

1805. Nov. 19.

O'NEAL *against* CORDES AND GRONEMEYER.

NO. 2.

LIEUTENANT TERENCE O'NEAL, commander of his Majesty's cutter the Cobourg, fell in with, and detained, a brigantine called the Stettin, in April 1799, as a lawful prize. The vessel was loaded with flax and clover seed, hemp, flax, madder, gin, &c., and sailed direct from Rotterdam, an enemy's port, for Leith.

The right of neutrals to carry on a direct trade between two belligerent states.

Mr O'Neal applied to the Court of Admiralty, to have the ship and cargo adjudged as a legal prize. The ship was claimed as neutral property by Hilary Bauerman and Sons, and given up to them; and Messrs Cordes and Gronemeyer of Hamburgh, appeared, and claimed a considerable part of the cargo as their property, and not liable to seizure, being neutrals, and entitled to carry on the trade.

They produced in evidence of this, a declaration by themselves upon oath, before the Senate of Hamburgh, laying claim to the cargo as their property, having been shipped "for their absolute and sole account, risk and benefit;" and they asserted, that the history of the shipment, as given in the following letter to Messrs Van Egmont and Sons of Rotterdam, was the real state of the case: "15th January 1799. By the arrival of several English mails, we learn from several of our friends, that lintseed, clover-seed, flax, and other articles, the produce of your country, would yield a good profit in the Scotch market; you will please therefore charter for us a vessel for the Forth, if no other ship-room offers, and ship by the same for our account, the following parcels, intended as consignments to our friends, depending to have the whole of the best qualities, and at as moderate terms as your market will admit of." Then follows a particular list of the articles ordered, with particular marks, according to the persons to whom they were alleged to be consigned.

Cordes and Gronemeyer further stated, that, in consequence of this order, the goods were shipped on board the Stettin, a Prussian vessel, by Van Egmont and Sons, who forwarded to them bills of lading, and an invoice, which is entitled, "Invoice of the under-mentioned goods, shipped by T. Van Egmont and Sons, by order and for account of Messrs Cordes and Gronemeyer of Hamburgh, on board the Prussian brigantine vessel Stettin, Captain Jacob Runke Jacobs, for Bergen." The bills of lading were also made out for Bergen, in order to save her being seized by Dutch or French cruizers, if they found her sailing direct for an enemy's port. The invoices were sent by Cordes and Gronemeyer to the merchants in this country, who were to be the consignees, some of them inclosing letters to the same persons from Van Egmont and Sons; and the bills of lading were

NO. 2. sent to Messrs Henderson and Company, merchants in Leith, who were appointed agents for the ship.

Upon the detention, the persons in whose favour the bills of lading were made out, to the number of thirty-eight, were allowed to receive the goods, on finding caution to pay the amount to the prevailing party.

Lieutenant O'Neal, on the other hand, argued, That all these papers were merely a cover to sanction a direct trade between this country and Holland; and that, from the tenor of the correspondence, it appeared, that Van Egmont and Sons, who shipped the cargo, were truly the owners of it, who obtained the interference of Cordes and Gronemeyer, to enable them to carry on their usual trade with this country; for that orders sent to Rotterdam were executed in the same manner as those which had been sent to Hamburgh.

The Judge-Admiral pronounced this interlocutor (21st November 1800):
 " Finds the whole cargo of flax and clover seeds, hemp, flax, madder, gin,
 " and other merchant goods, on board the brigantine Stettin, when seized
 " and captured by Lieutenant O'Neal of his Majesty's cutter Cobourg, in
 " the manner libelled, was the property of persons residing within the ter-
 " ritories of a power at present in a state of avowed hostility with Great
 " Britain, and therefore finds the same is just and lawful prize; and con-
 " demns, adjudges and declares the whole of the said cargo to appertain
 " and belong to his Majesty, and to the officers and crew of his Majesty's
 " said cutter Cobourg, to be divided in terms of the statute libelled, and
 " adjudges, decerns and declares accordingly."

Judge-Admiral Cay altered this interlocutor, and (21st May 1801) found,
 " That the cargo in question was, at the time of the capture, sufficiently
 " documented as neutral property, belonging to the claimants Cordes and
 " Gronemeyer; therefore, that the said cargo was not, and is not, liable to
 " condemnation, as lawful prize, and ought to have been restored *cum omni*
 " *causa*, as soon as the documents were inspected; therefore, finds said car-
 " go, or its price, to have been, and still to be, the property of the said
 " claimants, and upliftable by them, or by their lawful attornies; and or-
 " dains the said cargo, price or bills, to be delivered to, or possessed and
 " disposed of by the said claimants and their said attornies, in the same
 " manner and to the same effect as if it never had been seized by the pur-
 " suers; and decerns; finds expences due, and allows an account to be gi-
 " ven in."

This judgment was brought under review of the Court of Session, and the parties were heard in presence; when the Court (15th January 1805), adhered, " reserving the consideration of expences until the conclusion of
 " the cause."

O'Neal reclaimed ; and

Pleaded : The principles of law relative to a trade between two belligerent countries, declare, that a direct trade, for the benefit of the subjects of either, is illegal ; but if the goods be truly the property of a neutral merchant, although they may have been shipped for his behoof in one of the belligerent states, with the intention of being carried directly into the other belligerent country, but still for his behoof, they are not legal prizes, but, if seized, must be restored to the neutral merchant. This exception in favour of neutrals, is the natural consequence of their independent rights, the fair and honest exercise of which cannot be interrupted by a war in which they are not parties. But, amidst the shocks of war between great states, the neutral cities of Europe find the source of their prosperity, and meet with great temptations to lend the sanction of their names, for enabling the merchants of the belligerent nations to carry on that trade, which it is the object of the war to interrupt. The cover is easily effected. The orders, as usual, go directly to Holland ; the goods are prepared in the Dutch port, and put on board a neutral vessel, bound directly for this country. They are marked and addressed for this country, in terms of the order transmitted to Holland. A neutral merchant, who is to cover this shipment, receives from Holland an account of the cargo, and he makes affidavit in the place of his residence, that the goods are sent for his benefit, and at his risk. He transmits to the Dutch port an order, as if from himself, of these various goods, to be shipped on his account ; and the bills of lading are made out accordingly, and one set of these, together with invoices, is sent to the neutral merchant, to be by him transmitted to the numerous persons in this country, who commissioned the goods, upon whom bills are drawn by the neutral merchant, in favour of the agent, in this country, of the Dutch merchant. For the trouble which the neutral merchant has in this transaction, he receives a small commission. By means of this arrangement, the trade between Great Britain and Holland proceeds as easily, and with as little interruption, as if the nations were at profound peace. The only difference is that there is a commission to be paid for the protection of a neutral name. The evidence to disprove this, would be the original letters from the Scotch to the neutral merchants ; but none such appear ; in room of which is substituted a general order for the whole cargo, by the neutral to the Dutch merchant. We should also have the bills by which the price of those goods was paid by the neutral to the Dutch merchant ; instead of this, we find the neutral merchant drawing bills on the Scotch consignee, but in favour of the known agent of the original shippers. Defect of evidence is in general a good ground for condemnation, when the claimants had full time to procure the evidence, which would have justified their statement that the pro-

NO. 2. perty was neutral ; but, when this defect is mixed with fraud in making out documents for attempting to supply the defects, it is conclusive, that the general order by the neutral merchant, seems plainly to have been fabricated *ex post facto*.

But it is contended, that the neutral trade ought to be favoured ; and that by means of the bills of lading, making the goods deliverable to the neutral merchants, there was a legal property vested in them at one time ; and that by their indorsement alone, the Scotch merchant could acquire right to the property. But the bills seem never for a moment to have remained with the neutral merchant : As soon as they were received, they were instantly indorsed, and sent off to the Scotch merchant, long before the vessel sailed. So that the property cannot be said to have been vested in the neutrals. A bill of lading is a transference of property only, because after the commencement of the voyage, the master has the sole and uncontrolled custody of the goods, and has bound himself to deliver them to the holder of the bill of lading. When the voyage began, the property was vested in the Scotch merchants ; and previous to that, it belonged to the shipper.

The neutral merchants had no real interest in the cargo ; their name has been used as a cover ; and they have acted only in so far as was thought necessary to make it effectual : For this agency they have received a commission of 2 *per cent.*, sufficient for this purpose, but inadequate to their risk and trouble, if they were truly more than agents.

Answered : During the existence of a state of war between two countries, a trade always springs up which is carried on by neutrals, for the purpose of exchanging the various commodities of each, for their mutual benefit ; a trade which, by the law of nations, is considered lawful, and by the practice of the two countries is highly beneficial ; because it diminishes the hardships of war, contributes to the welfare of the people, and supports the manufactures of the country. The neutral merchant does, in war, what the foreign native merchant did in peace, but what the present political relations of his country with that to which the trade is carried on, does not permit. He purchases in the one, and conveys to the other, with the additional advantage, that he does so in consequence of a suspension of the navigation act, (37th Geo. III. c. 8.); by means of a neutral vessel. This is the description of the present case. The neutral merchant, residing in Ham-
burgh, commissions a certain quantity of goods, the produce of Holland, from a Dutch merchant, to be sent direct to this country ; and the invoice and bill of lading both shew, that the order was fulfilled, and the goods sent on account of the neutral merchant, by whom insurance was also effected. Their own affidavit confirms those proofs. Their profit on the

transaction is just 2 *per cent.*, which is the usual rate. It is not commission NO. 2. as an agent, but the mode in which the business of Holland is always carried on; and for this the merchant takes upon himself the whole risk. And no better proof of property can be had, than by inquiring upon whom the loss of the goods will fall. Possessed of the bills of lading, the neutral merchant might have sent the goods where he pleased, might have stopped them *in transitu*; in short, had the sole and uncontrolled property in them. This is direct evidence, that the goods are neutral property; yet it may be traversed, but not by circumstances of mere conjecture and suspicion: Something more positive will be necessary. Without such, no court will ever think of condemning an intercourse which is found beneficial; especially when the appearances of suspicion must arise so often from defects in the evidence, the effect of mere ignorance, of negligence, or perhaps of accident, difficult to be obviated, when the countries are in a state of hostility, and the means of communication troublesome and circuitous.

The Court were very much divided in opinion upon this case. It was considered entirely as a question of property. On the one hand, it was contended, that two hostile nations cannot trade directly, by means of the intervention of a neutral: The goods, to be protected, must be actually the property of the neutral, and transported for his behoof. It must not be a trade, where the British merchant commissions the goods from the Dutch merchant, and the neutral merely acts as agent, in order, if possible, to deceive the two countries, and forward this unlawful intercourse. On the other hand, it was maintained by the majority, that, according to mercantile practice, the possession of the bill of lading vested the property; by which means, the neutral merchant was at one time the proprietor, which was sufficient to prevent condemnation.

The Court adhered.

Lord Ordinary, *Glenlee.*

Act. *Gillies, G. J. Bell, Reddie.*

Agent, *J. Peat.*

Alt. Solicitor-General *Blair, Cathcart, Baird.*

Agent, *J. Pattison, W. S.*

Clerk, *Hems.*

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