken place with France. I agree that the law forces the assured to prove their warranty, and that a condemnation as enemies' property is conclusive against a contrary warranty.

"The parties have had doubts as to the warranty, whether such existed or not, and if it did exist, as to what was the meaning of it? I rely most upon the word '*settled*.' I think this meant a final agreement; and that a condemnation might probably follow upon capture and seizure, was a matter understood and known to the parties, but the consequences of it were renounced.

"Looking to the state of things at the time of the agreement, and to the words of it, I think the assured were entitled to be paid by bills at four months' date."

Justice Heath's Opinion.

Justice Heath.—"After the ample discussion already given to this case, I shall contract what I had to say thereon.

"The agreement, in this case, was inaccurate, but its meaning is clear, that the parties meant to ascertain the property, in case of capture and seizure. The underwriters, on the consideration of a high premium, were to take the risk of condemnation on themselves. This matter of the high premium is well stated in the Lord Ordinary's interlocutor.

"In every executory agreement, parties may make what stipulation as to proof they please. In the case of insurance by the fire offices, it is usual to require that the assured shall produce a certificate in his favour by the master and church wardens of the parish, which has been acted upon.

"The time within which the proof was to be adduced is material.

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A question was asked, what would have been the effect if the capture and condemnation had been heard of at the sametime.—I think it would not have altered the stipulation as to proof.

" For these reasons I think they were entitled to have recovered on these bills.

" On the conclusiveness of the foreign sentences I am of opinion with my brethren."

Baron Hotham's Opinion.

BARON HOTHAM —" In my opinion the parties meant, by capture and seizure, a total loss. The policy and explanatory paper must be taken to be parts of the same agreement. There was nothing in the policy to prevent parties from entering into a further agreement as to proof.

" The policy was thought to have left matters too loose. The warranty was not then in litigation. The owners undertook to produce proof of the ship and goods being American ; and, on production of these proofs, the underwriters were to settle.

" Have these things been done ? All that the agreement required on the part of the assured has been complied with. But it is different as to the underwriters ; it was impossible for them not to have seen that condemnation was a possible case. Against whom were the assured to use their best endeavours to recover the property, but against a seizing enemy. They meant to set aside the condemnation of the foreign sentences altogether. The agreement seems to me explicitly to say, ' let the event be what it may, it matters nothing to us, we stipulate for no more but the production of proof that the ship was an American bottom, and bills of lading to show the property of the tobacco.'

" On this my opinion rests. Nothing of what was argued as to the political danger of supporting such agreements can enter into *our* contemplation, sitting here, as we do, in a *judicial* capacity.

" On the points of warranty, and the conclusiveness of foreign sentences, I concur with my brethren."

Lord Chief Baron's Opinion.

LORD CHIEF BARON.—(His Lordship was very brief: His opinion being, that the relative agreement had taken this case out of the general rule of law; that the assured had done all they were required to do by that agreement; and that the bills at four months' date ought to have been granted, and might have been sued on.

As to the conclusiveness of foreign sentences, he concurred with his brethren.)

THE LORD CHANCELLOR (ELDON.)—Read a speech of some length, (but as it was repeated afterwards, in giving final judgment, as below, it is not inserted here), and moved that judgment be deferred.

On the 15th July case resumed.

And the Judges having delivered their opinions thereon.

THE LORD CHANCELLOR (ELDON) said:—

" My Lords,

" I may state, in the commencement, in the necessary absence of

a noble and learned Lord, (Lord Ellenborough,) that I am in possession of his judgment, and that he concurs in opinion with me.

(His Lordship stated particularly the policy, relative agreement, judgments of the foreign Prize courts, of the Court of Admiralty in Scotland, and Court of Session.)

" The first and last, and continued impression upon my mind has been, and is, that the policy and explanatory agreement were the sole grounds upon which this cause was to be decided. When it was first argued, a noble and learned Lord, who attended the hearing, had great doubts of many cases that had been decided, and of applying the case of Cornelius *v.* Hughes, which was a decision *in rem*, to cases like this, where the parties are totally different.

" Another noble and learned Lord now present, was of opinion, that whatever doubts upon this subject might have been entertained originally, and though there might have been a mistake in the principle, yet there had been such a series of decisions as could not now be disturbed but by the Legislature. He was also then of opinion that it would be necessary to decide the case as if the policy was not altered by the relative agreement. Lord Alvanley.

" Your Lordships therefore deemed it expedient to call for the opinions of the judges, as to what the law of England would have decided upon the case, that you might apply the best judgment as should appear to be proper. The question put to the judges adverted to the legal meaning and effect of the policy, and relative agreement, and of the foreign sentences. It comprehended also the particular circumstances of the case, and one, among others, which appeared to require much attention, namely, That while it was admitted that the Catherine, when captured, had on board every document which American ships *usually had* at the time of her sailing, the Arrêt requiring ships to have on board a role d'Equipage, neither was nor could be known in America, when the ship sailed. The question also noticed the point, if the money could have been recovered on the bills that might have been granted in terms of the relative agreement.

" Though the judges were not unanimous in their opinions upon every point of the question put to them, I may venture to say, that there was no disagreement among them as to this, that where there is an express warranty, in a policy against enemies' property, an adjudication, or condemnation of enemies' property, distinctly stated in the judgment of a prize court, negatives the warranty.

" This doctrine may have arisen, perhaps, from some such circumstance as the assured suing on a policy, and producing in evidence the sentence of a court condemning as enemies' property, to enable them to recover the sum in the policy. The defendants, in case of a warranty against enemies' property, might turn round and say, ' you have produced evidence conclusive against yourself.' In some of the original cases applying a decision *in rem* collaterally to a case

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of insurance, it was stated that all parties might have come in before the prize court *pro interesse suo*. I may say, that it is founded in a mistake, to have supposed that the underwriters could have come in.

" But I cannot be so bold as to say, that the doctrine of the case of Hughes and Cornelius is not now to be applied to cases of insurance, after it has been so applied for a long series of years by judges who will be reverenced as long as the law of the country is remembered. Sums of money to a very great amount have been long since settled on the ground of these decisions; and all contracts of insurance that have since been entered into, have had relation to these decided cases.

" But there is another and more recent set of cases, in which the courts of law have entered into the sentences, when founded, as they conceived, upon arbitrary ordinances. If they could find no direct adjudication of enemies' property, our courts have held such sentences not to be conclusive. Of these, I think it proper to state, that they have not, in my opinion, attained such a degree of stability as not to render it highly proper to examine the principle maturely when a case of this kind may occur. I think, at present, I should have great difficulty in acknowledging the authority of some of these cases.

" While I have to thank the judges for their opinions given upon this case, I do not know that one point has been sufficiently considered in this case. Granting the conclusiveness of sentences, negativing the warranty in general cases of condemnation as enemies' property; yet here, it appears upon the face of the sentence, that the ship could not be provided with the proper document, for the want of which she was condemned. I am not prepared at present to say, that this should make no difference in the judgment. When the two parties to a contract of this nature are unavoidably ignorant of some matter, similar to that in the present case, it seems to me a question, if such ignorance ought not to void the contract altogether, as made under an invincible mistake, and whether the premium ought not to be returned? I state no opinion upon this, but merely throw it out, and I wish so to guard the judgment in this cause, as not to preclude a discussion of this point, if a similar case occur.

" The next question is, if it be necessary at present to decide any of those important points, which have been so much agitated in this case. I have considered this again and again, and the ultimate impression of my mind is, that the parties meant to get clear of all these questions. A noble and learned Lord now absent, to whom I may say that Scotland is very deeply indebted for his attention to questions from that country, was of a different opinion. You have heard the opinions of four very eminent judges also to the same purpose. Your Lordships must decide between us.

Lord Thurlow.

"When the policy was entered into, it was very difficult to say what would be the decision of the French courts on any given case. Another thing is clear, that these parties did not very well understand whether or not the policy contained a warranty, and what was the effect of such warranty. I take it to be clear law, that the representation in this policy, that the Catherine was an American vessel, meant a warranty that she should be American documented. It appears, however, that neither party understood the warranty in the policy to mean so much. In the explanatory agreement they declare their doubts of there being a warranty at all, and go on to explain what they understood by it. Am I not also, by all the legitimate rules of construction, to say, that they have regulated all that was to be done by either party. If the agreement has not this effect, what effect had it at all?" (Here his Lordship read the agreement.)

"It will be noticed, that as to the ship, the words of the *agreement* differ from those of the *policy;* the insured were to produce proof of the ship's being an American bottom. My apprehension of their meaning upon this subject was, that proof of the ship's being an American bottom, was to be sufficient; not that she should be American documented. So, in the case of the property on board, the production of the bills of lading was to be sufficient.

"What were the underwriters to do when these stipulations were complied with? There may be cases of capture and restitution, capture and recapture, and capture and condemnation. These proofs (agreed on) might have been given long before recapture or condemnation. Do they propose to wait till they should see the fate of this ship? No: They agree to settle by giving their bills at four months' date.

"It was contended that this settlement was liable to be undone; and it was asked, what would have happened if notice of the capture and condemnation had arrived at same time? I do not see any ground on which the bills could have been demanded back, and I think an action would have lain against the underwriters if they refused to grant the bills.

"The agreement states, 'in full dependance that the insured will 'use their best endeavours to recover the property, as for account of 'the shippers.' It is true, that though this be a case of condemnation, there were other cases in which the endeavours of the insured might have been useful. But they did not state that such endeavours should be effectual. In using their best endeavours to prevent condemnation, they did every thing that was required of them; and after having done so, the underwriters engaged to pay, if these were not effectual. It appears to me that any other interpretation would do away the effect of the relative agreement altogether, and render it as if it never had been entered into.

"In therefore moving what appears to me to be the judgment fit

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for the House to pronounce upon this occasion, it seems proper to state, that your Lordships do not proceed on the conclusiveness or inconclusiveness of the foreign sentences, but on the special circumstances of the present case. It also seems to me proper to declare, that it is not necessary to decide many of the points mentioned in the Lord Ordinary's interlocutor; but to affirm the interlocutor of the Court of the 27th of June 1800, with a slight alteration."

(His Lordship having made a motion to this effect.)

LORD ALVANLEY said,

"My Lords,

"I shall trouble your Lordships very shortly; but after the great variety of topics which have arisen in this cause, and the difference of opinion among the judges, I must briefly state the grounds of my own opinion.

"The decisions in Westminster Hall have now, for nearly fifty years, been uniform upon this point, that an adjudication of enemies' property in a foreign Prize court negatives a warranty of neutrality in a policy of insurance. On such decisions, property to the amount of many millions has been paid. I was very much surprised, in the outset of this case, to hear these decisions questioned; and an argument raised, that they might still be set aside, as none of them had yet been affirmed in this House. If the judgments of the Courts of law, after such a series of years, had been set aside, I should not have been surprised if the underwriters had shut up Westminster Hall altogether. At sametime, I think that the noble and learned Lord (Thurlow) now absent, would not have wished to set aside those commercial decisions. Every subsequent policy of insurance has been entered into in contemplation of them. We are unfortunately again engaged in a war, in which such questions may occur; but no mischief can now arise from the agitation of that question.

"I now come to the relative agreement. When I first considered this, I doubted if the agitation of the other question could then be waived. Let us see what is the effect of the policy without this relative agreement. The parties follow the words of the English policy. It has been long decided that such words amount to a warranty, not only of American property, but of American documented and conducted. This was a war policy; and I admit it did go the length contended for by the appellants, that it was the same as if the ship had been warranted neutral.

"It seems that the parties were not aware of the extent of this. (Here his Lordship read the relative agreement). This is merely an illusion, if an American *bottom* meant the same as an American vessel. What was to be the consequence if she was carried into the enemy's port? The assured undertook to get it back if they could; but, if they were unsuccessful, what then? Is it possible that they should have failed to stipulate that? The only real object of the parties in this agreement was that they should, in that

event, do what was equivalent to paying in ready money, that is, grant bills at four months' date. They must have meant, that whatever was the extent of the policy, if proof was produced that the ship was an American bottom, the assured were to be absolved from all other circumstances.

" I entirely concur with the noble and learned Lord who has just spoken, as well upon this case as upon the set of cases to which he alluded, in which the judgments of foreign courts have been opened up. I admit that very strong arguments in the present case were advanced by those judges from whom we differed in opinion.

" I entirely agree with the opinion delivered by the present Master of the Rolls, in the case of Kindersley and Chafe, at the Cockpit. I am afraid that some of the cases in which the foreign judgments were opened up, went on too refined principles. In our Prize courts, we never give any reasons at all in the judgments of condemnation. I do not know if the courts of other countries canvas our sentences or not. I do not see what the ground of condemnation in a Prize court can be, except that of enemies' property."

It was declared, that in this case it is not necessary to decide whether, upon the several grounds mentioned in the interlocutors of the 28th May and 2d July 1799, the Lord Ordinary ought to have pronounced the same. And it is ordered and adjudged that the interlocutors of the 27th of June, and signed the 4th of July 1800, complained of in the appeal, be affirmed, with the following variation: 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 affirmed.

For the Appellants, *Robert Dallas, Wm. Adam, W. Robertson.*

For the Respondents, *E. Law, J. A. Park.*