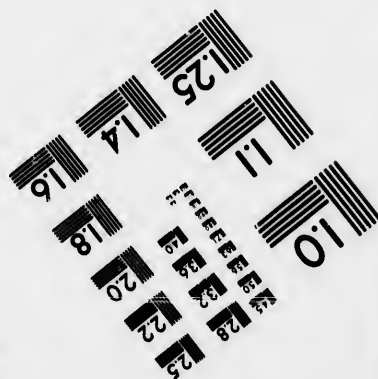
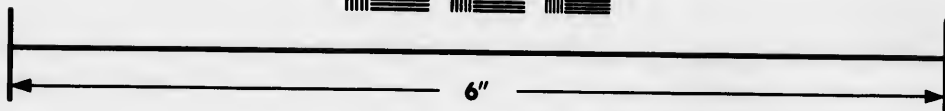
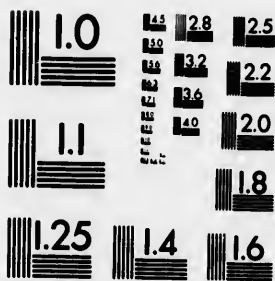


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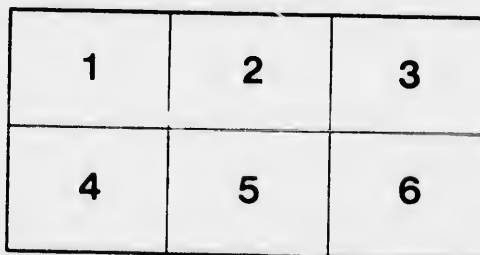
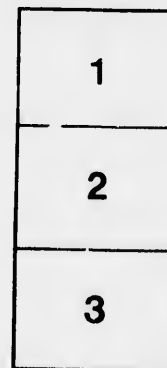
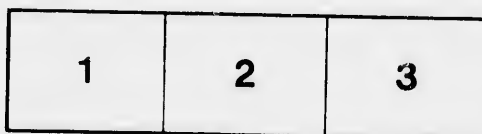
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THE  
SUBSTANCE OF A DECISION,  
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The Court of Vice-Admiralty at Halifax,  
UPON A PETITION FROM THE DEPUTY TO  
*The Treasurer of Greenwich Hospital,*  
AGAINST  
*The Prize-Agents of the Bermuda,*  
FOR CERTAIN UNCLAIMED SHARES OF PRIZE-MONEY DUE TO  
THE HOSPITAL,

Delivered on the 8th May, 1811.

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*Published at the suggestion of some of the Gentlemen of the Profession.*

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## THE SUBSTANCE OF A DECISION,

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[DR. CROKE.]

**T**HE question for the decision of the Court, arises upon a Petition, given in by Mr. Brenton Halliburton, the Deputy to the Treasurer of Greenwich Hospital, in which he states: "That three months have elapsed, since Messrs. Hartshorne and Boggs, as Agents for His Majesty's Ship Bermuda, have made a Distribution, according to law, of the Prize Ships Venus and Charles, and the Petitioner has called on them to pay over the unclaimed Shares to him, to be remitted to the Treasurer of the said Hospital.

"That in adjusting the accounts of the said Prize Vessels, it appears that Messrs. Hartshorne and Boggs claim to retain in their hands the sum of Forty-Five Pounds and Two Pence—being the share to which one Owen Cotton, who was the Captain's Clerk of His Majesty's said Ship, is entitled to receive of the neat proceeds of said Prizes. That the said Agents have produced to the Petitioner, as a voucher for retaining the same, an Attachment, issued pursuant to a Law of this Province, out of His Majesty's Supreme Court, whereby the property of the said Owen Cotton, as an

absent or absconding Debtor, has been attached in their hands.

“ That the Petitioner does not conceive the said Attachment as a voucher authorised by the Prize Act, and prays that they may be compelled, by the Process of this Court, to pay the same to the Petitioner, for the use of His Majesty’s said Hospital, as the Law directs.”

To this Petition an Answer, and Counter-Petition has been given by Lawrence Hartshorne and Thomas Boggs, as Agents for His Majesty’s Ship Bermuda : stating, “ That the Memorialists are Agents for His Majesty’s said Ship Bermuda, respecting two Prize Ships, the Venus and the Charles, that Owen Cotton, Clerk to the Captain of His Majesty’s said Ship, was entitled to the sum of £45 0 2 $\frac{1}{2}$  for his Share of said Prize Vessels which has been attached in the Petitioners hands by virtue of a Process issued out of His Majesty’s Supreme Court, under a Law of this Province, at the suit of William Duffus.

“ That upon the Petitioners settling the Accounts of said Prizes, with the Deputy to the Treasurer of Greenwich Hospital, he claims to receive for said Hospital, from your Petitioners, the said sum of Forty-Five Pounds Two Pence Three Farthings, as the unclaimed share of the said Owen Cotton, and refuses to receive from the Petitioners the said Attachment, as a voucher to justify them in the payment of said money to the Creditors of the said Owen Cotton. That by a recent decision of said Supreme Court, it has been determined that money can be attached in the Hands of Prize Agents, at the suit of the Creditors of the Person

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entitled to receive the same; and the said William Duffus, is proceeding against the Petitioners, to compel them to pay him the share of said Owen Cotton's Prize, in discharge of his debt, which he alleges to be due to him from the said Owen Cotton—The Petitioners therefore humbly pray that they may not be compelled to pay said money over to Greenwich Hospital; and that the said voucher may be received as sufficient to discharge them from the demand of the Deputy Treasurer of Greenwich Hospital."

It is admitted by Messrs. Hartshorne and Boggs, that, as Agents for the ship Bermuda, they have in their hands the sum demanded, being the share of certain Prizes to which Owen Cotton, Clerk to the Captain of the said Vessel, is entitled. They do not deny that three months have elapsed since they made distribution, and that they are therefore liable to be called upon to pay over the unclaimed Shares to the Deputy of Greenwich Hospital. But they claim to retain in their hands these Shares belonging to Owen Cotton, because they have been attached under a Law of this Province; and they have produced this attachment, as it is called, somewhat improperly, as a voucher for retaining the same, which the Deputy Treasurer refuses to receive as such, and prays a Monition to compel payment. The whole question is, therefore, reduced to a single point.

It is stated in the Answer, that "by a recent decision of the Supreme Court of this Province, it has been determined that money may be attached in the Hands of Prize Agents, at the suit of persons entitled to receive the same," and many of the

arguments of the Counsel at the Bar were founded upon the supposition of a case in which money had been paid under a Judgment of that Court : what might have been the legal effect of an actual payment made under that authority, upon such an application against the Agent, or against the Creditor who had received Prize-Money under it, the Court has not at present to inquire. It has only to determine upon the facts stated in the Petition and Answer, namely, that the money has been attached without any Judgment obtained, or Payment made, thereupon.

Neither has it to decide upon the validity of the Attachment in itself, as between the Creditor and the Agent. That is a question which affects other parties; and belongs to other Tribunals. The only question here is, how far it is a voucher to the accounts of the Agent to justify the retention of Cotton's share.

As a matter indeed collateral to the main point, as having formed the substance of the greater part of the arguments at the Bar, and as tending greatly to elucidate the principal question, it may not be improper to consider the nature and effects of the process itself which is thus set up as a bar to the claim.

It appears that Owen Cotton being indebted to William Duffus in the sum of £.12 15s. 4d. gave his note of hand for that sum, on the 9th September, 1809, upon which a declaration was filed, and served upon Messrs. Hartshorne & Boggs, as the Agents of Owen Cotton, alleged to be an absent or absconding debtor, according to the Law of the Province, in Trinity Term, 1810. It has

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not been, and indeed it cannot be, contended that the Agents would have been protected against the claim of the Hospital, in case of a voluntary payment made by them to the Creditor, either by the note of hand, or by any discharge which the Creditor could have given. Neither could they have been compelled to pay the Creditor, upon this note, by the common or ordinary statute law. The effect of the attachment, whatever it may be, is derived solely from the Law of the Province.

The Province, having a Legislature within itself, is competent to make Laws which are no doubt binding upon all persons, and upon all property, situated within the limits of its jurisdiction ; provided that they are applicable to the subject matter, and that they are not controlled by other considerations.

There are three points therefore to be enquired into.

1st. Whether an attachment lies under *the words* of the Act of the Province.

2dly. Whether such can be the true interpretation of the words of the Province Act, since the Act itself might then *be repugnant to the Prize Act* and therefore so far illegal, and void.

3dly. Notwithstanding the validity of the attachment in itself, on both these grounds, whether it is a voucher to the Agent, under the Prize Act, as against Greenwich Hospital.\*

1. The Law of the Province gives this declaration, or attachment, against *the goods, effects, or credits, of any person absconding or absent out of the Province, in the hands of his attorney, factor, agent, or trustee.*

\* 1 Geo. III. cap. 8. See the end...

The subject of this application is prize money, in the hands of a prize agent; a species of property of a very peculiar nature, inasmuch as it is created, and laid under many restrictions, by the King's Proclamation, and by various Acts of Parliament.

By the Laws of Great-Britain, all prize belongs originally to the King, as a part of the ancient rights of the Crown, and no subject can be intitled to it but by grant from His Majesty. Grants of Prize, like all other Royal Grants, are to be construed strictly against the Grantee, and cannot be extended by any construction beyond the plain import of the express words. Such grantees are captors held to be in law, and neither the confirmation of the grant by Act of Parliament, or the granting of the further or reversionary right remaining in the Crown to other subjects, have taken them out of the general rule. These principles are incontrovertible, and they have formed the basis of most of the decisions which are to be found relating to droits of Admiralty.\*

If then the King, in his Proclamation, and by the Acts of Parliament, has not granted prize money absolutely, but under certain restrictions, those restrictions are limitations which confine and circumscribe the grant, and the right cannot by any construction be extended beyond their express terms. *Within* those restrictions the captors acquire a perfect right to prize, *beyond* those restrictions they acquire no right at all. Where the captors do not comply with the conditions,

\* Rebecca, Thompson, 1 Rob. 230. Geitruyda, 2. 219. Marie Francaus 6. 297.

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their right does not vest, and the interest remains in the Crown, or with those to whom it may have been transferred.

Let us look into the terms of the grant. The Proclamation orders *the neat produce of all prizes to be for the entire benefit of the officers and seamen.* If it stopped here it would be an absolute grant ; but various restrictions are afterwards introduced, such as that they shall be on board at the time of capture, and that they shall not be entitled until after a final adjudication.—The Prize Act adds many others ; for all the regulations therein contained, as far as they apply to the captors themselves, are the conditions of the grant.

So, though prize money is given to the captors, the mode in which they are to demand it, and to receive payment, is pointed out ; and this forms another restriction, or limitation, of the grant. By 49. Geo. III. C. 123. Sect. 13. the last Act upon that subject : “ All shares of Prize due and to become due to Petty Officers and Seamen shall be paid by the Agent or the Treasurer of Greenwich Hospital to the person intitled thereto, or to any other person authorized to receive the same, by any order in the form or to the effect set forth in the schedule annexed, which order shall specify the name of the prize, or give such description thereof as shall be satisfactory to the person in whose possession the prize money shall be, and the name of the ship on board of which the person making the order was serving.—He must procure likewise a certificate in the form annexed, containing a full description of his per-  
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son, which must be signed by the Captain, and one other signing Officer of the ship in which he shall then be serving: If discharged from the service; the certificate must be signed by different persons there mentioned as the case may be, which certificate shall be written or printed on the same paper containing such order, and which order and certificate being presented together, and the said order being paid, such order and certificate shall remain with the Agent paying the same: Provided always, that every such order shall be revokeable at pleasure by the person making the same—Provided also, that no such order shall be valid if the party shall be then residing within the distance of five miles from the place of payment."

Two persons are here pointed out for the Agent to make his payments to, 1st. *the person intitled to the prize money*; that is, *the seaman himself*, and to prove his identity, and that he was on board, two of the conditions, the 59th section of the 45th of the King directs that the Captain shall send to the Agent a list of the persons intitled, with their names, ages, and the description of their persons. Under these words it cannot be contended that any man can demand payment but the very individual, so ascertained, and so personally described—

2. The only other person pointed out is *the person who is authorised by an order in the form prescribed*.

The question then is, whether these words of the Acts are *exclusive* of all other modes of payment. It was admitted by the Counsel against the petition that if the Act had contained negative words

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no attachment would have lain. But if they are in themselves exclusive, they necessarily imply a negative, and the same inference would follow.

The words of a statute are to be interpreted, by the rules of law, according to their usual and known signification, and by the reason and spirit of the Act itself. Now this is a *disjunctive proposition*, and all such are necessarily exclusive, as it has been observed by all writers upon the subjects of Grammar and Logic, not from any technical refinements, but from common usage: Such propositions are said not to be correct, if there are any other cases not comprehended under them. As in the *indicative* form, the sentence, *it is day or night*, is said not to be true because it might be twilight, which is neither the one or the other. So in the *imperative* form. If I order a servant to go to Sackville, or to Windsor, it is no authority to him to go to Annapolis. His going thither is not warranted by the order. So the words of the Act: "All shares shall be paid to the person intitled, or the person authorized by the order prescribed," necessarily implies that it shall not be paid to any other person, and affords no authority for any other payment. The word "*all*" renders it equally exclusive, for if *all* the shares are directed to be paid to A. or B. *none* can be paid elsewhere. But the reason of the thing shews evidently that the words are exclusive, because otherwise the regulations would be totally useless, if they were required to be adopted under one form of transfer, yet other modes, in which they might be neglected, were equally valid.

It has been a great object with the Legislature to

protect sailors from fraud and imposition by restricting the mode of transfer. Each successive Prize Act has gone beyond its predecessors in multiplying forms and precautions. Under the Act of the 26 G. III. the directions were that "no letter of attorney or will made by any Petty Officer or Sailor shall be good unless made revokeable, signed before, and attested by the Captain, specifying the name of the ship," and other particulars there mentioned. Upon this Act a case was decided in the Court of Common Pleas, *Macdonald v. Pasley*, Bos. & Pul. 1. 161. An action was brought by Macdonald a sailor against Pasley the Prize Agent for the whole of the prize money due to him. The Agent had paid a part of it to one Grant, as indorsee of an order given by Macdonald in favour of one Abraham Joseph upon Pasley for his prize money. On shewing cause against a rule, why, on payment of what remained unpaid to Grant to such persons as the Court should appoint, all further proceedings should be staid, it was contended for the plaintiff, that the payments to Grant could not discharge the debt, since the order did not comply with the directions of the Act, and that if it was necessary to subject a letter of attorney to the restrictions of that Act, *à fortiori* it was so with respect to an order which was a less solemn instrument. The Court discharged the rule, and Chief Justice Eyre said that, there was a great deal of colour for the argument which had been used respecting the nature of the authority under which these payments had been made. *If the Legislature thought fit to put a power of attorney under particular regulations, there is great*

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*reason to suppose that it was meant, that the Agent could not be discharged by any thing less than a power of attorney."* Now in this old Act there were no words to direct how the money should be paid, nor was it couched in any negative form, yet it was held that the restrictions laid upon one form of instrument, must, *vi materia*, and from the reason of the Act, be considered as exclusive of every other instrument. How much stronger is that conclusion under the present Prize Acts where exclusive words are actually employed ?

Such exclusive restrictions and limitations then as to the mode in which prize money is to be paid, having been introduced into his Majesty's grant under the Act of Parliament, the captors complying with those conditions have a vested interest, which has frequently been enforced in the Courts of Common Law, but if the conditions are not complied with, the grant cannot take effect, nor does any right whatever vest under it. If the sailor demands his money in person, or by such an order, it vests : if he does not he has no interest whatever. The right to prize, originally in the Crown, not being divested out of it but according to the terms of the grant, still remains in the Crown, or in the grantee of such residuary interest.

This is Greenwich Hospital to whom the residuary interest is given by the same Acts of Parliament. By sect. 87, every Agent within four months shall remit all *unclaimed* balances, and shares, and all shares of run men to the Treasurer of Greenwich Hospital. All shares are unclaimed which are not claimed according to the Act, and

the interest of the Hospital is real, and not merely, through parly, for the benefit of the individual captors. It has, first, a beneficial possession, from the interest of the shares which are invested in Government securities, and it has the ultimate property if they are not legally demanded, as it has originally in run men's shares, forming together a fund for the benefit of the Hospital.

In the case of Home against Lord Cambden, 2 H. Black. 533, Lord Chief Justice Eyre said, that the different sections which give powers and impose duties upon Agents, all respect sales in order to distribution, and *the interests of Greenwich Hospital* arising out of those sales. So that the Hospital is considered as having an interest from the beginning.

Here *then is subject matter for the Law of the Province to act upon.* Prize money is neither the goods, effects, or credits of the seaman, unless he demands it in person, or by such a power of attorney as is described. Not having so demanded it, it could not be liable to an attachment under that description, and the time having now expired, without such legal demand, the interest of Greenwich Hospital becomes vested.

But it was said by Council, that the seaman *might maintain an action* against the agent, at the time the attachment issued, and therefore that the creditor representing his interests may maintain an action also. Now I doubt much whether the sailor himself could have brought an action for his prize money, until after he had demanded it in person, for his personal appearance, to identify him with the person described in the prize list, is

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necessary under the Act; and, as the rules of good pleading prove the law, a demand by the claimant and a refusal by the Agent is always pleaded as a foundation for the action in suits in the Common Law Courts against the Prize Agent, as appears in the case of *Wemyss v Linzee*, in Douglas 310. If the party himself could not have brought an action the argument fails as to the creditor. His appearance in person could not have satisfied the intention of the Act.

If the party had been here he certainly could not have *transferred* or *assigned* his right to prize money to the creditor in satisfaction of his debt, unless according to the regulations of the Act. Nay more, if the party had been here himself at the time the attachment issued he could not have assigned it at all, for no order whatever given by him here would then have been valid to authorise the receipt of prize money, by the express words of the Prize Act. Does the Act of the Province then make a transfer of rights to the creditor which the party himself could not have done?

The attachment is besides an order to the Agent to detain the money, and not pay it over to Greenwich Hospital. But the party himself could make no such order. That privilege is confined to warrant officers.\*

Further as to this supposed *representation*; of the two modes of payment, the first is personal to the party, I do not see how this can be transferred to another, and the other regulations are directed to this very point, namely to ascertain how the sailor shall be represented. One only

\* 45 Geo. III. C. 72, Sect. 33.

mode of constituting a representation is pointed out, by letter of attorney in the form prescribed. If these restrictions are exclusive they must annihilate every other kind of representation, (except that of executors and administrators which is admitted and put under regulations,) whether that representation arises by Common Law, by Statute, or by Act of the Province.

This property likewise is protected upon another ground.—It was admitted by the Counsel for the Agents, that money could not be attached if under the custody of the law, and whilst a suit is depending in the King's Court. Several cases were cited to this effect. In particular the case of Coppel against Smith, and Grant against Howding, 4. T. R. 312. Money in one case attached, and, in the other, paid upon a judgment upon an attachment, were adjudged to be paid again, because the money had been directed to be paid by the Court of King's Bench and therefore was a judicial act. Yet it had not been attached in one case until after the master's allocatur, nor in the other until the day arrived for payment, so that the interest was completely vested, and nothing remained for the Court to decide.

Prize money is under the custody of the King's Court of Admiralty until it is actually demanded or paid to the parties. Until that moment the prize cause is still depending. This is evident because until that time the Court is open to any application from persons interested, and can make order thereupon, without instituting a fresh suit, which must necessarily be done if the original cause was out of Court. Until payment the

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judgment given is not effected and satisfied. Till that time all the parties are under the controul of the Court. How many regulations are there in the Act relating to the conduct of the Agents *after final judgment*, and to the time of actual payment, all which it is the duty of the Court of Admiralty, by the directions of the Prize Act to enforce? Here after final judgment the agent is to register his Power of Attorney, to exhibit his Accounts of Sales, in some cases to bring the proceeds into the registry, or to invest them under the directions of the Court. By the orders of this Court he is to make distribution, here he is to make up and verify his final accounts as the Court shall require, and under the direction of the Court to remit all unclaimed shares to Greenwich Hospital,—If property so situated is not under the custody of the King's Court of Admiralty until actual payment I know not what property can be considered as in that situation, nor do I know any case in which the Courts of Law have been held even to have concurrent jurisdiction until the property is become absolute and vested by the Prize Act, either by a demand in person, or by an acknowledged Power of Attorney, neither of which have taken place in the present case.

2. As the Sailor has no attachable goods or effects, so I think there is considerable strength in another ground which was so fully argued by his Majesty's Advocate, namely, that a Prize Agent is not either an Attorney, Factor, Agent, or Trustee, as intended and described by the Act. The more general words "*in whose hands or possession the same may be found*" in the first clause, being

confined to such goods or effects as are exposed to view, or can be come at.

They are indeed called Agents, and are named by the parties, but they are certainly very different from the persons usually understood under that denomination. They are in reality appointed by the Prize Act for certain special purposes. They are rather officers of the Court than agents of the parties. To the Court of Admiralty they give security, and that not a security in each particular case, but a general security for the due performance of their general duties. They are under the controul and direction of the Court as of its proper authority, independent of any act, or motion of the Captors. The parties have no controul over the property in their hands, they cannot take it out, or direct the disposal of it, but according to the restrictions of the Act. Nor can they give any authority to him to retain it in his hands, after the expiration of the time limited. And they are not Agents for the Captors only, but for all other persons interested—they are Agents as well for Greenwich Hospital as for the Sailors.

3. I think there is some weight likewise in the observation made by the Solicitor General, that a sailor, coming here, for a short time, in His Majesty's Service, can scarcely be the person intended by the Act, under the description of *an absent or absconding debtor*—To be absent, or to abscond, implies a previous residence, and how can a person be considered as a resident who accidentally visits this harbour in one of His Majesty's Ships, and has nothing like a domicile within the Province?

In the cases of *Sill v. Boswick*, and *Hunter v.*

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Potts, which were cited at the Bar, Provincial Laws were held not to have a complete operation for the benefit of persons who went into a Colony merely to take advantage of those Laws, how then shall such a temporary and involuntary visit give them effect to any person's detriment ?

2. I have hitherto confined my observations to the words of the Province Act itself, and have shewn that it does not apply to Prize-Money, because it is not the property there described, and because neither the Prize-Agent, or the Sailor himself, are the persons against whom it is directed.

I proceed now to another point, that such cannot be the true interpretation of the Province Act, because, if it were, the Act itself would be repugnant to the Prize Acts, since enacted, and therefore so far illegal and void.

It is an admitted principle of Law, and was stated as such by Lord Mansfield,\* that the Colonies take all the Common and Statute Law of England, which is applicable to their state and condition. The Regulations in the Prize Act extend expressly to the Colonies, and since all the right which Captors have in Prize is created by them, in conjunction with the Proclamation, these title deeds must be taken with all their limitations. Either the whole is applicable, or no part. It cannot be said we will take the Proclamation and the Statutes as they give prize to the Captors, but we will reject the conditions under which it is given. By the 7 and 8 Wm. III. C. 22, Sect. 9, "All Laws, in any of the Plantations, which are repugnant to any Laws to be made in Great-Britain, so far as such

\* *Lindo v. Rodney--Douglas*

Law shall relate to, and mention, the said Plantations, are illegal, null and void, to all intents and purposes." If then the Province Law is repugnant to the restrictions imposed by the British Act, it is so far illegal and void. Considering it in another point of view, and giving it every possible validity, still the British Act must be allowed to be of equal authority, and then the Province Act must be taken to be substantially repealed, so far as it is repugnant to the British Act, which is of a later date, upon the universal maxim, quod leges posteriores priores contrarias abrogant.

If the Province Act is to be construed as is contended, and an attachment lies in this case, it is evidently repugnant to the Prize Act. That Act directs the money to be paid to the party in person, or to an Attorney, in a certain mode appointed; and if not so demanded and paid, that it shall go to Greenwich Hospital; the Act of the Province would direct, that although it had not been so demanded, yet it should not go to Greenwich Hospital, but to any creditor who chose to attach it, and that noble charity would be deprived of a residuary interest vested in it by the same Statutes under which the Captors themselves derive their right of property. The Prize Act limits the right of transfer to one form of an order; the Province Act would extend it to promissory notes, to common bills of exchange, nay to every instrument and mode by which credit may be given, and debts contracted. If such is the true construction of the Provincial Act, a Statute may be good so far as it gives an interest, but void so far as it restricts it; a Grant made by the Crown in 1805, can be extended be-



yond its exprefs terms, and plain conditions, by a Provincial Aét, passed in 1761, before the property itself was created; and an Aét of Parliament, extending to the Province, passed in the 45th year of the King, can be virtually repealed in some of its most material clauses, by an Aét of the Province, passed in the first year of the same reign.

This repugnancy is not only to the exprefs words of the Aét, but still more against its spirit and intention. These restrictions were introduced partly to discourage desertion, and partly for the purpose of preventing sailors from being defrauded of their prize-money, by their executing powers of attorney, and other instruments, improvidently, and thereby transferring not only their present but their future interest—With respect to the first, the Prize List indeed ascertained, they were not run men at the time of delivery, but as their share was equally forfeited by a subsequent desertion, the order was required to be signed by the Captain, or must contain a certificate of the sailor's discharge. If an attachment can be sued out upon any instrument, executed without any of these precautions, or for any debt, there is no security than run men may not receive their shares, to the encouragement of desertion, and the injury of the Naval Service. Frauds were often practised by impostors who personated sailors, and received their prize-money. This was guarded against by compelling them to appear in person to be checked with the Prize List, or to be certified by their Captain. The same precautions were a protection against forgeries, and frauds in obtaining orders, and the villainies practised upon unthinking sailors, in cheating them by

anticipation of their future prize-money, whose value was unknown, was in some measure prevented by the necessity of specifying the prizes, and other circumstances.

Such was the series of well-considered regulations, adopted gradually, as experience suggested their necessity, for their wise and benevolent purposes. But if an attachment can be sued out by any creditor, real or pretended, upon any instrument, or security, or for any debt whatever, the whole fabric falls to the ground. It is said that the Supreme Court will be extremely cautious, and will so shape its proceedings, as to guard against fraud. Be it so, it is the duty of every Court of Justice. But it has not means equal to those prescribed by the Act. All its precautions are ineffectual, in comparison to those of the Prize Act. Under the Prize Act such are the regulations that every point must be proved, and in a mode which scarcely leaves a possibility of fraud, to the satisfaction of the party who has to pay the money. Unless those regulations are pursued, the Agent is not discharged, and it is therefore made his interest to see that they are observed *bonâ fide*. But if prize-money can be attached in his hands, and such process, or judgment upon it, is a legal discharge, he has no interest in resisting it. He may indeed be compelled to appear, but cold and lifeless will be the defence, where victory or defeat are equally indifferent. It is said the party may come in under the Province Law, and set aside the judgment within three years, but how is a poor sailor, who may never revisit these shores, to avail himself of an expensive proceeding at Law to recover a poor pittance of a few

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pounds, and this right of a re-hearing does not extend to Greenwich Hospital, since it is confined by the Act to the debtor himself. Since then the proceedings in the Provincial Courts cannot afford an equal security against the mischiefs intended to be remedied, the process of attachment would set aside all the excellent regulations of the Prize Act, without substituting an equivalent in their place, and would leave His Majesty's Service, the Sailor, the Agent, and the Hospital, naked, and exposed to every species of fraud and imposition. But, after all, the question is not whether the precautions used by the Provincial Courts are equally efficacious with those of the Prize Act, but whether a Law of the Province, made long before, is to be so interpreted as to make it abolish those regulations, and to leave it to the Courts of Law to substitute others in their place.

If an attachment lies, it overturns all those provisions which are so advantageous to the seaman. On the other hand it is only an *additional remedy to the creditor*. It is an established maxim, *quod lex citius tolerere vult privatum damnum, quam publicum malum*. It is better that a creditor, who had other means of recovering his debt, having neglected to use those means, should be deprived of this further remedy, (accumulated remedies for the benefit of those who have neglected to use due legal diligence, not being favored in Law,) than that a door should be open to fraud and imposition, that a class of men, to whose bravery and exertions the British Empire, and the Colonies in particular, owe their existence and independence, should be liable to be robbed of the just reward of their me-

ritorious services, to the great injury of the Public; and that the British Legislature should be defeated in an important object, which has occupied so much of its care and attention.

With every deference to the very respectable Gentlemen <sup>wh.</sup> who preide in the Provincial Courts, after the most diligent examination, and the maturest deliberation which I have been able to apply to this subject, for the reasons which I have stated, I cannot be convinced that prize-money can legally be attached, under the Act of the Province, in the hands of Prize Agents, and that a decision to the contrary can be maintained in Law. Diffident as I must naturally feel in these sentiments, from their not coinciding with, what I understand to be, the opinion of those respectable Gentlemen, I cannot but think that they receive some support from an argument which is not unfrequent in the mouths of some of the most learned Sages of the Law, against the legality of any actions, or other legal proceedings—*that they are not founded in precedent.* The Law of the Province has now been in force half a century; many and frequent have been the complaints of losses by the debts of sailors; prize money to an immense amount has been from time here deposited, and yet neither the keenest of creditors, or the ingenuity of the Gentlemen of the Profession, have, till very lately, discovered this mode of proceeding. As a new and unprecedented practice is at least fairly open to some discussion.

3. But however valid the attachment may be as between the parties, it does not follow that it is binding upon Greenwich Hospital. It is res

inter alius acta quæ aliis nocere non debet. The Hospital is not a party in, or privy to, that suit. It cannot intervene in it, and it is excluded from a re-hearing by the Province Act, which limits that privilege to the absent or absconding debtor.

If an attachment, taken out by a Creditor against the Agent, would be a bar to the claim of the Hospital, it would be deprived of its rights without an opportunity of defence. If an attachment, not followed up by a judgment, would be a bar, Agents, by fraudulently procuring process to be sued out, by fictitious or small creditors, may retain the money in their own hands; as in this case, where the demand of the Creditor is much less than the money in the hands of the Agent.

2. By the words of the Province Act, this process, and judgment of Law upon it, are declared to be a full acquittal and discharge of the Agent from all demands, by his principal, his executors, or administrators; but it is not declared to be a discharge of the Agent against the demands of any other persons, and of course not against the claims of Greenwich Hospital.

3. The extensive view which I have thought it necessary to take, of the validity and effects of the attachment, and which has led me into an examination of the nature of prize property, and of His Majesty's Proclamation, and the Prize Acts, and the inferences which I have deduced from them, strongly prove that the directions of the Act to Agents, respecting their payments and accounts, must be literally adhered to. If those di-

rections are decisive, I know of no authority in this Court which can set them aside, or deviate from their obvious meaning. This Court cannot admit this attachment as a voucher, if it is not allowed by the Act.

The words of the Prize Act are these: (45 Geo. III. c. 72, § 84) "And be it further enacted, That no deduction shall be allowed, *on any account*, in the payments of unclaimed or forfeited shares and balances paid over to the Treasurer of Greenwich Hospital, or his Deputy, for any sums not appearing, upon the Prize List of Distribution, to have been paid thereon and acknowledged, unless satisfactory vouchers from the Parties, or their lawful Attorney, are be produced for the same."

To know what are satisfactory vouchers from the Parties, or from their lawful Attorney, we must look at the other parts of the Acts. The only voucher from the party directed by the Act, except in the case of a personal demand, the only mode by which a lawful Attorney can be appointed, is an order in the form there directed. No other vouchers are authorised under the Prize Acts. Since then the Note of Hand given by Owen Cotton, and the declaration founded upon it, do not come under that description, since they are neither vouchers for the sums appearing upon the Prize List of Distribution to have been paid thereon and acknowledged, since they are not such satisfactory vouchers from the Parties, or their lawful Attornies, as are legalised by the Act, they are excluded by the exprets words of this section, and no deduction can be allowed on that account. So imperative are the words of the Act, and so clear in their

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meaning, that nothing is left to the discretion of the Court; in the allowance of these Accounts it has little more than a ministerial power.

I decree a Moution against Messrs. Hartthorne and Boggs, as Agents for His Majesty's Ship Bermuda, to pay the sum of Forty-Five Pounds and Two-Pence Three Farthings, being Owen Cotton's Share of certain Prizes, to the Petitioner, as Deputy to the Treasurer of Greenwich Hospital, as prayed by the said Deputy-Treasurer.

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An ACT to enable Creditors to receive their just Debts, out of the Effects of their Absent or Absconding Debtors. [1st Geo. III. c. 8, § 1. 2, 7, 8.]

**B**E it enacted, by the Honorable the Commander in Chief, the Council, and Assembly. That it shall and may be lawful for any person entitled to any action for any debts, dues or demands whatsoever, against any person absconding or absent out of this Province, to cause the goods and estate of such absconding or absent person to be attached, in whose hands or possession soever the same are, or may be found: And the attaching of any part thereof shall secure and make the whole, that is in such person's hands, liable in the law to respond to the judgment to be recovered upon such process, if so much there be, and no further, and shall be subjected to be taken in execution for satisfaction thereof, or so far as the value thereof will extend, and the person in whose hands they are shall expose them accordingly.

II. *And be it further enacted,* That were no goods or effects of such absent or absconding person in the hands of his attorney, factor, agent, or trustee, shall be exposed to view, or can become as to be attached, it shall and may be lawful to and for any person entitled to any such action as aforesaid, to file a declaration against such absent or absconding person, in the Clerk's office of the Inferior Court of Common Pleas in the same county where such factor, agent or trustee lives, therein particularly setting forth his debt and damage, how and for what cause it arises; and to cause the attorney, factor, agent or trustee, of such absent or absconding person, to be served with a summons out of the office, annexed to the said declaration, fourteen days before the sitting of the Court, for his appearance at such Court; which

being July served, and return thereof made under the officer's hand, shall be sufficient in the law to bring forward a trial, without other or further summons, unless the principal be an inhabitant, or hath for sometime had his residence within this Province, in which case a like summons with an attested copy of the declaration annexed, shall also be left at his dwelling house, lodging or place of his last and usual abode, fourteen days before the sitting of the Court; and such attorney, factor, agent, or trustee, upon his desire, shall be admitted to defend the suit on behalf of his principal throughout the course of the law, and an imparlance shall be granted of course at two terms successively, that he may have an opportunity to notify his principal thereof; and at the third term, without special matter alledged and allowed in bar, abatement, or further continuance, the cause shall peremptorily come to trial; and if judgment be rendered for the plaintiff, all the goods, effects or credits of such absent or absconding person, in the hands of such attorney, factor, agent or trustee, which were in his hands at the time of his being served with the summons and declaration aforesaid, to the value of such judgment, (if so much there be) shall be liable and subjected to the execution granted upon such judgment, for or towards satisfying the same; and from the time of serving the summons as aforesaid, shall be liable and secured in the law, in his hands to answer the same, and may not be otherwise disposed of or converted.

VII. *And be it further enacted*, That the goods, effects, or credits, of any absent or absconding person, so taken as aforesaid by process and judgment of law, out of the hands of his attorney, factor, agent, or trustee, by any of his creditors, shall fully acquit and for ever discharge such attorney, factor, agent or trustee, his executors, or administrators; of, from and against all actions and suits, damages, payments, and demands whatsoever, to be asked, commenced, had, claimed, or brought by his principal, his executors, or administrators, of and for the same; and if any attorney, factor, agent, or trustee, shall be molested, troubled, or sued by his principal for any thing by him done in pursuance of this Act, he may plead the general issue, and give this Act in evidence.

VIII. *Provided nevertheless, and be it further enacted*, That any absent or absconding person, against whom judgment shall be recovered as aforesaid, shall be entitled to a re-hearing of such cause at any time within three years after such judgment; and the plaintiff in such action, before any execution shall issue on such judgment, shall give sufficient security to the satisfaction of the Court, for the re-payment of all such monies as may be levied by virtue of such execution, in case the said judgment should be reversed on such re-hearing as aforesaid,



