

THE TOPAZ, Nicoll, master.**February 9, 1811.**

Resistance to the exercise of the right of visitation and search.

An armed American vessel, having carried on the forced trade on the Spanish main, and, while under a British flag, seized some vessels for the purpose of ransoming part of the crew which had been detained on shore, &c, on arriving off Macao, attempts to resist a British cruiser in the exercise of the right of visitation and search, captured, after a desperate resistance.
Condemnation.

AN armed American schooner, condemned in the Vice-Admiralty Court, of Bombay, for resistance to the exercise of the right of search, by his Majesty's ship Diana, in Macao Roads, in China.

This schooner having been equipped for, and employed in, the forced trade on the Spanish main, arrived at Macao, where an attempt was made to search her, by the boats of The Diana, in consequence of information given by some of her crew, who had entered on board The Diana, that she had committed various acts of piracy under a British flag, during her cruise upon the Spanish main. A desperate resistance was made by the master and crew, in which the

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former was killed, several of both parties wounded, and the vessel captured. An appeal from a sentence of condemnation was prosecuted, on the presumption, that as the right of search had been previously submitted to peaceably, the search, in the present instance, had been attempted vexatiously in an improper manner, and also in an improper place, namely, within * the limits of the [* 21] neutral Portuguese territory or roadstead of Macao.

King's Advocate, for the captors. The circumstances developed in the preparatory examinations of this case, fully justify the captor in the exercise of the right of search, which right the claimant now attempts to invalidate, by a long train of evidence, introduced to prove that the captured vessel was situated within the territorial limits of the Portuguese settlement of Macao. The question of territory has, however, been most attentively considered by the court below, which, from its proximity to the scene of action, must have had more satisfactory means of ascertaining the validity of this objection, than any we can obtain. The judge appears to have most judiciously referred the question respecting the local situation of this vessel, with the ship's papers, logs, &c., to the decision of three respectable nautical men, under the superintendence of the registrar; the substance of their report is, that upon examination it appears that the soundings of Macao reach upwards of ten miles from the town; that the term, Macao road, is quite undefined, meaning only the anchorage ground between Macao and that range of islands of which Samcock and Tycock are the principal, which is open anchorage; that from the log-book of The Topaz, it appears that The Topaz lay in four and a half fathom water; that soundings of four and a half fathoms do not come nearer Macao than about four miles, nor nearer the Nine Islands, which are desert rocks, than three miles; that, upon the whole, from the evidence, it would appear, that the position of the schooner was about five miles from Macao, five and a half miles from Cabretto Point, four * and a half miles from a point forming the [* 22] opposite side of the entrance to the Typa, and at least three miles from the Nine Islands; that upon the 6th day of August, 1807, the brig Diana lay with Macao town bearing north-west by west four or five miles, and the Nine Islands north by east half east; that at this time The Diana must have been about two miles and a quarter from Cabretto Point, the nearest land; that next day, being the 7th August, The Topaz came to anchor north-east by north, three and a half miles from The Diana; that in the afternoon of that day The Diana shifted her berth to the north-east, but how far the log-book does not specify, nor can the reporters discover by other means; that

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this motion carried her still farther from the nearest shore, and nearer to The Topaz; in this situation, she was moored at daylight in the morning of the 8th; in the afternoon the boats went to board The Topaz, and eventually took possession of her; the schooner Topaz having just got under weigh when taken, was then carried towards The Diana, and at five in the afternoon brought to anchor with Macao town north-west by north, The Diana bearing east north-east, and Cabretto point south by west; that, upon the whole, they report that The Diana, on the 6th, and part of the 7th of August, was about two miles and a quarter from Cabretto Point, and in the evening of the 7th moved farther from that point and from the land in a north-easterly direction, but find it impossible to report how much, having no data.

By a subsequent report, upon inspecting some additional surveys of the harbor of Macao, and the river Typa, made by order of the East India Company, they, in all respects, confirm the former [* 23] report, except that * the said survey would make The Diana somewhat less than a half mile nearer to Cabretto Point before she shifted her berth on the afternoon of the 7th, and thus make her to have been somewhat less than two miles from Cabretto, but from her afterwards shifting her station, find it impossible to state her actual place at the time of fitting out the boats.

There appears, in the appellants case, nothing satisfactory to overturn the inference to which these reports must necessarily lead, except the vague testimony of some sailors on board, who speak with much diversity as to her situation at the time of capture; one stating it to be two miles from the shore, and seven from Macao; another, one mile from the shore, and town of Macao; a third, two and half from shore, and four from Macao. From such evidence, especially when given by part of the captured vessel's crew, little can be safely inferred. The difficulty of ascertaining distances at sea with any precision by the eye, also renders it expedient to prefer charts, logs, and soundings, with the calculations of experienced seamen, to any evidence deduced from sight, which is extremely liable to deception. The inference, therefore, to be drawn from these reports is, that this vessel was totally out of the protection of neutral territory, and, therefore, liable to search; nor was her distance materially altered by the unavailing attempt it appears she made to clear The Diana's boats, and get into the Typa. She had only hoisted sail when the boats boarded.

Dismissing this part of the case with observing, that no remonstrance was then or has been since made to the detention and seizure of this vessel by the Portuguese governor, which affords a strong pre-

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sumption that no violation of territory was even suspected, it *will appear that the design and conduct of this voyage, [* 24] or piratical cruise, (as it may be termed,) imperatively called upon the commander of his Majesty's brig to investigate the complaints which had reached him through the medium of some of the Topaz's crew, which had entered on board the brig. From the preparatory examinations, it appears the vessel sailed from Baltimore for the north-west coast and a market, well armed, and provided with French, English, American, and other colors. Her cargo consisted of linen, dimities, muslins, &c. The master was enjoined by instructions from one of the owners, Mr. Taylor, "to avoid speaking with, and not voluntarily to throw himself into the way of other vessels; to resist if attacked by any other vessel whatever, and to fight his own way." The master had also repeatedly said he would suffer none to board while a man was alive. The conduct of the voyage perfectly accorded with the nature of these preparations and instructions. She directed her course to the Spanish main, where she committed various piratical acts, boarding Spanish vessels, forcing them to contribute to her wants, taking possession of them in order to procure her papers, which, in one instance, had been detained when sent on shore, or with a view to procure the release of part of her crew, which had been seized on account of previous enormities committed on the coast. At Monte Christo, a landing was made to plunder the town, which was repulsed, with the loss of twelve of the crew. The master described his vessel frequently as an English privateer, and English colors were hoisted. During her expedition to the Spanish main, it is stated, she obtained by these illegal means, and the sale of one third of her cargo, a very valuable return cargo, consisting * of valuable metals, plate, and specie.¹ It is submitted, [* 25] by the reasons in the case,

1st. That "there is no sufficient proof that the property of the cargo belonged lawfully to the claimants;

And 2dly, That the ship and cargo are subject to condemnation for resistance to search, by which many persons have been wounded, and other deplorable consequences have ensued."

Adams and Stephen, for the claimants. Notwithstanding the first reason assigned in the captor's case, no substantial objection has been offered as to the property of this vessel and cargo, in opposition

¹ 65 tons of copper, 65,000 dollars, 146 lbs. silver plate, 325 lbs. silver in pegs, and some gold.

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to the concurrent affidavits of the asserted owners and several of the crew. This part, therefore, of the case may be taken as proved. The remaining question is one of the most delicate nature, and upon your decision thereon depends the fate of an extremely valuable vessel and cargo. What has been urged upon the propriety of the intervention on the part of the Portuguese government on a claim of territory, is to us, and to the merits of this case, immaterial. It is one thing to attempt to invalidate a capture on a claim of territory, & another to say that, geographically speaking, the search was attempted within the neutral territory. The remissness or neglect of the neutral government cannot deprive a claimant of his rights, however such a government may be disposed to abandon its own. This vessel must necessarily be considered to be in the harbor of Macao, upon the faith of the protection afforded by the neutral territory, a protection [*26] founded *on the justest principles, and long sanctioned by the law of nations.

This vessel appears to have been engaged in what is commonly denominated the forced trade, which is not unusually carried on with similar circumstances of deceit and violence, because it is almost impossible it could be otherwise. For acts like these the parties therein engaged cannot, morally speaking, justify themselves; but it cannot be doubted that this trade, and its accompanying circumstances, are by most nations considered politically justifiable. In the present circumstances of European commerce, the most glaring deceit is daily practiced to facilitate the introduction of British manufactures. This, though of a much later date, must still be considered perfectly justifiable in a political point of view.

The right of visitation and search has ever been considered by neutrals as most invidious, and has been repeatedly the source of remonstrance and contention. But the exercise of this harsh right upon one neutral, within the territory and protection of another, is a grievance not to be endured. All authorities of earlier date have uniformly maintained the principle; and Mr. Jenkinson, whose opinions are very familiar to later times, pursuing the reasonings upon this subject in his work entitled "Conduct of Great Britain in respect to Neutral Nations," states as an incontrovertible truth, "within the precincts of the dominion of any government you are not at liberty to search the ships of any country." A most important object, therefore, with all nations must be the inviolability of the protection of their territory. The road of Macao is formed by the river Typa emptying itself into a narrow arm of the sea, on one side inclosed by

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the main land, on the other by the range called the Nine *Islands, something like Spithead, several parts of which [*27] also are full three miles distance from the contiguous lands; yet no one ever supposed Great Britain would endure that foreign vessels should be visited and searched by others while lying within such a road. Three witnesses on board allege her distance from the Portuguese territory was within three miles at farthest, and all on board agree she was within the territory of the settlement when the search was last attempted. To get rid of this positive swearing, reports are obtained from some ships' captains, to whom the vessel's papers, logs, &c., have been referred; which cannot but be considered much more vague and conjectural than any evidence afforded by persons upon the spot, who were eye-witnesses of the whole transaction. Yet even these reports establish the claimant's case. The Nine Islands must be considered part of the territory of Macao, as it forms part of the harbor or roads which are there said to be very indefinable, extending even ten miles from the town. The report adds, the prize was at anchor within five miles of Macao, that is higher up the river than the capturing vessel, therefore, within the roads, and the exercise of this right cannot be considered legal. The instructions were not found on board; but it is proved the master was required by them not to molest but avoid all other vessels, but to resist in case of attack, as was perfectly justifiable. The whole management of this unfortunate affair has been extremely objectionable. If suspicions were excited, as The Topaz lay in a land-locked place, and the town was provided with a fort and troops, had an application been made to the governor, representing the circumstances, and he had considered it necessary, the search might have taken place without bloodshed, or the violation of territory. But the *captor [*28] does not avail himself of the constituted authorities, but takes the whole affair into his own hands; pays first one visit, and then another, as appears by the petition of appeal, both which were peaceably submitted to; a third is attempted by the commander of the brig in person, with the brig's boats well manned and armed. This third visit assuming the appearance of an hostile boarding, the master was bound by his instructions to resist; but first endeavored, by making sail up the river, to get clear of the boats. This certainly is not the mode of exercising the right of visitation and search which courts in this country will be induced to uphold, upon a mere statement that some sailors had communicated information respecting these alleged piratical transactions on the Spanish main. The evidence of these deserters was extremely suspicious; and this gone-by transaction, however properly it might have been a subject for representation

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from the Spanish to the American government, was not one which called for the unsought interference of a British officer in the East Indies. If these depredations ever had been carried on partly under our flag, it was then properly a subject of representation from the British to the American government only, and by no means within the scope of his official duty. But another reason is furnished by one of these sailors, who states, that the last time the brig's boats went for wages due to some of his comrades, who had entered on board the brig. In this he is corroborated by the evidence of the surgeon of The Topaz, who adds, the master had refused to pay an arrear of wages due to one of them. British ships of war, it is well known, exercise this privilege of enforcing the payment of wages owing by the masters of British vessels to seamen entering [*29] on board his Majesty's ships, but by what right they may be privileged to act as collectors, and enforce the payment of such alleged debts by neutral masters, remains yet to be explained. If the right is not distinctly proved, resistance to it cannot fairly be visited by penal consequences, and the confiscation of this very valuable property. It is remarkable, too, that one witness states the brig's boats first fired on The Topaz's crew who were endeavoring to make their escape. The whole tenor of the evidence might lead to a suspicion that these violent means were resorted to in order to provoke a resistance which might in some sort justify the capture. The claimant appears to be in that situation that he may require the captor to propound the whole of the right by virtue of which he acted. We deny what is presumed by the captor, that the exercise of this right was legal. Upon this presumption alone depends the whole of the captor's case. The burden of proof rests, therefore, with him; but the fair presumption is against the party. The weakness of his case, and the doubtful evidence adduced, must throw proportionable strength into the scale with the claimant. If we can only bring the question to a state of doubt, that doubt should prevail in our favor. If still the court should be of opinion enough has been shown by the captor to substantiate part of his case, and that more accurate information as to the territorial limits of the settlement would be desirable, further proof may be required; the best mode of obtaining, which would probably be through the medium of the custom-house of Macao, to show how far the territory of the settlement is considered by the Portuguese government to extend.

[• 30] * *King's Advocate*, in reply, contended — That it was perfect competent to any British officer to detain even forcibly this vessel, on receiving intelligence that she had for a long time been

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engaged in a sort of piratical cruise, during which she had frequently assumed and thereby degraded the British flag. The resistance made originated in consciousness of guilt; and it was remarkable, one of the witnesses on board stated, that the master had avowed his intention to dispose of the vessel as a privateer at the Isle of France, which resolution was attributed by another to the apprehensions entertained lest the transactions on the South American coast might have been represented to the American government. In the case of *The Washington*, a vessel fitted out for a slave voyage, sailing from a port in this country, and amenable to the laws enacted relative to the slave trade, it was proved resistance had been made, and this court had condemned the vessel.¹ If the objection here *taken on the question of territory were available, and no [* 31] right of search allowed to the extent here contended for, it could never be known how far the belligerent's right might be safely exercised with respect to the seizure or detention of neutral vessels under suspicious circumstances. The first visit was merely for the purpose, it appeared, of examining the protections of the crew, not to search the vessel. This made no material alteration in the case. It had been erroneously assumed, that the right of visitation and search was confined to the high seas. This doctrine had been directly contradicted by their lordships' own rules. With respect to the proposed proof from Macao, it could not but be objectionable, as such could only with propriety be received in support of a claim of territory, which had never been made.

¹ *Washington*, Adams, Lords, June 3, 1809. A case of an American vessel bound from Liverpool to the coast of Africa on a slaving voyage, for account of several British proprietors, and from thence to the port of Charlestown for delivery. In the river of Congo she was boarded by *The Prince of Orange*, private British ship of war, and sent to Surinam for adjudication, for having on board contraband of war, which it appeared she had obtained from a British ship while on the coast of Africa. On the voyage to Surinam she was again taken possession of by the boats of his Majesty's ship *Epervier*, but on the captors proceeding to adjudication the ship and cargo were restored. An appeal was prosecuted before the lords commissioners, where the captors availed themselves of a fresh ground for condemnation, namely, that after she had been captured and sent towards a port for adjudication, the master and crew had attempted to rescue the vessel, and had actually taken measures for arming themselves, and compelling the prize-master and crew to quit the prize in an open boat. It appeared in evidence that the master had endeavored to obtain the key of the arm-chest for the purpose of arming the crew, and but for a discovery of their design, the rescue would have been attempted. Upon the ground of attempted rescue and unneutral conduct, their lordships, therefore, it would appear, pronounced for the appeal, and condemned the ship and cargo as lawful prize to the captors.

Stephen distinguished the resistance made from that proved in *The Washington*; which was a deliberate conspiracy to retake the ship after capture, and the crew were very fortunately prevented from turning the prize-master and his crew adrift into the Atlantic in an open boat.

The *King's Advocate* submitted— That the consequences of an attempt to rescue a prize, and an actual resistance to the exercise of a legal belligerent right were equally fatal.

SENTENCE — 2d May.

Pronounced against the appeal, and affirmed the sentence of the court below, condemning the ship and cargo.