

1781. *January 19.*Captain CHARLES NAPIER *against* ROBERT and JOHN BROWNING.

## No 2.

The exemption from being impressed, which is competent to masters and mates of trading vessels of 50 tons and upwards, does not extend to persons of that rank when employed in smuggling. See No 3. *infra.*

THE ship *Liberty*, of Folkstone, of the burden of 160 tons, was furnished with letters of marque against the French and Americans, in September 1778.

In winter 1779, she was seized on the eastern coast of Scotland, by three cutters belonging to the revenue, as having been employed in a smuggling trade. The master and mate, Robert and John Brownings, with the rest of the crew, were, by Captain Napier, regulating the impress service at Leith, impressed and carried on board a tender lying in the Frith of Forth.

A bill of suspension was presented for Robert and John Brownings, which was passed upon caution.

A general point of law was then argued, and decided, viz. whether the exemption from being impressed, competent to masters and mates of trading vessels of 50 tons and upwards, extends to persons of that rank, when employed in smuggling.

*Pleaded* for the suspenders; Smuggling is only a *malum prohibitum*. The delinquency consists solely in transgressing a statutory prohibition; and no punishment, not expressly prescribed by the statute itself, can with justice be inflicted upon the offenders. There is no law declaring that the commanding officers of smuggling vessels may be seized by the impress officers. The instructions given by the Lords of the Admiralty, contain no directions to that effect; and it would be productive of the worst consequences, if it were in the power of a regulating Captain, upon this pretence, without proof, trial, or conviction, to adjudge whom he pleased to the sea-service.

Special statute has been thought necessary to authorise Justices of Peace to adjudge for soldiers, persons convicted of running goods; and the mode of trying this offence is pointed out by the act 19th Geo. III. c. 50. By c. 69. of the same year, a form of trial is directed against persons guilty of obstructing the officers of the revenue, in seizing prohibited goods; and, it is declared lawful for Justices of Peace to adjudge such persons, upon conviction, to the sea or land-service.

Courts of law refuse to sustain action upon smuggling contracts; because doing otherwise would be giving the aid of justice to compel performance of illegal obligations. But the suspenders make no such demand. They only insist, that their rank in life exempts them from being impressed; and, that their having been concerned in smuggling, is not to deprive them of this immunity, any more than if they had been guilty of adultery or perjury; crimes of a deeper dye than smuggling, but which were never made the handle of obliging the committers to serve as common sailors on board the fleet.

There are few Captains in the service of the East India Company, or even in the King's ships, who do not bring home articles for which the duties have

not been paid, no gentleman returns from his travels without bringing sundry prohibited commodities along with him; but it was never heard that an impress officer could, on that account, adjudge them to the sea service.

No 21

*Answered* for the charger; There is no exemption from being impressed, competent in strict law, to sea-faring men of any denomination.

From a laudable attention to the interests of commerce, the Lords of the Admiralty generally instruct the Lieutenants on the regulation to pass masters and mates of vessels of 50 tons and upwards. But they may withhold or suspend such instructions; and the charger's directions are, 'to impress as many sea-faring men, and others described in the press-warrants, as he possibly can, from privateers, as well as other ships or vessels.'

Supposing such exception to be established by inveterate usage, there is no law nor expediency in extending it to smugglers in any rank. A superiority among them, is only a pre-eminence in defrauding the revenue and fair trader, and can never, in a court of law, be attended with beneficial consequences to its possessor.

The charger pretends to no judicial powers, nor to punish smugglers. He only contends, that smuggling can give no exemption, and that a sea-faring man, otherwise liable to be impressed, cannot be privileged, because he holds rank in a smuggling vessel.

The subject of the charger's department are, seamen and sea-faring men. Offenders against the revenue on land, and gentlemen returning from their travels fall not within that description. A Captain of a King's ship is already in the service; and, if the sole employment of an East India Captain were to defraud the revenue, he would be equally subject to the impress regulation, with the meanest seaman.

THE LORDS 'repelled the reasons of suspension, and found the letters orderly proceeded;' and to this judgment they adhered, upon advising a reclaiming petition and answers.

*N. B.* The Court were unanimously of opinion, that masters and mates in a ship of 50 tons, or upwards, employed in a lawful commerce, could not be impressed.

Reporter, *Lord Kennet.* Act. *Hay Campbell.* Alt. *Crosbie, Elphinston.* Clerk, *Tait.*  
G. *Fol. Dic. v. 3. p. 311.* Fac. Col. No 28. p. 32.

1782. February 6. BRODIE, ELLIS, and HERD *against* NAPIER.

BRODIE, ELLIS, and Herd, were impressed by Captain Napier's officers in circumstances precisely similar to those occurring in the case of Brownings, decided 19th January 1781, No 2. p. 6610. But when the legality of the impressment came to be discussed, their situation was very different. The Brownings

No 3.  
What extent  
of smuggling  
ought to have  
the above  
effect?