THE FLORENZO.

Case No. 4,886.
{Blatchf. & H. 52.}[1]

District Court, S. D. New York. Feb. 6, 1828.

SHIPPING—REGISTRATION OF AMERICAN VESSELS—ACT OF DEC. 31, 1792—PURCHASE BY ALIEN—FORFEITURE—SUBSEQUENT BONA FIDE PURCHASER—PRIOR LEVY BY SHERIFF.

1. A bona fide purchaser of the whole interest in a vessel, subsequent to a forfeiture incurred

under the 16th section of the act of congress of December 31, 1792, (1 Stat. 295), by the sale or transfer to an alien of any interest in an American registered vessel, is not within the proviso of that section. That proviso relates only to persons who are joint owners of a vessel at the time of the commission of the act which produces the forfeiture.

[Cited in U. S. v. Sixty-Four Barrels of Distilled Spirits, Case No. 16,306; Harrington. v. U. S., 11 Wall. (78 U. S.) 368.]

2. Such a purchase will not prevent the forfeiture. The forfeiture takes place at the moment of sale or transfer to an alien, and any subsequent judgment of forfeiture relates back to that time.

[Cited in U. S. v. The Reindeer, Case No. 16,144.]

3. The title of the alien purchaser, if he acquires any, is divested eo instanti by the statute, and he has left in him no interest which can be seized on execution.

4. A levy on the forfeited property, under an execution against the alien, previous to the prosecution of the forfeiture, will not prevent the forfeiture.

5. Whether previous possession by a state sheriff, under a fi. fa. issued by a state court, excludes the marshal from arresting and taking into his possession, under an attachment issued by this court, a vessel forfeited for a breach of the laws of the United States, quaere.

[Cited in Riggs v. The John Richards, Case No. 15,132.]

6. A forfeiture under the statute above cited does not avoid the lien of seamen and material men, existing at the time of forfeiture.

[Cited in The Ranier, Case No. 11,565.]

In admiralty. Various proceedings were taken against the brig Florenzo in the port of New-York, which were brought before the court upon the following pleadings: Two libels were filed on the 7th of September, 1827, by different parties of her crew, to recover wages earned on her last voyage. On the same day the court ordered these suits to be consolidated. Process of attachment was issued in them, returnable on the 25th of September, under which the vessel was arrested. A petition was subsequently filed by a material man, praying to be paid out of the proceeds of the vessel. There was no dispute as to the services rendered by these parties; and the amounts due to the libellants and to the petitioner were decreed to be paid them.

The United States subsequently filed a libel of information against the vessel, claiming her condemnation and forfeiture to the United States. The collector had previously seized the brig as forfeited under the provisions of the act of December 31, 1792 (1 Stat. 287), entitled "An act concerning the registering and recording of ships or vessels," the 16th section of which enacts, "that if any ship or vessel heretofore registered, or which shall hereafter be registered as a ship or vessel of the United States, shall be sold or transferred, in whole or in part, by way of trust, confidence or otherwise, to a subject or citizen of any foreign prince or state, and such sale or transfer shall not be made known in manner herein before directed, such ship or vessel, together with her tackle, apparel and furniture, shall be forfeited." The manner of making known such sale or transfer is prescribed by the 7th section, and is by giving up the certificate of registry to be cancelled. The libel alleged a transfer of the Florenzo, in whole or in part, by way of trust, to an

alien, within the meaning of the act, namely, to one Pettit, without making known such transfer in the manner prescribed by the act, and claimed a forfeiture of the vessel, her tackle, apparel and furniture.

Against the libel of the United States two claims were interposed. One was put in by Whitehead Cornell, as owner, alleging a bona fide purchase by him of the vessel on the 1st of September, 1827, by a regular bill of sale therefor, from George Marsden, her master, an American citizen, and at that time her registered owner, for $2,500, without knowledge or notice on the part of the claimant of any cause of forfeiture existing at the time. It was insisted for this claimant that Marsden was the real owner in his own right, or, if not, that the claimant's case came within the proviso to the 16th section of the act referred to, which is, "That if such ship or vessel shall be owned in part only, and it shall be made to appear to the jury before whom the trial for such forfeiture shall be had, that any other owner of such ship or vessel, being a citizen of the United States, was wholly ignorant of the sale or transfer to or ownership of such foreign subject or citizen, the share or interest of such citizen of the United States shall not be subject to such forfeiture, and the residue only shall be so forfeited."

Upon the question whether the vessel belonged to Pettit or to Marsden, it appeared in evidence, that in September, 1826, the vessel was registered in the name of one Weathersby, and in November, of the same year, in the name of Marsden; but Weathersby testified that he transferred the vessel and cargo, by a bill of sale, for $3,700, to one Arnold, who was a partner of Pettit, and an alien also, and that afterwards, at the request of either Arnold or Pettit, he made a bill of sale to Marsden, but that no part of the consideration moved from Marsden; and it was proved that he had not the means to purchase a vessel of the price of the Florenzo. Marsden, though cited to appear, could not be found, but it was proved by several witnesses that his statements as to his interest in the vessel, subsequent to her alleged purchase from Weathersby, were contradictory, he at one time alleging that he was her sole owner, at another time that he was part owner, and at another time that she belonged to Pettit and Arnold. Arnold testified that he and Pettit advanced money to Weathersby on the security of the brig and her cargo; that he afterwards, in October, 1826, by Weathersby's consent, and with his advice, sold the brig, without the cargo, to Marsden, for

$2,500, and that Marsden paid him one-half, namely, $1,250, but whether Pettit received the other half he did not know; and that he had previously taken Marsden's note for $4,000, to be given up on payment of the $1,250. The register in Marsden's name was in November. The bill of sale from Weathersby to Marsden was not produced on the trial.

Upon the question of the bona fides of the sale from Marsden to Cornell, it was proved that at the time of the sale the brig was in the possession of the sheriff of New-York, under a fi. fa., to satisfy the claim of a judgment creditor of Pettit, and that the mate of the brig informed Cornell of the fact, who replied, "that it was nothing to him." The only payment made by him on the purchase was his promissory notes for $2,500, which were accepted by Marsden, to whom he was a stranger, without inquiry. Cornell purchased the vessel immediately on her return from a long voyage, without examination or inquiry into her condition, and without going on board of her. It was matter of consultation among the parties concerned in the sale and purchase, how the brig might be kept from forfeiture, and it was suggested between them that a bona fide transfer to an American citizen might save her.

The second claim was made by Samuel Candler, as a judgment creditor of Pettit. He proved that on the 23d of August, 1827, he caused a writ of fi. fa., issued in his favor on a judgment rendered in the supreme court of New-York for $5,501 08 against Pettit, to be levied by the sheriff of the city and county of New-York on the brig, as the property of Pettit. He averred that the brig was then the property of Pettit, and was, as such, lawfully arrested and held by the sheriff under his fi. fa. at the time of her seizure by the United States marshal. It was insisted for this claimant, that the title acquired by the United States under a forfeiture, dated from the time of its completion by a judgment of forfeiture by a competent court, and not from the time of the commission of the act inducing the forfeiture; that, at all events, the United States could not usurp the possession of a vessel, already in the custody of the law under state process; and that it belonged exclusively to the state courts to decide whether the execution of the claimant could be satisfied out of the vessel or not.

Robert Tillotson, Dist. Atty., for the United States.

George Brinckerhoff, for Cornell.

Robert Sedgwick, for Candler.

BETTS, District Judge. There is no controversy concerning the first libel pending against this vessel, and the claim of the seamen and of the material man must be allowed.

The second libel is filed by the United States. It claims a forfeiture of the vessel and of her equipments, for a violation of the act of congress of December 31, 1792 (1 Stat. 287), entitled "An act concerning the registering and recording of ships or vessels," the 7th section of which prescribes certain formalities in the transfer of American registered vessels to aliens, which are not now in question, and the 16th section of which makes any

transfer to an alien, by way of trust or otherwise, without the formalities prescribed in the 7th section, a cause of forfeiture. The libel alleges a transfer of the vessel, in whole or in part, to one Pettit, an alien, in such manner as to cause her forfeiture within the meaning of the act.

Two claims are interposed: One on the part of Whitehead Cornell, who asserts that he acquired the vessel by a bona fide purchase of her on the 1st of September, 1827, from George Marsden, the then owner, and he produces a bill of sale in support of his title. Although the evidence is not in all respects free from doubt, yet I am satisfied the weight of it proves that Marsden was not at the time the owner of the brig in his own right but that, being an American citizen, he took the nominal title in his name, to hold her in trust for Pettit, or for Arnold and Pettit, both of whom were then aliens. This brings the case within the words of the statute, and the vessel must be declared forfeited, so far as the claimant Cornell, is concerned, unless he brings himself within the proviso to the 16th section of the act. It is plain, however, from the language of the proviso, that it applies only to the case of joint-owners of a vessel, one of whom admits an alien to an interest in the vessel, without the privity of his citizen co-owner. The substance of the provision is, that if it appears that the other part owner was ignorant of the transfer to the alien, his share shall not be forfeited, but the residue only. He will not lose his interest in the vessel, by the misfeasance of his associates, to which he was not party or privy. Without this proviso, his interest would not be protected, because an absolute forfeiture of a vessel transfers the entire interest in her to the government, without regard to the claims of parties who did not participate in the cause of forfeiture. This is invariably so in respect to vessels confiscated for violations of the revenue laws.

Two things are necessary to protect the claimant under the proviso to the 16th section. First, he must be a part owner (The Margaret 9 Wheat. [22 U. S.] 421), and, secondly, he must be such part owner at the time of the commission of the act which produces the forfeiture. But the claimant makes title to the whole vessel. He does not allege that he acquired a share in her, which the proviso might protect from the forfeiture incurred, because of the ownership of an alien in common with him, but he claims

that he is the bona fide owner of the entire vessel. In the second place, he does not allege any interest in the vessel at the time of the commission of the act which produced the forfeiture. He acquired his alleged title subsequently. Clearly, then, he is not protected by the proviso to the 16th section, even if he had proved himself to have been a bona fide purchaser, without notice of any cause of forfeiture existing at the time of his purchase.

But there are forcible reasons to question the bona fides of the sale to Cornell. If he had not full knowledge of the situation of Pettit in respect to the brig, he had sufficient notice to put him upon his guard, and, if he then neglected to make proper inquiry, the law deals with his claim as if it were acquired with knowledge of the facts which reasonable inquiry would have disclosed. The Ploughboy {Case No. 11,230}; The Mars {Id. 9,106}. Cornell and Marsden stand, therefore, in the same position before the court, and the vessel must be decreed to be forfeited, so far as their rights are concerned.

A second claim is interposed on the part of Samuel Candler. He alleges that he is a judgment creditor of Pettit, and that, at the time of the seizure of the brig by the United States, she was in the lawful possession of the sheriff of the city and county of New York, under a fi. fa. issued on a judgment rendered in his favor by the supreme court of New York.

It is not necessary, in this case, to decide whether the interest in the vessel which Pettit may have acquired was a subject of seizure and sale by the sheriff on a fi. fa. For supposing it were, that will be of no avail, if the claim of title to the brig by the United States, from the time of the commission of the offence which caused the forfeiture, be upheld; for, in that case, all title, of whatever nature, of all persons, which was not saved by the proviso, was divested out of them, and became vested in the United States. A judgment of forfeiture is necessary to effectuate the title of the government, but, when declared, it dates back, by relation, to the time of the commission of the offence, and consequently overrides all intermediate titles, however acquired. Against this general doctrine the position is taken, that where no specific mode of effectuating the forfeiture is prescribed by statute, it has no other effect than at common law, where the title to the thing forfeited does not become complete until judgment of forfeiture is pronounced by a competent court. This is no doubt the common law doctrine, and the principle, to the extent above indicated, has the support of Judge Winchester, and of Chief Justice Marshall, Mr. Justice Story and Mr. Justice Washington. U. S. v. The Anthony Mangin, 3 Cranch {7 U. S.} 356, note; U. S. v. 1,960 Bags of Coffee, 8 Cranch {12 U. S.} 398; The Mars {Case No. 9,106}. These cases suppose that relation, being a fiction of law, should not be allowed to work an injury to any one, and therefore should not override the title of an innocent purchaser intermediately acquired; that if the forfeiture, which must often be secretly incurred, be indissolubly attached to the property, so as to divest the title of a purchaser without notice, great injury would result to the commercial interests of the country; and

that the mere attaching of a forfeiture as a punishment to a statute offence, does not exclude the common law doctrine of forfeiture, unless the statute distinctly so provides.

The weight of authority is, however, the other way (U. S. v. 1,960 Bags of Coffee, 8 Cranch [12 U. S.] 398; U. S. v. Grundy, 3 Cranch [7 U. S.] 338), and the distinction between forfeitures at common law and under a statute is established. The words of the statute are held to be imperative, making the forfeiture the necessary consequence of the offence, and dating its operation from the commission of the act. The same doctrine is laid down by the supreme court of this state. Fontaine v. The Phoenix Insurance Co., 11 Johns. 293; Kennedy v. Strong, 14 Johns. 128. The tenor of English adjudications is to the same effect. Roberts v. Wetherall, 1 Salk. 223; Roberts v. Withered, 5 Mod. 195; Robert v. Witherhead, 12 Mod. 92; Wilkins v. Despard, 5 Term R. 112. It has been for years the settled construction of acts of congress which declare the absolute forfeiture of property as consequent to an offence committed therewith, that a judgment of conviction shall take effect, by relation, as of the time when the forfeiture was incurred. U. S. v. 1,960 Bags of Coffee, 8 Cranch [12 U. S.] 398; U. S. v. Grundy, 3 Cranch [7 U. S.] 338. Congress has not seen fit to change or interfere with this construction. Without, therefore, speculating upon what might have been the rule most consonant with equity when the question first arose, it is the duty of this tribunal, as the subordinate court, to administer the law as it is interpreted by the supreme court, and, accordingly, whatever property Pettit acquired in this vessel by the sale to him, was, because of his alienage, divested eo instanti, and was vested in the United States by force of the statute. I shall accordingly hold that no interest of Pettit subsisted in the brig, which could be the subject of levy and arrest under the execution of the claimant, Candler.

It is further contended by the claimant, that the brig was in the custody of the law under the state process; that jurisdiction accordingly attached to the state court, to determine the legal effect of the execution and the character of the interest of Pettit; and that, to pursue the case in this court, would be to create a conflict between the judicial authorities of the state and of the United States. Under our system of federal and state governments, questions may arise

rendering inevitable a conflict of judicial powers between their respective judicatories. Each will sedulously avoid encroaching upon the jurisdiction of the other, and, if the difficulty must be encountered, it will no doubt be met in a spirit of mutual forbearance and conciliation, and neither will attempt, except in most urgent extremities, to resist or counteract the authority of the other. When the same remedy may be had by litigant parties under either jurisdiction, there can be no occasion for any collision of powers, because the subject matter, if not transferable from one court to the other, by way of error or appeal, will naturally be left to the disposal of the one first acquiring cognizance of it. Such was the case of The Robert Fulton [Case No. 11,890]. The libel in this court was by material men, to enforce a lien on the ship for materials and labor supplied her in this port. She was a domestic vessel, and the lien was one under a state statute. The vessel was held under a prior arrest for a like demand, by process from a state court. There was no ceding to the authority of the state court, but the United States court decided in effect, that, as both tribunals were administering relief by virtue of the same law, the one first having possession of the subject matter could rightfully retain it. There was, moreover, a special fitness in that case, in the forbearance of the federal court to interfere, inasmuch as, in the state tribunal, the property would be held sequestered for the common benefit of all lien creditors, whilst in admiralty the decree would have regard to no other parties than those litigant before the court. That case does not in any aspect, supply a formula for the present one, the proceedings in the two tribunals being now diverso intuitu, not looking to a common purpose or a common method of attaining it. In the state court, the proceeding seeks to satisfy an execution in favor of a single judgment creditor, out of the vessel, as being the property of a judgment debtor. In this court, the action demands the entire proprietorship of the vessel, under a title anterior to any supposed interest of the judgment debtor in her, which title is confirmed by an act of congress. Jurisdiction over this demand belongs appropriately to the United States court, and, if a suit were brought upon it in the state court, that court if competent to take cognizance of it, would not be bound to do so by lending its support to the enforcement of a penal law of the United States. U. S. v. Lathrop, 17 Johns. 4.

If the levy of a writ upon a vessel, under such circumstances, in a suit between individuals, could retain in a state tribunal authority to pass upon the title to the vesesl as against the government, ah easy means might be afforded, not only of evading a punitive law of the United States, but also of counteracting the national polity, which exacts that ships enjoying the privileges of American bottoms shall be the property of American citizens. In the municipal tribunals, a ship might, in all respects, be dealt with as a chattel interest, in which an alien could have a right of property, and that interest might be pursued irrespective of the navigation laws; and the government, if it litigated there, might be subject

to hindrance and embarrassment in enforcing the policy upon which its commercial regulations are founded.

Moreover, the proceeding in the state court could not have prevented a different party from arresting the vessel in the same or in another court, or from taking her out of the possession of the sheriff by a writ of replevin or of detinue. The title or ownership was not in contestation under the levy. A purchaser under a sale on execution takes, by force of the judgment awarding the writ, no more than the interest of the defendant in the chattel. The judgment does not assume to determine that any legal interest of the defendant exists in the chattel. In the present case, the attachment of the vessel in behalf of the United States, on the claim of a full title to her, older in inception than the supposed interest of the defendant in the execution, creates no competition of jurisdiction between the two courts. A conflict of authority would only arise, in case the court out of which the execution issued should consummate a sale under it, by ordering the vessel to be put into the possession of the purchaser. This case is in no position for such a procedure, and there is no legal impediment to the arrest and condemnation of the vessel, as demanded by this libel.

If the possession of property by a state sheriff, under a fi. fa., is to exclude the marshal from taking possession of it in execution of the laws of the United States, it might be made the means of preventing the revenue laws, including the laws against smuggling, from being enforced against vessels or their cargoes. An arrest by a sheriff, under state process, in behalf of a friendly creditor, might thus, by connivance, be made to exempt the guilty property from seizure under the process of this court. This difficulty, however, does not arise in this case. The sheriff levied the execution on the 23d of August, and, on the 31st, an informer gave notice to the custom-house that the brig had incurred a forfeiture. She was immediately seized by the United States' officers, and has since remained in their charge. The sheriff proceeded to sell the cargo, but did not attempt to sell or hold the vessel. He made no objection to her passing into the custody of the marshal, and he now interposes no claim to her possesion. It may be inferred from this, that the execution is satisfied, or that the levy under it is abandoned, leaving the brig within the sole power of this court. The claimant by acquiescing in the seizure, by his notice to the custom house, and by putting in his claim here, is precluded from

questioning the jurisdiction of the court over the subject matter.

I shall therefore decree the condemnation of the vessel. The claim of Candler must be dismissed, with costs. The seamen and the material man are first to have their claims and costs out of the fund in court. The forfeiture does not avoid their rights.

Decree accordingly.

[1] {Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.}

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