

IMPRESS SERVICE.

1780. December 8. JOHN SYME against CHARLES NAPIER, and Others.

IN June 1779, Captain Napier, then regulating the impress service at Leith, sent a numerous press-gang, who surrounded the yards and docks of John Syme ship-builder, and carried off 27 of his work people. Syme repaired immediately to the rendezvous, and claimed them as his apprentices; producing, at the same time, their indentures; all of which, except two of a late date, had been indorsed by Captain Napier himself, on former occasions. Captain Napier, however, refused to release them, and ordered them to be put aboard a tender, which set sail with them next morning. But the Lords of the Admiralty, upon an application from Syme, and understanding that the Lord Chief Justice of the Court of King's Bench had granted writs of *habeas corpus*, sent the whole apprentices back to Leith in a sloop of war, except two, the period of whose apprenticeship was expired, and who voluntarily entered into his Majesty's service.

Mr Syme brought an action of damages against Captain Napier, Lieutenant Younghusband, an officer employed in the impress service, and Lieutenant Scott, commander of the tender; for whom it was

Pleaded in defence; The power of impressing men to serve in war is a prerogative of the crown, founded on necessity. The exercise of it, so far as relates to the royal navy, appears from the antient commissions granted to the High Admirals of England, and from the opinion of lawyers treating of such subjects.

That all 'needful artificers,' and all whose occupations necessarily connected them with ships, were formerly liable to be impressed, is evident from the commission granted by Queen Elizabeth to Sir Martin Frobisher; from another issued in the 50th of Edward III.; and from that of Lord Seymour, in the time of Edward VI. These commissions, and many others, are cited by Sir Matthew Foster, in his argument upon the case of Alexander Broadfoot; and the learned Judge observes, that all the High Admirals, since the Restoration, have had powers equally ample conferred upon them.

No 1.

Found, that workmen of a ship-carpenter cannot be impressed. In an action of damages against a regulating captain for impressing persons of the above description, the captain's plea of *bona fides* was repelled.

No 1.

The trade of a ship-wright is, by its nature, inseparably connected with the navy; and, in every treatise relative to marine regulations, carpenters are specially enumerated; Justice's Sea Laws, p. 297; Wellwood's Abridgment of Sea Laws, tit. 30; Cay's Abridgment of the Statutes, *voce* Seamen; and Molloy, *De Jure Maritimo et Navali*, in his chapter, 'Of the right of pressing,' expressly mentions carpenters as liable to be impressed.

The circumstance, that the apprentices were afterwards returned, is no evidence that Captain Napier exceeded his powers, because they were so returned in the way of favour, and without any legal compulsitory.

Accordingly, it has been generally understood, that ship-carpenters may be impressed, as well as other sea-faring people. And, in particular, as to Mr Syme himself, at the commencement of the present impress service, when it was advertised that all persons liable to be impressed should receive protections, upon furnishing one man out of five, he, amongst others, accepted of these terms. When employed to build the Fury sloop of war, for government, he applied to the Commissioners of the Admiralty, and obtained protections for his journeymen and apprentices, during their continuance in that service. Upon the commencement of hostilities with Spain, he again, by way of compromise, furnished one man out of ten to the royal navy. And that, at all times, he considered his apprentices as having no other protection or exemption than what arose from their indentures, is evident from his getting Captain Napier to indorse those indentures, and from the grounds of a protest which he took upon the present occasion.

When, therefore, Captain Napier received the most positive orders from the Admiralty, issued, indeed, 'on the spur of the occasion,' but afterwards ratified by act of Parliament, to disregard all protections, he was certainly *in bona fide* to believe that he had a right, and that he was even obliged, in the exercise of his duty, to impress the apprentices in question. It was equally his duty, at a time when the exigencies of the state required such a supply, to send them off immediately for England.

The defence of *bona fides* has always been sustained in similar cases; Fountainhall, 30th November 1703, Fairholm *contra* Warrender, No 14. p. 1697; Forbes, 27th July 1710, Lamb *contra* Cleland and Gibson, No 16. p. 1700. In a question between the defender and one Mr Chalmers, No 11. p. 594. respecting an impressed apprentice, the Court sustained this defence, and assolizied. There the Court were of opinion, that the only circumstance by which the *bona fides* could be removed, was an express and immediate offer to prove, that the apprentice had not been at sea before the date of his indenture. But here Mr Syme did not, by any such offer, or even averment, take off the natural presumption arising from the profession of his apprentices; and, therefore, has no legal claim of damages against the defenders.

Answered for the pursuer; The original instructions issued by the Lords of the Admiralty, empowered Captain Napier 'to impress as many seamen, sea-

‘faring men, and persons whose occupations and callings are to work in vessels and boats upon rivers, as he shall be able.’ By this last description are meant persons navigating lighters, barges, fishing, or passage boats, and other vessels that ply on rivers; but by no means carpenters, who are said, technically, to work, not in, but upon a vessel. Ship-carpenters, therefore, under these instructions, are not liable to be impressed till they go to sea, and so fall under the designation of ‘sea-faring men.’

Nor were Captain Napier’s powers, in this respect, enlarged by his later instructions, which authorised him ‘to impress as many seamen, sea-faring men, and other persons ‘described in the press warrants,’ as he possibly could, without regard to protections,’ &c. Here the original description is still adhered to; and if ship-carpenters, who have never been at sea, are not impressible at common law, neither were they by the terms of these instructions,

The private opinion of the pursuer, or his taking protections for his men from those whom he saw invested with power, does not bar him from appealing to the violated laws of his country; and his founding principally upon the indentures, in his protest against Captain Napier, does not exclude his availing himself of other arguments.

The proof of the apprentices never having been at sea before they were impressed, does not rest upon the pursuer. The rule of law is, *affirmanti incumbit probatio*.

THE LORD ORDINARY had found, “that ship-carpenters, who have only wrought at land, in building or repairing ships, but never have been employed in their vocation at sea, are not, in terms of the press-warrants, seamen, or sea-faring men;” and, of consequence, are not impressible. Several of the Judges had doubts upon this point; but, as the defender had acquiesced, the question turned principally upon the effect of his *bona fides*.

Observed on the Bench; The *bona fides* of a public officer mistaking his duty, can have no farther effect than to limit the claim of damages to what is necessary for the indemnification of the injured party. The *onus probandi* in this case clearly lies upon Captain Napier.

The pursuer passed from insisting against the two Lieutenants, who had been assoilzied by the Lord Ordinary, as having acted under ‘the orders of their superior officer, which, by the rules of the navy, they were obliged to obey.’ The judgment therefore was:

“Find Captain Napier liable to the petitioner in damages and expenses.”

To which the Lords adhered, on advising a reclaiming petition for Captain Napier.

Lord Ordinary, *Manboddò*. Act. *Crosbie*. Alt. *Murray*, Solicitor General. Clerk, *Colquhoun*.
L. *Fol. Dic. v. 3. p. 310. Fac. Col. No 7. p. 13.*