

*Locke v. United States* and the Definition of Probable Cause in U.S. Civil Forfeiture Proceedings

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**Abstract:** United States civil forfeiture laws are rooted in admiralty *in rem* forfeiture proceedings that go back to mid-1700s English customs law, and a statute called the Act of Frauds. The procedure was born of the necessity of international marine trade. Similarly, when it came to using *in rem* seizure to enforce the customs laws, the Crown used a burden shifting presumption that was also born of necessity. Vessel owners were required to come forward and exculpate their vessel once the Crown showed probable cause of a violation. In *Locke v. United States*, Justice Marshall upheld that burden shifting presumption and the definition of probable cause in the admiralty *in rem* seizure context as a showing of reasonable suspicion, something less than a *prima facie* case. Sixty years later, however, the United States courts would begin to uphold uses of *in rem* forfeiture outside of the context of customs law, and today, statutory forfeiture provisions are constitutional scholars question whether or not civil forfeiture proceedings, having entered the law in the narrow context of admiralty *in rem* forfeiture proceedings, do an end run around the Fourth Amendment and Due Process. The *Locke* Court never heard or considered any constitutional argument.

**Discipline:** Admiralty, United States History, Civil Forfeiture

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## I. Introduction

In a 1987 Supreme Court case styled *Maryland v. Garrison*, defendant Garrison brought a Fourth Amendment challenge to a warrant obtained by Baltimore police officers to search the third floor of his apartment building located at 2036 Park Avenue. The officers intended to search the apartment of a different tenant, McWebb, but failing to realize that the third floor of Garrison's building was divided into two units, they searched Garrison's unit instead. They found drugs and cash in violation of Maryland's Controlled Substances Act. The Supreme Court ultimately upheld the search – since the officer's warrant said “3rd floor,” they had reasonably relied on its text – but were called upon to examine the limits of a warrant's “particularity” under the Fourth Amendment.<sup>1</sup>

*Garrison*, argued almost 200 years later, connects with another Supreme Court case originating in Baltimore, *Locke v. United States*, 11 U.S. (7 Cranch) 339 (1813). While far from the American drug war that *Garrison* deals with, the historical context of *Locke* involves a kind of prohibition as well. *Locke* began as an admiralty *in rem* forfeiture under American customs law. American customs law was modeled on the British customs law imposed on the colonies prior to the Revolutionary War. The Crown used writs of assistance, essentially broad search warrants, to enforce the Navigation Acts, a series of customs laws for its colonies, which progressed in complexity and severity in the decades preceding the Revolutionary War. The experience with the writs of assistance prompted the early Americans to take care to insert the “particularity” requirement into the Fourth Amendment that *Garrison* dealt with 200 years later. Searches conducted under authority of the writs of assistance could lead to seizures of property using the *in rem* forfeiture mechanism.

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<sup>1</sup> 480 U.S. 79.

Indeed, generally speaking, the Crown's efforts to enforce its customs laws and trade controls in the colonies played a central role in the conflict leading to the Revolution. It may have been a little surprising to some, then, that after the Revolution the new republic adopted a similar system of customs laws, allowing for *in rem* forfeiture and adopting another feature of British law, the shifting of the burden of proof to the claimant if the government could show probable cause of suspecting a violation of the customs law. The *Locke* case is about this burden shifting provision. *Locke*, then, is very much a case about searches and seizures, and the standards imposed on the agents of government who have the authority and duty to carry them out.

In modern times, much commentary has been written about the constitutionality of the use of the *in rem* forfeiture procedure in the American drug war, a war that has proved to be so difficult as to require the American government to stretch to its financial and constitutional limits to continue to fight it. Before the modern war on drugs, or the Prohibition era, the trade embargo implemented as an effort to stave off the War of 1812 was another kind of "zero tolerance policy" that the United States government struggled to enforce, through the customs service. Having entered our legal system literally through the ports, and having found footing in early cases like *Locke*, the use of *in rem* forfeiture has spread throughout our legal system. Today there are well over 100 statutes that authorize the use of the admiralty *in rem* forfeiture action to condemn and seize property. The claimant-appellant in *Locke*, however, did not make any constitutional argument.

*Locke* specifically stands for a weakened definition of probable cause in the context of *in rem* forfeiture of a vessel seized for a violation of the customs laws, which would be enough to shift the burden of proof to the claimant of the vessel, should one come forward. The *Locke* court held that probable cause in this context means only reasonable suspicion of a violation. This

standard, and the burden shifting provision that depends upon it, survive to this day. The question remains whether this definition, born of necessity in enforcing trade regulations in an era of booming trade, opportunistic merchants, and limited resources at the customs house, comports with our modern understanding of due process.

## **II. The English Colonial Customs Service**

In the 17<sup>th</sup> century, Britain experienced increased prosperity from a rising merchant class trading not only with Europe but with the British colonies. Soon, however, a colonial merchant class was formed, too, and the colonists did not always find trade with England to be the most lucrative or desirable. Under a mercantilist worldview, Britain believed that there was a fixed supply of economic value. The Crown therefore realized that it should undertake to apply mercantile principles throughout its colonial empire, directing the flow of trade so that more of the wealth of the colonies would stay with Britain, and Britain's manufacturing and merchant classes could further grow.<sup>2</sup>

As early as 1621 the Privy Council passed legislation restricting colonial trade, aimed at the thriving tobacco trade in the Virginia colony.<sup>3</sup> By 1651 the first broad Navigation Act was passed, affecting all of the colonies, and containing one simple regulation: only British ships manned by British subjects would be permitted to carry raw materials from the colonies to the mainland, and foreign ships would only be permitted to go to the colonies only if the goods and the ship carrying them came from the same foreign port.<sup>4</sup> This early restrictions, however, left ample room for colonists to continue to trade relatively freely with the world, and with each other.

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<sup>2</sup> Thomas C. Barrow, Trade and Empire: The British Customs Service in Colonial America, 1660-1775 4 (1967).

<sup>3</sup> *Id.*

<sup>4</sup> Barrow, *supra* note 2, at 4-5.

## Early Colonial Smuggling

In 1660, a much more broadly and strongly worded Navigation Act was passed. The Act of 1660 limited trade in certain enumerated goods produced in the colonies, goods of particular importance to the success of the empire like tobacco and coffee, to British ports or ports of British territories. Under the Act of 1660, no ships could trade with the colonies unless they were British-owned. Foreign-made vessels trading in colonial waters would be required to attest to British ownership. The Royal Navy was given authority to seize ships that were in violation of these provisions.<sup>5</sup>

With the increase in regulation of colonial trade came an increase in creative circumvention and outright illegal smuggling, beginning a pattern of colonial resistance that would continue until the Revolutionary War. In 1663, the Staple Act patched over a loophole which allowed British-owned ships to trade freely in non-enumerated goods with foreign ports so long as British ownership was attested.<sup>6</sup> After the Staple Act, only imports laden on board British ships in Britain were allowed into the colonies. Foreign goods could reach the colonies if taken to Britain first, unladen and duties paid, and then laden again on board ships bound for the colonies.<sup>7</sup>

By 1673 it was clear that smuggling of enumerated goods to foreign, European ports, was occurring at a significant rate, and that, to the great surprise of the Crown, trade between the colonies was thriving. Colonial merchants who traded with each other could bypass the customs duties imposed in mainland ports, and this activity was not contemplated by the system of customs regulation that England had created for the colonies. This problem was addressed by an Act of 1673 which imposed a surety bond requirement for loading enumerated goods in colonial ports,<sup>8</sup>

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<sup>5</sup> Barrow, *supra* note 2, at 17.

<sup>6</sup> Barrow, *supra* note 2, at 12.

<sup>7</sup> Barrow, *supra* note 2, at 12.

<sup>8</sup> Earlier Acts had required similar bonds, posted when leaving English ports bound for the colonies.

ensuring that those goods would be unladen in a mainland port. Or, if the bonding requirement was not met, Parliament required payment of duties before any enumerated goods could be loaded.<sup>9</sup>

Also around this time, in 1671, the Crown established the first royal customs officer for the colonies.<sup>10</sup> Colonial governors had been trusted with the job up until this point, but were generally seen to be ineffective, due to their allegiance to local trading interests. Because of establishment of a customs officer, Parliament was able to use the Act of 1673 to essentially ratify the subsuming of colonial customs oversight inside the London-headquartered English customs service, stating explicitly in the Act of 1673 that the Navigation Acts would now be administered by the English Commissioners of the Customs.<sup>11</sup>

Commentators speculate that the imposition of duties in this Act of 1673 shows the beginnings of English exasperation with colonial subversion of the spirit of the Navigation Acts.<sup>12</sup> More specifically, in the Act of 1673 can be seen the beginnings of an irreparable economic and political rift between Old and New England. Because the New England colonies were not geographically suited to the production of huge quantities of tobacco, coffee, or sugar, their populations prospered by mimicking the trade activities of the English merchants. This was

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<sup>9</sup> Barrow, *supra* note 2, at 7-9. The duty imposed here have been a source of confusion and argument, because generally, the Navigation Acts were seen to have been aimed at directing the flow of trade, not raising money. So argued the colonists in the years just prior to the American Revolution, during which the English trade policy turned much more aggressively towards the imposition of duties. However, one interpretation put forth by the British Lords of Trade suggested that since a duty was required to be paid in the alternative, that perhaps merchants paying such a duty on enumerated goods would be free to carry them to any port in the world. This interpretation was rejected, however; the duty was to be paid if a ship came to a colonial port from any other place but an English port, and under the Act of 1663, there was an independent bonding requirement placed on such a vessel. Thus, all ships were to carry bonds requiring the enumerated goods to go to England, but ships coming from English home ports could avoid the paying of a duty in addition to carrying a bond. The two policies read together, therefore, clearly imposed a tax to deter the coasting trade between colonies.

<sup>10</sup> *Id.*

<sup>11</sup> Barrow, *supra* note 2, at 13. However Parliaments language was imprecise, allowing colonists in later years to argue that the authority of the Collectors of Customs applied only to the duties imposed on enumerated goods.

<sup>12</sup> Barrow, *supra* note 2, at 8.

increasingly seen as a problem and source of tension, because the colonial merchants could gain advantages over English merchants by avoiding English customs duties.<sup>13</sup> That these advantages could lead to economic, and therefore, political independence from England was not lost on the Crown. The duties therefore were most likely imposed in 1673 to curb the colonial coasting trade that had surprised the Crown and was becoming of greater strategic concern.<sup>14</sup>

As the 17<sup>th</sup> Century wound to a close, the Crown realized that without substantial effort to create a real machinery of civil service, the Navigation Acts would remain ineffective in the colonies. To this end, in 1696 the British Parliament passed the last of its Navigation Acts, entitled: “Act for Preventing Frauds, and Regulating Abuses in the Plantation Trade.” This act was different in its outlook from the previous acts. While the previous Navigation Acts had assumed social and political unity of the colonies with the Crown, this act assumed that colonists would resist any effort by the Crown to control colonial trade, and prescribed a program of enforcement.<sup>15</sup>

#### Accomplishments of the Act of 1696

In its Preface, the Act stated: “great abuses are daily committed, to the Prejudice of the English Navigation, and the Loss of a great Part of the Plantation Trade to this Kingdom, by the Artifice and Cunning of ill-disposed Persons.” Tightening the reigns yet again, under the Act of 1696, no goods were to be taken in and out of the colonies except in English-built and owned ships. The Act increased the responsibilities of the colonial governors for enforcing the Navigation Acts, requiring oaths and imposing fines on those who failed to properly administer the law. The new law gave the commissioners of customs the power to remove the naval officer, an officer of the port formerly under the sole authority of the governor. Though the naval officer remained under

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<sup>13</sup> Barrow, *supra* note 2, at 9.

<sup>14</sup> *Id.*

<sup>15</sup> Barrow, *supra* note 2, at 53.

the authority of the governor, the commissioners were given the authority to approve or reject the governor's appointments to the office.

The Act of 1696 also extended to the colonies the English Act of Frauds, first passed in 1662.<sup>16</sup> This act gave the collectors of customs broad authority to enforce the Navigation Acts, including the power to use writs of assistance, which were general search warrants which bestowed the right of forceful entry. The Act of Frauds shielded customs officials from the risk of personal suit should they seize goods under circumstances later found to be unlawful. Additionally, the Act of 1696 specified that proceeds from seizures would be split one third each between the Crown, the Governor, and the person putting the suit into prosecution. The burden of proof in the case of a seizure was to be on the defendant. Fines were created for the use of forged papers. A paragraph of the Act stated explicitly that any law passed by a colonial legislature would be invalid if it was "in any wise repugnant" to the Navigation Acts.<sup>17</sup>

The Act of 1696 became the first comprehensive system of customs laws for the colonies, and many features were included that would be adopted by the United States after the revolution. For the context of the *Locke* case and its later import, two of the features relating to seizures were particularly important: the burden shifting provision, and the provision allowing for the splitting of funds between the executive authorities and the party responsible for making out the case for seizure.

#### The Utility of Admiralty Jurisdiction and *In Rem* Forfeiture

In the larger historical context, the commercial law was changing in England. The powerful admiralty courts, which were civil law courts, lost jurisdictional territory to the common

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<sup>16</sup> Barrow, *supra* note 2, at 54.

<sup>17</sup> Barrow, *supra* note 2, at 55.

law courts.<sup>18</sup> In one area, however, that of customs law, admiralty retained jurisdiction. Merchants preferred admiralty because it was based in a civil code system of law and therefore was cognizable to European trading partners, whereas the common law courts would have been less suitable for dealings with the international trade community.<sup>19</sup> The provisions allowing for the seizure of vessels and their cargo for violations of the customs laws were central to the enforcement of the Navigation Acts.

An action *in rem* is against the property itself. *In rem* forfeiture is as old as the Bible, and prior to the Navigation Acts there was at least one other *in rem* forfeiture proceeding, that of common law deodand.<sup>20</sup> If an object was involved in a death, it was forfeited to the government.<sup>21</sup> The admiralty action *in rem*, however, developed independently.<sup>22</sup> An independent admiralty action *in rem* developed out of necessity, and was useful to merchants and governments alike. As international trade flourished, a common problem for administering the law was that the owner of a vessel that was the subject of a dispute was often in a different part of the world than the vessel.

For example, many *in rem* actions against vessels had to do with collecting debts after failed voyages. Proceeding *in personem* might have meant having to locate and obtain jurisdiction over an individual elsewhere in the world, or it might have required bringing *in personem* suits against a great number of individual owners of a vessel in order to execute a money judgment. By proceeding *in rem*, the claims against a vessel could be resolved promptly and with relative ease, at a local court.

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<sup>18</sup> Michael Schechter, Fear and Loathing and the Forfeiture Laws, 75 Cornell L. Rev. 1151, 1154 (1990)

<sup>19</sup> Schechter, *supra* note 18, at 1154.

<sup>20</sup> Schechter, *supra* note 18, at 1153.

<sup>21</sup> *Id.* Oliver Wendell Holmes, in his book, The Common Law, speculated that deodand was the source of our *in rem* civil forfeiture laws today, however this speculation ignored the independent development of *in rem* forfeiture in under admiralty law, and the direct connection between the customs laws authorizing its use and our laws today.

<sup>22</sup> *Id.*

Thus, it was the reality of a globalizing world that led to the development of the admiralty action *in rem* as a mechanism for resolving commercial disputes related to the growing mercantile commerce. This included disputes between merchants and the government, through the agents of the customs service.

### **III. The Revolution and the New Republic**

The customs law reforms of 1764 became the final chapter in English colonial rule in America, as the flaws of the Navigation Acts, combined with a redoubled effort by the Crown to raise revenue by imposing customs duties on the colonies, and the increasing heavy handedness that was required to achieve this end, stirred the colonists to revolution.

Following the Revolution, the port of Baltimore grew with the early republic, and with it the city of Baltimore. By 1799, a comprehensive system of customs laws had been adopted for the new republic that were in many ways very similar to the English laws before the Revolution. Both the growth of Baltimore and the reestablishment of customs law in the United States set the stage for the events of the *Locke* case.

#### The Rise of the Port of Baltimore

Prior to the Revolution, Baltimore was not recognized as a port of entry worthy of its own collector of customs. The crown officially recognized a port of Chester & Patapsco and one of Patuxent,<sup>23</sup> which competed for the territory containing the site where Baltimore City would be incorporated in 1796. The logic of English mercantilism fueled the growth of Baltimore after the Revolution. When Maryland was primarily a tobacco growing colony, the Port of Annapolis was as good as any – growers loaded their crop onto barges which ferried the crops out to waiting ships.

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<sup>23</sup> Barrow, *supra* note 2, Appendix D. *See also*, Archives of Maryland Historical List Abbreviations, MARYLAND STATE ARCHIVES, <http://msa.maryland.gov/msa/speccol/sc2600/sc2685/html/abbrev.html>, last accessed November 23, 2014.

However, Baltimore, with its deep water port, its turnpike into the bread basket of western Maryland, and the Jones Falls for hydropower, rapidly became a much more productive port than its neighbors in Maryland, and the greatest early grain port in the country.<sup>24</sup> Baltimore's deep water port could accommodate the largest commercial ships, and there was ample space for warehouses and other port infrastructure to support huge exports of grain, lumber, iron, and food-stuffs.<sup>25</sup> By 1799, Baltimore's exports had increased more than seven fold in as many years, from \$2,500,000 in 1792, to \$16,610,000 in 1799.<sup>26</sup> Neither Annapolis, nor silt-plagued Joppa, both of which had grown more quickly than Baltimore in the early days, could serve the rapidly modernizing Maryland economy as well as Baltimore could.

#### The Customs Service in the New Republic

Along with growing trade in the new republic, came customs bureaucracy. The first Customs Act was passed in 1790, and then another in 1799, referred to in *Locke* as the Collection Law of March 2, 1799. The act of 1799 provided for a collector, a naval officer, and surveyor at each of various ports of entry, located within customs service districts. Baltimore was one such port of entry.

Sections 50 and 71 of the Collections Law of March 2, 1799 would provide the statutory underpinnings of *Locke*. Section 50 reads: "No goods, wares, or merchandise, brought in any ship or vessel from any foreign port or place, shall be unladen or delivered from such ship or vessel, within the United States, but in open day, that is to say, between the rising and setting of the sun,

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<sup>24</sup> Ruthella Mory Bibbins, A.B., Ph.M., The City of Baltimore, 1797-1850. The Era of the Clipper Ship, the Turnpike, Mill and Railroad. An Epoch of Commerce and Culture., in BALTIMORE: ITS HISTORY AND ITS PEOPLE 63, 65 (Clayton Colman Hall, LL.B., A.M., ed. 1912).

<sup>25</sup> Bibbins, *supra* note 24, at 68.

<sup>26</sup> Bibbins, *supra* note 24, at 63.

except by special license from the collector . . . nor at any time without a permit from the collector . . . .”

Section 71 said: “And in actions, suits, or informations to be brought, where any seizure shall be made pursuant to this act, if the property be claimed by any person, in every such case the *onus probandi*<sup>27</sup> shall be on the claimant, only where probable cause is shown for such prosecution, to be judged of by the Court before whom the prosecution is had.”

Between 1799 and the *Locke* case, which began with the filing by the Maryland Attorney General of an information in the port of Baltimore in 1809, much would change about the nature of early American trade, however it would be these basic provisions, in the Collection Law of 1799, that would drive *Locke*.

#### **IV. The *Locke* Case**

*Locke* is about smuggling, and the historical context for this smuggling was the restrictive trade policies, imposed not by the English colonial government, but by the Jefferson administration in the years before the War of 1812. Britain and France had been at war for almost two decades by the turn of the new century. This ceaseless conflict had been profitable for the young Republic, as American merchants, including those from Baltimore, supplied both sides. This situation was unsustainable however, and soon each of the warring powers looked to stop the flow of American supplies to the other.

British conduct was especially infuriating to the Americans. Britain had captured 1,000 vessels and impressed 6,000 seamen in a quest to find or replace mass desertions of their own seamen, often occurring when British vessels docked in American ports.<sup>28</sup> It was the Royal Navy,

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<sup>27</sup> The burden of proof.

<sup>28</sup> Bibbins, *supra* note 24, at 96.

however, that Britain entrusted with its survival, and in fact, with that of all free peoples.<sup>29</sup> On the European mainland, Napoleon's armies were unmatched. Britain saw its naval power as "the last stay of the liberties of the world."<sup>30</sup> Without the Royal Navy, the British believed that Napoleon would shortly establish a presence in America, easily putting down any resistance from the young republic.<sup>31</sup> The moral positioning of the Royal Navy as the guardian of free peoples made the British hostile to the idea of neutrality, especially when neutrality aided the despot, Napoleon.<sup>32</sup> The British belief that deserters remained subjects of the British Crown further contributed to the unraveling of British-American relations in the years before the War of 1812.<sup>33</sup>

In the summer of 1807, the *Chesapeake-Leopard* affair produced a milestone in this unraveling, and prompted a vigorous response from Baltimore. City residents wrote President Jefferson and demanded that a stop be put to British transgressions. Before outrage resulted in war, however, the Republicans would try to influence both the British and the French with trade policies of their own. The increasingly aggressive policies of the warring parties, stemming from the British "Orders in Council," and the French Berlin and Milan decrees, imposed severe losses on the American merchants attempting in vain to maintain their neutrality. Jefferson decided to respond in kind with trade sanctions aimed at making both countries feel the loss of the American wealth that had been supplying their armies.<sup>34</sup>

Jefferson's policies created a game of economic "chicken." Some Americans felt sure that if deprived of American goods, the British Empire would quickly collapse.<sup>35</sup> America needed British and French buyers to grow its own economy just as much or more than the warring powers

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<sup>29</sup> Bradford Perkins, *Prologue to War*, 4 (1961).

<sup>30</sup> Perkins, *supra* note 29, at 5.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Perkins, *supra* note 29, at 91.

<sup>34</sup> Bibbins, *supra* note 24, at 95.

<sup>35</sup> Louis Martin Sears, *Jefferson and the Embargo*, 55 (1927).

needed American raw materials and rudimentarily manufactured and processed goods. Similarly, it was the merchant class, especially in New England where the local economy was more dependent on trade than anywhere else, that would suffer the most from – and therefore resist the hardest – any restraint on trade. Soon, New England was expressing that while the British and French harassment of trade was devastating, it was better than no trade at all, and they demanded that Jefferson’s Embargo Act, the strongest of the colonial policies, be repealed.<sup>36</sup> As England had learned in the previous century, it was impossible to restrain the surging colonial, and then early American economy trade and enterprise.

#### The Struggle to Enforce the Embargo of 1807

President Jefferson’s first attempt had been the Non-Importation Act of 1806, which took effect on November 15 of that year. This act was to be administered under the Collection Law of 1799. On the very first day of the Non-Importation Act, collectors began to seize goods, however, they soon found that there were tremendous problems with the wording of the act. By December 3, 1806, President Jefferson was requesting suspension of the Non-Importation Act, perhaps indefinitely. Diplomatic talks were still being tried at this time, but by October of 1807, it was clear that negotiations between British Foreign Secretary George Canning, and the Jefferson Administrations representatives, James Monroe and William Pinkney, would fail.

As with the Navigation Acts years before, some of the problems with the Non-Importation Act were drafting problems. When Treasury Secretary Gallatin was consulted, he said that the act was “so badly worded that it ‘will give rise to much perplexity and numerous suits.’” The previously suspended Non-Importation Act of 1806 actually did go into effect for several months

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<sup>36</sup> Bibbins, *supra* note 18, at 95.

between December 1807 and February 1808, before being suspended again when a revised version was passed, which was to take effect on June 14, 1808.

However, President Jefferson's attention shifted to passing an embargo. The President asked Congress to draft an embargo on December 17, 1807, and in only five days time, it did so.<sup>37</sup> The Embargo Act was strict, prohibiting all departures of United States' ships to any foreign port or place, unless they were "under the immediate direction of the United States." If a vessel wished to participate in the coasting trade, traveling from one U.S. port to another, bond would be required.<sup>38</sup> As with the British Navigation Acts of the century prior, seizure and forfeiture of vessel and cargo was one of the key enforcement tools provided for in the Embargo.<sup>39</sup>

Again, as might be reasonably expected of a law drafted in five days time, there were drafting problems. These problems were compounded when examined by clever merchants looking for any means by which to circumvent the Embargo. What followed in the first months of active enforcement of the Embargo were a series of loopholes exploited by merchants, followed by a series of patchwork Supplementary Acts.<sup>40</sup>

First, the coasting trade posed a much greater problem for the Embargo than anticipated. Merchants would leave for a coasting voyage, and with improbable regularity, encounter bad weather or other dangers at sea, and be forced to change course for a foreign port.<sup>41</sup> Docking at an American port close to a foreign port might result in goods making their way into the foreign port. Second, there were problems with the bonding requirements, and clever merchants were often able to render these provisions ineffective. Third, the first Embargo Act failed entirely to

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<sup>37</sup> Dwight F. Henderson, Congress, Courts, and Criminals: The Development of Federal Criminal Law, 1801-1829 78 (1985).

<sup>38</sup> *Id.*

<sup>39</sup> Henderson, *supra* note 37, at 79.

<sup>40</sup> *Id.*

<sup>41</sup> Henderson, *supra* note 37, at 78.

address trade over land and trade coming across the Great Lakes. Similarly trade on the Mississippi River had to be addressed in a later Supplementary Act of April 25, 1808.<sup>42</sup>

Attempts to enforce the embargo quickly became awkward and difficult for Congress, and while only some were openly opposed to the embargo, many legislators were uncomfortable with it. Representative Matthew Lyon of Kentucky wrote during the debate over the second Supplementary Act that he did not like “this string of oaths, required by the embargo laws. There [is] too much swearing. [The House is] stretching the plaster over the sound flesh, and [I fear] it will end in gangrene.” Indeed, the fact that the struggle to enforce the embargo was reminiscent of the fights over the failed British policies of the Navigation Acts was very apparent, and opinion leaders at the time openly drew comparisons.<sup>43</sup>

Treasury Secretary Gallatin, who had corresponded with collectors nationwide, wrote to Thomas Jefferson on the need to find a solution to enforcing the embargo, or in the alternative, to concede that war with Britain was inevitable. “[T]wo principles must be adopted in order to make [the Embargo] sufficient: 1<sup>st</sup>, that not a single vessel shall be permitted to move without the special permission of the Executive; 2<sup>nd</sup>, that the collectors be invested with the general power of seizing property anywhere, and taking the rudders or otherwise effectually preventing the departure of any vessel in harbor, though ostensibly intended to remain there; and that without being liable to personal suits. I mean generally to express any opinion founded on the experience of this summer that Congress must either invest the Executive with the most arbitrary powers and sufficient force to carry the embargo into effect, or give it up altogether . . . I see no alternative but war.”<sup>44</sup>

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<sup>42</sup> Henderson, *supra* note 37, at 79-80.

<sup>43</sup> Henderson, *supra* note 37, at 84.

<sup>44</sup> Henderson, *supra* note 37, at 80.

Jefferson responded: “I did not expect a crop of so sudden and rank growth of fraud and open opposition by force could have grown up in the United States. I am satisfied with you that if orders and decrees are not repealed, and a continuance of the embargo is preferred to war, (which sentiment is universal here) Congress must legalize all *means* which may be necessary to obtain its *end*.”<sup>45</sup>

This discussion preceded the passing of the Enforcement Act of 1809, an act that sought, once and for all, to make the embargo work by cutting off every avenue by which it could be circumvented. To achieve this, the act granted to collectors a blanket, discretionary power to seize property, forbid movement of vessels, and to search vessels “when there is reason to believe that they are intended for exportation.” The collectors were granted the use of the militia, if necessary, to prevent both the illegal departure of vessels and cargo, and to prevent and support any “armed or riotous assemblage[s] of persons.”

When Congress debated the Enforcement Act, legislators finally touched on constitutional issues for the first time in any of the debates related to the embargo policy. Prior debates had centered on the local economic interests in protecting the livelihood of merchants. Many of the constitutional issues discussed prior to the Enforcement Act presaged debates that would follow the *Locke* case into modern times, concerning specifically the use of the *in rem* forfeiture action. Debated issues included: (1) subordination of civilian to military authority, (2) excessive power delegated to the President, (3) illegal search and seizure provisions, (4) Due Process concerns, (5) infringement on the right to trial by jury, and (6) denying right to use state judicial processes.<sup>46</sup>

The impact of the Enforcement Act was swift and brief. Passed on January 9, 1809, it lasted only until March 1, 1809, when it was repealed by Congress as a disgraced President

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<sup>45</sup> Henderson, *supra* note 37, at 81.

<sup>46</sup> Henderson, *supra* note 37, at 81.

Jefferson prepared to leave office.<sup>47</sup> In the Supreme Court cases that arose at least in part from actions taken under the Enforcement Act, *Locke* included, the act itself played little role because by that time it was null and void.<sup>48</sup>

The embargo was a failure both at home and abroad. The Enforcement Act finally showed that embargo would not work as a policy to achieve the desired result on the international stage. There was little to no impact on Britain and France – in part because bumper crops in Europe during 1808 had lessened the need for American goods, and also because Napoleon’s “Continental System” was reducing France’s dependence on colonial goods. After 1815, a blanket embargo was never again used by the United States. As they would in later years under Prohibition, or arguably under the modern drug war, Americans responded to the draconian Embargo with widespread illegal activity, mainly smuggling along the coastlines.<sup>49</sup> Americans opposed the embargo violently, attacking and intimidating the collectors charged with its enforcement.<sup>50</sup> President James Madison replaced the embargo with the largely toothless Non-Intercourse Acts, but the country had largely by this time realized that both negotiations and trade sanctions had failed, and war was likely on the horizon.<sup>51</sup>

The response of politicians and also the collectors of customs to the Enforcement Act and the embargo in general, was reminiscent of the colonial response to the Navigation Acts of the previous century. In some cases, collectors resigned rather than enforce the embargo. Many simply refused to enforce it, or were completely ineffective in their enforcement of the embargo.<sup>52</sup>

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Henderson, *supra* note 37, at 85.

<sup>50</sup> *Id.*

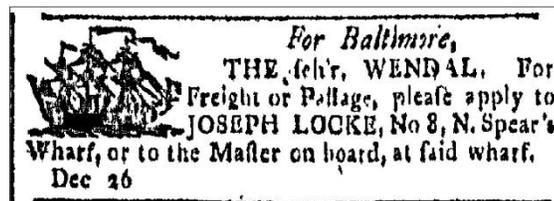
<sup>51</sup> *Id.*

<sup>52</sup> Henderson, *supra* note 37, at 85.

The Federalist political party experienced a resurgence that would have seemed improbable a few years before.<sup>53</sup>

The *In Rem* Proceeding at the District Court in Baltimore

Joseph Locke's goods, aboard the Schooner *Wendell*, arrived in Baltimore shortly after the passage of the Enforcement Act of 1809, and were seized before the Embargo was repealed, on February 23, 1809.<sup>54</sup> Prior to sailing for Baltimore, the Schooner *Wendell* was loaded by Joseph Locke at Shear's (Locke's) Wharf in Charleston, Boston, in December of 1808, and cleared customs in Charleston on December 18, 1808.<sup>55</sup> A man named William Lowes, an employee of Mr. Locke, was questioned in Boston and stated that the goods on board the *Wendell* were taken from a British Schooner, the *Brisk*. Also questioned in Boston was John Baker, of the firm Dilloway & Baker, who were merchants in Boston. Mr. Baker was questioned because his name appeared on the shipping manifest as the shipper of some of the goods. However, he testified that he had no knowledge of the goods and that his firm had not shipped them.<sup>56</sup>



Advertisement<sup>57</sup>

The Captain of the *Wendell*, William Bodfish, answered in his interrogatories that the *Wendell* had sailed with a coasting manifest. Capt. Bodfish stated that he did not know whether or not the Boston collector of customs had inspected the goods aboard the *Wendell* closely, but

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<sup>53</sup> *Id.*

<sup>54</sup> Case Papers, No. 480 Locke v. United States [7 Cranch 338], in NATIONAL ARCHIVES AND RECORDS ADMINISTRATION MICROFILM PUBLICATION M 214 53 available at [http://www.mdhistory.net/nara\\_m214/locke\\_nara\\_m214\\_19\\_480/html/locke\\_nara\\_m214\\_19\\_480-0001.html](http://www.mdhistory.net/nara_m214/locke_nara_m214_19_480/html/locke_nara_m214_19_480-0001.html)

<sup>55</sup> *Id.*

<sup>56</sup> Case Papers, *supra* note 26, at 44.

<sup>57</sup> Advertisement, Boston Commercial Gazette, December 29, 1808

that Mr. Locke had assured him that the shipment was legitimate. Capt. Bodfish also answered that Mr. Locke had told him to apply to a “W Paltonstall” once in Baltimore, but that none of the consignees had ever come to pick up their goods. He also stated that a man named George Edgar had brought aboard two more trunks after the ship cleared customs on the 18th.<sup>58</sup>

**SMUGGLERS TAKE WARNING !**  
*Officers look out !*  
The schooner *Wendell*, from Boston, was on the 24th of Feb. seized by the collector of Baltimore, for a violation of the Non-Importation act. The following species of goods, &c. were found on board :  
Superfine broadcloth,  
Scotch thread,  
Irish Linens, &c. In all, upwards of 60 packages estimated at about 40,000 dollars.  
The owner of this schooner is said to have gone off *in a hurry* from Baltimore, the day before yesterday—and to have *five similar vessels* engaged in smuggling **BARING'S GOODS** into our sea-ports.  
[Whig.  
We are informed that the above goods nominally belonged to a certain John Lock of Boston. E. P.  
**Smugglers Take Warning!**<sup>59</sup>

According to Capt. Bodfish, the *Wendell* set sail for Baltimore on December 30, 1808, and arrived in Baltimore sometime before February 23, 1809.<sup>60</sup> On that day, James H. McCulloch, the Collector of Customs for the District of Baltimore, seized the *Wendell* and her goods for violations of various customs laws, and John Gregg, a worker in the Baltimore customs house, testified that he unloaded the goods that very day at the direction of the collector.<sup>61</sup> On April 24, 1809, McCulloch and U.S. Attorney for Maryland John Stevens exhibit an information in the port of Baltimore.<sup>62</sup>

<sup>58</sup> Case Papers, *supra* note 26, at 54.

<sup>59</sup> Smugglers Take Warning ! Officers Look out !, Newburn Herald, March 16, 1809

<sup>60</sup> Case Papers, *supra* note 26, at 42.

<sup>61</sup> Case Papers, *supra* note 26, at 57.

<sup>62</sup> Case Papers, *supra* note 26, at 2.

As was stated in the information posted by the Collector of Customs, the *Wendell* contained the following which were the subject of the forfeiture proceeding:

“Thirty-five Boxes and one trunk containing one Thousand and twenty three pieces of Scotch Linen, Two Bales containing Twenty pieces of Kersymere (sic) and ten pieces of cloths, Eight Bales containing two hundred and thirty seven pieces of Scotch Linen, Three cases containing fifty four pieces of Kerseymere, Two Bales containing nineteen pieces cloths, one trunk containing twenty two pieces Brown Scotch Linen, Two Bales containing thirty six pieces Kerseymere (sic), nine trunks containing twelve hundred and forty four pounds Scotch thread and thirty seven pieces Scotch Linen of the goods and chattels of some person or persons to the Attorney unknown.<sup>63</sup>”

The libel *in rem* filed by the U.S. Attorney was styled, *United States v. Sundry Goods, Wares, and Merchandize aboard the Schooner Wendell*.<sup>64</sup> Joseph Locke and a Baltimore merchant named William French posted bond and filed a claim against the goods. They hired the firm of Harper and Martin to try their case.<sup>65</sup> Robert Harper and John Purviance made the initial filings and court appearances on their behalf.<sup>66</sup>

The district court next turned to the discovery phase, issuing interrogatories, and sending out two commissions to Boston to gather facts about the case. A Baltimore customs house employee named Simon Crowell stated that he measured the *Wendell*, finding her to have one deck and two masts, to be of about 64 feet length, 20 feet breadth, and 8 feet three inches depth, and 91 72/95 tons burthen. She was square-rigged, with no galleries, and an alligator figurehead.<sup>67</sup> It was also recorded that the *Wendell* was built in Sandwhich, Massachusetts, and that she had with her at the time a temporary certificate of enrollment issued in Plymouth, Massachusetts.<sup>68</sup> Copies of

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<sup>63</sup> Case Papers, *supra* note 26, at 2. “Kerseymere” likely means “cashmere” and the spelling of this word changes throughout the Case Papers.

<sup>64</sup> Case Papers, *supra* note 26, at 12.

<sup>65</sup> Case Papers, *supra* note 26, at 21.

<sup>66</sup> *Id.*

<sup>67</sup> Case Papers, *supra* note 26, at 41.

<sup>68</sup> *Id.*

the *Wendell's* license to participate in the coasting trade were available to the district court, as were the papers from the customs house at Boston, that the *Wendell* received before setting sail for Baltimore.<sup>69</sup>

On May 28, 1810, the commissioners who traveled to Boston filed their report. Then, on June 13, 1810, an evidentiary hearing was held in Baltimore. Additional testimony was taken during this hearing. Samuel Harden<sup>70</sup> and William Baker, two merchants of Baltimore who examined the goods on board the *Wendell*, gave their opinion that the goods were all of British manufacture and would fetch a very high price due to their limited supply during the embargo. In particular, William Baker stated that some of the cashmeres were of patterns that he had never seen prior to seeing them on board the *Wendell*, but that in the months afterward, they had become very popular.<sup>71</sup> Another man named William Lowry stated that he believed that the goods were all of very recent manufacture.<sup>72</sup>

<b>WILLIAM FRENCH</b>	
Has just received, and offers for sale, at No. 13, south Calvert-street,	
<b>A few packages of Goods,</b>	
Comprising the following kinds:	
Seeded Cambrics	American shirting
Plain & coloured mus- lins	cottons
Do. do. shawls	Stripes, sattinets &
Leno do. do.	stout cotton cloths
Ginghams	suitable for bed
Silk Chambrays	tickings
Mixed and drab Satti- nets	A few sets patent
Britannia Linens	Chairs of the la- test fashion, and
Morocco Pocket books	of a superior qua- lity.
<i>Also,</i>	
Mow and Murgungea Malmoodies, Fool- pore Sawns, and Gilla Handkerchiefs, Ladies Cotton Hose, Fans—and a general assort- ment of the most Fashionable Bonnets and Trimmings, &c.	
April 4	eodt

Advertisement<sup>73</sup>

<sup>69</sup> Case Papers, *supra* note 26, at 42

<sup>70</sup> Advertisement, Baltimore Patriot & Evening Advertiser, February 21, 1814. This advertisement states that merchant William French has removed to 175 Market St. and is now occupying the space formerly occupied by Samuel Harden.

<sup>71</sup> Case Papers, *supra* note 26, at 44-45.

<sup>72</sup> Case Papers, *supra* note 26, at 47.

<sup>73</sup> Advertisement, Federal Republican and Commercial Gazette, April 16, 1810.

The Baltimore merchant William French was the only person who gave testimony on behalf of Joseph Locke. French was a dry goods merchant with a storefront during the time of the *Locke* case at 13 S. Calvert St., and then at 175 Market Street,<sup>74</sup> and 1 Lovely Lane.<sup>75</sup> He sold luxury goods, including high fashion textiles, and signed the bond delaying prosecution along with Joseph Locke.<sup>76</sup>

In his testimony, French sought to explain away the irregularities of the shipment of goods aboard the *Wendell*. He stated in his testimony that he had previously worked in a trading house in Boston, and that he had seen that many goods that had been imported prior to the embargo shipped overland for home consumption, without going through customs. Also, more than \$500,000 in goods had come in from Canada during one year that he worked in Boston, and those had not gone through customs either. He also stated that it was his opinion that Joseph Locke had disguised the names of the shippers and consignees on the shipping manifest in order to hide the goods from his creditors, Mr. Locke being of “embarrassed circumstances,” at the time.<sup>77</sup>

The discovery report was filed on June 14, 1810. Having concluded discovery, the district court heard the arguments in *Locke v. United States*, in its June term in 1810. Judge James Houston decreed the goods condemned and forfeited to the United States, and filed his judgment on September 12, 1810.<sup>78</sup>

On November 7, 1810, Robert Goodloe Harper and John Purviance again appeared in district court along with the U.S. Attorney for Maryland, John Stephens, and filed an appeal to the Fourth Circuit.<sup>79</sup> Justice Samuel Chase heard their argument on January 28, 1811 in Baltimore,

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<sup>74</sup> Advertisement, Baltimore Patriot & Evening Advertiser, February 21, 1814. Market Street is today known as Broadway Street.

<sup>75</sup> Advertisement, Baltimore Patriot & Evening Advertiser, December 14, 1815.

<sup>76</sup> Case Papers, *supra* note 26, at 56.

<sup>77</sup> Case Papers, *supra* note 26, at 46-47.

<sup>78</sup> Case Papers, *supra* note 26, at 54.

<sup>79</sup> Case Papers, *supra* note 26, at 55.

and affirmed the decision of the District Court that day.<sup>80</sup> Also on January 28, 2011, the parties signed a stipulation that the goods on board the *Wendell* were found there on February 23, 1809, and that the William French who executed the bond to delay prosecution of the forfeiture was the same William French who gave deposition testimony on behalf of Joseph Locke.<sup>81</sup>

On February 4, 1811, the case record was sent to the Supreme Court.<sup>82</sup>

### The Lawyers of *Locke*

Despite what may have been his embarrassed circumstances at the time, Locke (or perhaps William French) had excellent legal representation. Both Harper and Martin, though the latter did not participate in arguments in *Locke*, were leading members of the Maryland bar. They were also both Federalists. Harper, having served in the South Carolina legislature during the years of Federalist power, was skeptical of President Jefferson when Jefferson was elected. Harper believed in a strong federal government, a strong executive, and also a strong military and navy to protect American commerce, deter war, and earn respect abroad.<sup>83</sup> Martin was known as a great enemy of President Jefferson, and the “bulldog of federalism.”<sup>84</sup> Justice Samuel Chase, riding circuit in the Fourth Circuit, was also a Federalist. Martin and Harper were on his legal team when he faced impeachment in front of the United States Senate, and Martin’s successful defense is remembered by history as helping to ensure that it would be a tenet of the American judiciary system that judges be insulated from political attack.<sup>85</sup>

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<sup>80</sup> Case Papers, *supra* note 26, at 57.

<sup>81</sup> Case Papers, *supra* note 26, at 56.

<sup>82</sup> Case Papers, *supra* note 26, at 58. See also Supreme Court Docket, No.480, February Term 1811, in NATIONAL ARCHIVES AND RECORDS ADMINISTRATION MICROFILM PUBLICATION M 216, available at [http://mdhistory.net/nara\\_supreme\\_court/m216\\_1/pdf/nara\\_m216\\_1-0260.pdf](http://mdhistory.net/nara_supreme_court/m216_1/pdf/nara_m216_1-0260.pdf).

<sup>83</sup> Charles William Sommerville, Robert Goodloe Harper, 13 (1899).

<sup>84</sup> William L. Reynolds II, Luther Martin, Maryland and the Constitution, MD. L. Rev. 291 (1987).

<sup>85</sup> Reynolds, *supra* note 84, at 291. Among many other achievements, Martin argued on the losing side in the landmark case, *McCulloch v. Maryland*.

Attorney General Pinkney, too, was a giant of the Maryland bar.<sup>86</sup> Of Pinkney, Justice Marshall is said to have remarked that he was “the greatest man he had ever seen in a Court of Justice.”<sup>87</sup> Pinkney had a close connection to Justice Chase as well – Chase was his tutor in Annapolis when he began the study of law. Pinkney served as a diplomat during the years of the embargo, and it was during the time of *Locke*, as Attorney General, that he rose to national fame as a lawyer. Though it would be by Pinkney’s indelible logic that would win over Justice Marshall at the Supreme Court, both sides of the *Locke* dispute were represented by titans.

### *Locke at the Supreme Court*

Arguments were heard at the Supreme Court on February 16-17, 1813, and the judgment of the district and circuit courts affirmed on February 19, 1813.<sup>88</sup>

The Supreme Court’s opinion begins by recalling the counts filed in the original libel. The libel contained eleven counts; in all there was one count under the Embargo Act, five counts under the Non-Importation Acts, and five counts under the Collection Law of 1799.<sup>89</sup>

Next, the Court recounted a summary of the arguments of the attorneys before the Supreme Court, made by Robert Goodloe Harper for the appellant, and Attorney General William Pinkney for appellee the United States. Harper argued that the United States had not made out its *prima facie* case under any of the counts, and so the libel was supported by insufficient proof.<sup>90</sup> Count 50 of the Collection Law, which described forfeiture procedures, required that the United States show probable cause that goods should be seized, and if it could do so, the burden of proof

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<sup>86</sup> Robert M. Ireland, William Pinkney, A Revision and Re-Emphasis, THE AMERICAN JOURNAL OF LEGAL HISTORY 235, 236 (1971).

<sup>87</sup> *Id.*

<sup>88</sup> Supreme Court Docket, No.480, February Term 1811, in NATIONAL ARCHIVES AND RECORDS ADMINISTRATION MICROFILM PUBLICATION M 216, available at [http://mdhistory.net/nara\\_supreme\\_court/m216\\_1/pdf/nara\\_m216\\_1-0260.pdf](http://mdhistory.net/nara_supreme_court/m216_1/pdf/nara_m216_1-0260.pdf).

<sup>89</sup> *Locke v. United States*, 7 Cranch 339, 341 (1813).

<sup>90</sup> *Id.*

would shift to the claimant to prove that the goods did not violate the Collection Law. Harper argued that probable cause meant a *prima facie* case, and until then, innocence was to be presumed. Furthermore, Harper argued that the suspicious circumstances recounted by the United States were all easily explainable, or simply not relevant.<sup>91</sup>

There were four suspicious circumstances that the parties argued over. First, there was a small variance in the manifest. Second, fictitious names had been used for both the shippers in Boston and the consignees in Baltimore. Many names appeared on the manifest, some of whom were not of real persons and others of whom had no knowledge of the shipment. Third, the goods did not have their certificates of entry which would have attested to proper importation at some time prior to the beginning of the Embargo. Finally, the marks which appear on manufactured goods and attest to the maker and place of origin of the goods had been rubbed off and replaced with new marks.<sup>92</sup>

The core of the dispute between the parties was over the burden shifting provision found in Section 71 of the Collection Law. This provision required that probable cause be shown by the government when making out a case for seizure, and that upon such a showing, the claimant would be required to prove that seizure would be unreasonable. Harper argued that probable cause meant the making of a *prima facie* case.<sup>93</sup> The government had failed to make this case. The suspicious circumstances put forth by the government were simply inadequate to establish, *prima facie*, the elements of the various counts of the libel that was filed. Harper argued that without stating from what vessel, or at what time, or at what place goods were unladen, it was simply impossible for a *prima facie* case to be made.<sup>94</sup>

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<sup>91</sup> *Locke*, 7 Cranch at 342.

<sup>92</sup> *Locke*, 7 Cranch at 342.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

Attorney General Pinkney limited his argument to count four under the Collection Law, which read:

The goods, being of foreign growth and manufacture, and subject to the payment of duties imposed by the laws of the United States between the 1<sup>st</sup> of May, 1804, and the day of filing the libel, were imported from some foreign port or place to the attorney unknown, into some port of the United States to the said attorney unknown, in a certain vessel to the said attorney unknown, and were afterwards and before filing the libel unladed at the said last mentioned port from the said vessel without a permit from the proper officers of the customs of the last mentioned port.<sup>95</sup>

Pinkney argued first that it was not necessary for the government to plead the exact time, place, or from what vessel goods were unladen in violation of the Collections Law in order to make out its case. It would generally be impossible to prove those circumstances, and supposing that a confession was obtained from a smuggler but no answer given as to any of those facts, the confession alone would be enough to convict the smuggler. That showed that time, place, and vessel were not essential.<sup>96</sup> Pinkney argued that Harper had the definition of probable cause wrong.<sup>97</sup> As proof, Pinkney pointed to the statute. If the definition of probable cause in Section 71 was to mean a *prima facie* case, it would have the effect of rendering that provision meaningless. The making out of a *prima facie* case always results in a shifting of the burden of proof, so there would be no reason to specifically state this burden shifting provision if that was the meaning.<sup>98</sup>

#### Chief Justice Marshall's Opinion in *Locke*

Neither party raised any constitutional questions about this burden shifting provision, and Justice Marshall declined to raise them himself, proceeding in his opinion to agree with Pinkney

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<sup>95</sup> Case Papers, *supra* note 26, at 3.

<sup>96</sup> *Locke*, 7 Cranch at 343.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

and affirm the judgment of the district court and Fourth Circuit.<sup>99</sup> Similarly, neither the Embargo nor the Enforcement Act were discussed, as they both would have been null and void even before the District Court heard arguments, and the first count under the Embargo Act was considered abandoned.<sup>100</sup>

First, Justice Marshall reasoned that it was incontestable that the goods in question were of foreign growth and manufacture, based on the evidence before the district court.<sup>101</sup> Next, he examined the four suspicious circumstances presented by the government, and found that they each had merit as a basis for reasonable suspicion of a customs violation, and that together they were greater than the sum of their parts. Justice Marshall reasoned that Locke was likely smuggling British goods into Baltimore in violation of the Embargo, and that the fictitious names on the manifest were meant to fool the customs officers, that the absence of evidence of legal importation was notable, since it would have been easy to keep the certificates with the goods, and that the removal and replacement of the marks designating the foreign manufacture of the goods was too labor intensive of a task to have been undertaken for no reason.<sup>102</sup>

Finally, having determined that the circumstances of the arrival of the *Wendell* in the Port of Baltimore were indeed suspicious enough to require exculpatory evidence, Justice Marshall addressed the probable cause argument.<sup>103</sup> Probable cause, he said, has a “fixed and well-known meaning” in cases of seizure. It meant in this context “less than evidence which would justify condemnation,” in other words, less than a *prima facie* case. To equate probable cause in the

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<sup>99</sup> *Locke*, 7 Cranch at 348.

<sup>100</sup> *Locke*, 7 Cranch at 339.

<sup>101</sup> *Locke*, 7 Cranch at 345.

<sup>102</sup> *Locke*, 7 Cranch at 345-346.

<sup>103</sup> *Locke*, 7 Cranch at 347.

context of seizure with the making of a *prima facie* case would, as William Pinkney argued, render the Collection Law meaningless.

## V. The Influence of *Locke* on Civil Forfeiture Law

The civil forfeiture provision in the Tariff Act of 1930, updated in 1984, reads as follows:

In all suits or actions [] brought for the for the forfeiture of any vessel, vehicle, aircraft, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, **the burden of proof shall lie upon such claimant;**

...

Provided, that **probable cause shall be first shown** for the institution of such suit or action, to be judged of by the court, subject to the following rules of proof:

...

(2) Marks, labels, brands, or stamps, indicative of foreign origin, upon or accompanying merchandise or containers of merchandise, shall be *prima facie* evidence of the foreign origin of such merchandise.

Nineteen U.S.C. § 1615 (1984). This statute retains the customs law heritage from which civil forfeiture entered our American legal system, but today over 100 statutes use this procedure.<sup>104</sup>

When Justice Marshall adopted the less exacting definition of probable cause, and the English burden shifting provision that had been codified into the early Collections Law, his words were fairly precise: “in all cases of seizure, [probable cause] has a fixed and well-known meaning.” It was not until the 1870s that *in rem* seizure came to be applied in American law outside of the context of customs law in which it had developed.<sup>105</sup> Deodand, the common law *in rem* forfeiture mechanism, was never adopted in the United States.<sup>106</sup>

When commentators write about civil asset forfeiture in the United States they usually begin their papers with a horror story. For example, consider the account of Billy Munnerlyn, who

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<sup>104</sup> Elizabeth A. Skorcz, [Rico Forfeiture: Secured Lenders Beware](#), 37 UCLA L. Rev. 1199, 1204 (1990)

<sup>105</sup> See *Dobbins' Distillery v. United States*, 96 U.S. 395 (1877).

<sup>106</sup> Schechter, *supra* note 24, at 1154.

spent \$85,000 in legal fees spent to recover the plane he used to operate a charter service, when, unbeknownst to him, a customer used it to transport cash from a cocaine deal. Munnerlyn got his plane back only to find that the DEA had done \$100,000 in damage.<sup>107</sup> Another example are the facts behind *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). In that case, a vessel was seized upon finding of one marijuana cigarette on board, even though the Court agreed that the owner had done everything in his power to prevent guests from bringing contraband aboard the vessel.

On their face, these stories leave one with a sense that an injustice has been committed; that so great a loss of personal property cannot be offset by the benefit to the overall public policy, of the specific enforcement action taken. So too in *Locke* perhaps, seen in light of the clear futility of attempting to curtail the young republic's burgeoning trade, and the historic failure of the embargo policy to accomplish their noble goal of peace by means other than military might.

Commentators have specifically questioned whether the burden shifting provision of *Locke* can comport with the modern understanding of due process.<sup>108</sup> Use of *in rem* forfeiture has expanded greatly since the days of *Locke*. Indeed, the circumstances of customs law and the demands placed on Collectors with limited resources were a narrow set of circumstances.

## **VI. Conclusion**

The British customs service gave the colonies the *in rem* forfeiture proceeding, born of the necessity out of growing international trade over the seas. Since the Crown used this proceeding to restrain burgeoning colonial trade, it was not popular. However, after the Revolution, the new republic sought fit to adopt a similar statutory *in rem* procedure.

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<sup>107</sup> David Benjamin Ross, *Civil Forfeiture: A Fiction That Offends Due Process*, 13 Regent U. L. Rev. 259 (2001)

<sup>108</sup> Peter Petrou, *Due Process Implications of Shifting the Burden of Proof in Forfeiture Proceedings Arising Out of Illegal Drug Transactions*, 1984 Duke L.J. 822 (1984)

*Locke* was not the only case to test the degree to which the new republic would adopt the old provisions of the old English customs law.<sup>109</sup> Largely, the Supreme Court in the first half of the 19<sup>th</sup> Century adopted all of the features of the old system. The circumstances of *Locke* however, are unique enough to customs law to raise a question about whether or not the Court would have intended its holding to apply so broadly outside of the context of customs law.

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<sup>109</sup> Donald J. Boudreaux & A.C. Pritchard, Civil Forfeiture and the War on Drugs: Lessons from Economics and History, 33 San Diego L. Rev. 79, 95 (1996) (citing *United States v. La Vengeance*, 3 U.S. (3 Dall.) 297, 301 (1796); *United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398, 405 (1814); *The Langdon Cheves*, 17 U.S. (4 Wheat.) 103, 104 (1819); *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827); *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 231-32 (1844); *The Brig Ann*, 13 U.S. (9 Cranch) 289, 290-91 (1815)).

## **Biographical Appendix A – Joseph Locke**

Joseph Locke was a Boston merchant, living at times in Gloucester, Hingham, and Boston. Locke was born February 22, 1772, and died April 17, 1838 in Boston.<sup>110</sup> He married Martha Ingersoll in 1795, who passed away shortly thereafter. After Martha passed, Locke married Martha's sister, Mary Ingersoll Foster in 1800.<sup>111</sup> Martha was the widow of the merchant Benjamin Foster, who she had married in 1795, and with whom she had two children, William Vincent, who died at sea off the coast of Africa in 1817, and Ann Maria, who married a Thomas Wells and was a writer of some note.<sup>112</sup>

Joseph Locke and Mary Ingersoll Foster had seven children together, including Frances Sargent Locke, also a noted early American author, who married the painter Samuel Osgood. She is known for having exchanged flirtatious poems with Edgar Allen Poe.<sup>113</sup> Locke's firstborn son, Andrew Aitchison Locke, was part of the "infamous" Harvard Class of 1823,<sup>114</sup> many of whom were expelled on the eve of graduation for rioting.<sup>115</sup>

Locke was a New England merchant extensively engaged in the fish trade.<sup>116</sup> It was said that he was a man of "much energy and great business talents."<sup>117</sup> A newspaper account of Locke at the time of the seizure of the *Wendell* stated that Mr. Locke had at least five other vessels engaged in smuggling in the coasting trade.<sup>118</sup>

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<sup>110</sup> Joseph Goodwin Locke, Book of the Lockes, A Genealogical and Historical Record of the Descendants of William Locke, of Woburn, Mass. 139 (1853) available at <https://archive.org/details/booklockesagene01lockgoog>

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* See also Rufus Wilmot Griswold, The Female Poets of America. 63 (1874) available at <https://archive.org/details/femalepoets00grisrich>

<sup>113</sup> Frances S. Osgood (1811-1850), Portraits of American Women Writers, LIBRARY COMPANY OF PHILADELPHIA, available at <http://www.librarycompany.org/women/portraits/osgood.htm>. See also Griswold, *supra* note 100, at

<sup>114</sup> *Id.*

<sup>115</sup> Thomas J. Meyer, The Great Rebellion of 1823: The Year Half the Senior Class Was Expelled, THE HARVARD CRIMSON, (February 17, 1982) available at <http://www.thecrimson.com/article/1982/2/17/the-great-rebellion-of-1823-pii/>

<sup>116</sup> *Locke, supra* note 91, at 139.

<sup>117</sup> *Id.*

<sup>118</sup> Smugglers Take Warning ! Officers Look out !, *Newburn Herald*, March 16, 1809

Locke kept a warehouse at No.8, Shear's Wharf, sometimes referred to as Locke's Wharf.<sup>119</sup> Today, Locke's Wharf is known as Pier 9 of the Charleston Navy Yard.<sup>120</sup>



Pier 9 of Charleston Naval Yard, originally known as Shear Wharf.<sup>121</sup>

<sup>119</sup> Case Papers, *supra* note 29, at 46.

<sup>120</sup> Notes, Charlestown Navy Yard, Pier 9, Between Piers 8 & 10, along Mystic River on Charlestown Waterfront at eastern edge of Navy Yard, Boston, Suffolk County, MA. HISTORIC AMERICAN ENGINEERING RECORD. (1968) Available at <http://www.loc.gov/pictures/item/ma1660/>

<sup>121</sup> <http://www.loc.gov/pictures/item/ma1660.photos.196172p/resource/>