REPORT

Of the Committee to whom was referred the Memorial of Commodore Rodgers.

FEBRUARY 7, 1816.

Read, and committed to a committee of the whole House on Friday next.

The committee to whom was referred the letter or memorial of commodore John Rodgers, of the navy of the United States

REPORT.....

That in October last a decree was rendered by the District Court of the Massachusetts District, against commodore Rodgers for $ 43,250. The decree expressly charges commodore Rodgers, as commander of the squadron only, exempting him from any personal agency in the transaction on which the decree was rendered. From this decree an appeal was entered to the circuit court, the judge of which, not having time to examine the merits, on account of his preparations to attend the supreme court at Washington, confirmed the decree *pro forma.*

To this view, drawn only from the proceedings of the court, your committee will add a more detailed one from other evidence. The frigates President and Congress sailed from Boston on a cruise about October, 1812. In the course of that

cruise, commodore Rodgers having captured the British packet Swallow, and being engaged in removing the *specie* from on board her to the President, capt. Smith, of the Congress, did, without order or signal from com. Rodgers, give chase to a vessel which he did not come up with in less than three quarters of an hour, and was leagues distant from, and out of sight of, the President at the time of boarding the said vessel, which proved to be the Eleanor of Baltimore, owned by John Donnell. The two frigates thus parted by the chase, did not unite till the next morning, eight o'clock. The facts of the boarding, as appears from the deposition of leut. J. J. Nicholson are, that he was ordered by capt. Smith to board the Eleanor, and send her captain and mate on board the Congress, with her ship's papers, which he accordingly did. It appears, that after boarding the Eleanor, lieut. Nicholson being asked by a boy on board, what vessel he belonged to, told him it was the British frigate Shannon; but it does not appear that the statement so made was by order of captain Smith; nor does it appear that any colours were flying from the Congress; and if they were, it was not known to lieut. Nicholson. It seems to have been the impression of lieut. Nicholson, that the insubordination of the crew was owing to the suspicion that they were captured by the Shannon. This impression may have been, and probably was, incorrect, as on the next morning the crew beat their captain (Graham) severely, and three of them were, at the request of capt. Graham, of the Eleanor, put on board the President.

The decree and the deposition concur in ascribing the loss of the vessel to the insubordination on board, which the decree supposes to have been occasioned by the deception of the boarding officer.

The judge deduces from this fact, a general liability for the consequences it is considered to have produced; which liability he fixes upon com. Rodgers, on the ground, that though not personally acting in the transaction, he was responsible as commanding officer of the squadron. It is not within the legislative sphere to decide on judicial questions; this case is prepared for a decision of the supreme court; there let it be decided. It is of importance to remark, that the commodore, by this decree, pro forma, is required to give security in the penalty of $ 45,000, a sum serious to be involved in, however strongly urged thereto by friendship; or the stronger impression, that the supreme court will reverse the decree. In looking to precedents, your committee find them numerous; the government having never failed to indemnify the officer who has suffered in the faithful discharge of his duty. Though the cases are many, none have been as strong as this, where the officer is made responsible by the force of his appointment solely, without personal agency or privity in the transaction. The cases of interference have, in the general, been after judgment, but in the case of lieut. Malay, the defence was assumed by the government. It would be certainly consonant with reason, to say that the propriety of indemnity being agreed, the period when, must be unimportant, or dependent upon the particular circumstances of each case; the peculiar features of this case requiring present interference, are the heavy security required operating oppressively on com. Rodgers before decision, and the possibility of an affirmance of the judgment for want of security, to the injury of the government.

Your committee seeing that com. Rodgers is charged in this case, whether rightfully or wrong-

fully, as the officer of the goverment only; acting allowedly within the limits of his duty, if indeed, he could be said to be acting at all in this transaction, and satisfied of the justice and strict propriety of indemnifying an officer so acting, recommend the following resolution:

Resolved, by the Senate and House of Representatives of the United States of America, in Congress assembled, That commodore Rodgers be required to prosecute the appeal taken from a decree of the circuit court for the Massachusetts District to the supreme court of the United States, in which John Donnell of Baltimore was libellant, and said Rodgers was respondent, for the sum of $ 43,250 with costs, and if the same be confirmed, that then the secretary of the treasury be required to cause the same to be liquidated and paid; and that dollars be appropriated for the same, out of any money not otherwise appropriated.

Resolved, further, That the attorney-general be required, on the part of the United States, to assist the counsel of com. Rodgers, in prosecuting aid appeal.

LETTER

From commodore John Rodgers of the Navy of the United States, addressed to the Speaker, soliciting the interference of Congress, in an action at law, between John Donnell and himself, arising out of the discharge of his duties as an officer of the Navy.

February 3d, 1816.

Referred to Mr. Bassett, Mr. Sargeant, Mr. Pleasants, Mr. Goldsborough, Mr. Ward of Mass. Mr. Irving, and Mr. Middleton.

Washington, 1*st February*, 1816.

SIR,

In the month of October, 1812, captain John Smith commanding the United States frigate the Congress, while on a cruise, fell in with the schooner Eleanor, owned by Mr. John Donnell of Baltimore, spoke her and sent an officer on board for the purpose of examining her papers. Some time after this the Eleanor was lost; and the owner alleging that her loss arose from her having been "forcibly taken and detained by the frigates President and Congress," instituted a suit against captain Smith, and myself as commanding the frigate President, for the value of the vessel and cargo. While the suit was pending captain Smith died; and at a special district court for the Massachusetts district, held in October, 1815, it was decreed that the libellant recover against me, the value of said schooner and cargo, being $ 43,250,

with costs. From this decree, an appeal was made to the next circuit court—and there, in consequence of some papers not having been received in time to admit of the case being fully examined by the presiding judge, before his necessary departure for Washington ; and as it was understood by the court and counsel on both sides, at the opening of the arguments, that a decree of some sort should be delivered before the close of the term, it was deemed necersary by the judge to enter an affirmance of the former decree—which now subjects me to the extreme inconvenience of filing a bond with sureties, to respond the final judgment and costs in this case, and to enter the appeal in six days.

I am prepared, sir, to show, that I had no agency whatever in the detention of the schooner Eleanor, more than if I had been with the President in the British Channel, and captain Smith had fallen in with her on our own coast.—That I never gave to captain Smith any order, either written, verbal, or by signal, directly or indirectly, with respect to the schooner Eleanor, prior to his falling in with her, or any order that could have had any effect whatever on his conduct towards that vessel—that at the time he fell in with her, the President was not in sight, neither did I know any thing of the transaction, until a considerable time after it took place—that I never gave any order whatever of any kind, at any time, or took any measure, in relation to the Eleanor, that was not most *obviously* calculated to afford her succour and relief.

A transcript of the decree delivered in the district court in October, 1815, is herewith transmitted. The judge, Davis, it may be seen expresses the opinion, that captain Smith would be liable to respond in damages if he were living; but " com-

modore Rodgers, *though not personally acting in this transaction*, must, I think, *as commander of the squadron*, be responsible."

I hope, sir, that this case will be considered as not undeserving of the interposition of the national legislature; I respectfully request, through you, that congress will be pleased to afford such relief, as in their wisdom and justice, may appear due.

I have the honour to be,
With great respect,
Sir,
Your most obed't serv't,

JNO. RODGERS.

The honourable the Speaker of the House of Representatives.

Massachusetts District, ss. Special District Court, October, 1815.

John Donnell, by James Perkins, his agent,
vs.
John Rodgers and John Smith.

The object of this libel and complaint is to recover of the respondents the value of the schooner Eleanor and cargo, the property of said Donnell, alleged to have been lost at sea in the month of October, A. D. 1812, in consequence of being forcibly taken and detained by the frigates President and Congress, and from improper and unjustifiable proceedings on that occasion, on the part of the captors, the said John Rodgers, commanding the ship President, and said John Smith, the

ship Congress, sailing in squadron, uuder the command of said Rodgers.

Having fully considered the evidence offered in this case, it appears to me to be proved, that the schooner Eleanor and cargo were lost in consequence of the master being deprived of the command of the vessel, and from the insubordination of the crew during his absence, and the absence of the master on board the frigate Congress. This temper of the crew appears to have been induced altogether by the indiscreet and unnecessary imposition which was practised on the part of the captors, by which a conviction was produced that the frigates were British; a persuasion which the subsequent explanations could not remove. Such deception is, indeed, admissible in war, in relation to the enemy, but the belligerant adopts it at his peril, and if an innocent party is injured by the indulgence of such a practice, there should be adequate redress. Nothing culpable or exceptionable appears in the character or conduct of this vessel. The right of search is indisputable, but in this instance it appears to me to have been exercised in an improper manner, and in such a manner as to make those who were instrumental in the transaction liable for the consequences connected with it. Captain Smith, commander of the frigate Congress, the ship by which the Eleanor was examined, has died since this suit has been pending. The reputation and character of that gentleman must assure us that no intentional wrong could have been inflicted by him on his fellow citizens while in the execution of his official duties. But I am compelled to say, that the course of proceedings relative to the examination and detention of the Eleanor were such as to render him liable to respond in damages, if he were living. Commodore Rodgers, though not personally acting in this

transaction, must, I think, as commander of the squadron, be responsible; and I shall decree accordingly, that the libellant recover against him the value of said schooner and cargo, being 43,250 dollars, according to the affidavit in the case. If the vessel and cargo should be considered as too highly estimated, I should ascertain the true value more correctly by commissioners to be appointed by the court. There is not time for this course of proceeding previous to the next circuit court, at which it is understood that it is desirable the cause should be entered for as early a decision as may be practicable. I shall, therefore, render judgment for the above-mentioned sum, with costs.

JOHN DAVIS, *District Judge.*

A true copy,

Attest,

JOHN W. DAVIS, *Clerk.*

Massachusetts District, ss. Special District Court, October 1815.

John Donnell, by James Perkins, his agent,

vs.

John Rodgers and John Smith, esquires.

The object of this libel and complaint is to recover of the respondents the value of the schooner Eleanor and cargo, the property of said Donnell, alleged to have been lost at sea in the month of October, A. D. 1812, in consequence of being forcibly taken and detained by the frigates President and congress, and from improper and unjustifiable proceedings on that occasion, on the part of the captors, the said John Rodgers, commanding the ship President, and said John Smith, the

ship Congress, sailing in squadron under the command of said Rodgers.

Having fully considered the evidence offered in this case, it appears to me to be proved, that the schooner Eleanor and cargo were lost in consequence of the master being deprived of the command of the vessel, and from the insubordination of the crew, during his absence and the absence of the mate, on board the frigate Congress.--- This temper of the crew appears to have been induced altogether by the indiscreet and unnecessary imposition which was practised on the part of the captors, by which a conviction was produced that the frigates were British; a persuasion which the subsequent explanations could not remove.--- Such deception is indeed admissible in war, in relation to the enemy, but the belligerant adopts it at his peril, and if an innocent party is injured by the indulgence of such a practice, there should be adequate redress. Nothing culpable or exceptionable appears in the character or conduct of this vessel. The right of search is indisputable; but in this instance it appears to me to have been exercised in an improper manner, and in such a manner as to make those who were instrumental in the transaction, liable for the consequences connected with it. Capt. Smith, commander of the frigate Congress, the ship by which the Eleanor was examined, has died since this suit has been pending. The reputation and character of that gentleman must assure us, that no intentional wrong could have been inflicted by him on his fellow-citizens, while in the execution of his official duties. But I am compelled to say, that the course of proceedings relative to the examination and detention of the Eleanor, were such as to render him liable to respond in damages, if he were living. Commodore Rodgers, though not

personally acting in this transaction, must, I think, as commander of the squadron, be responsible.--- And I shall decree, accordingly, that the libellant recover against him, the value of said schooner and cargo, being 43,250 dollars, according to the affidavit in the case. If the vessel and cargo should be considered as too highly estimated, I should ascertain the true value more correctly by commissioners to be appointed by the court.--- There is not time for this course of proceeding previous to the next Circuit Court, at which it is understood that it is desirable the cause should be entered for as early a decision as may be practicable. I shall therefore render judgment for the above-mentioned sum with costs.

JNO. DAVIS, *Dis. Judge.*

A true copy, Attest,

JNO. W. DAVIS, *Clerk.*

United States of America,
Massachusetts District, ss.

District Court of the United States for said district, sitting in Admiralty at Boston, in the district aforesaid, on the first day of Feb. 1813.

John Donnel, by his agent, James Perkins, compt.
vs.
John Rodgers & John Smith.

The answer of John Rodgers, commander of the United States frigate, the President, to the libel and complaint aforesaid.

The respondent now, and at all times hereafter, saving and reserving to himself all and all manner of benefit and advantage of exception that may be had to the many errors, uncertainties, and

manifest insufficiencies in the complainant's, said libel or complaint contained, for answer thereto, or unto so much thereof, as this respondent is advised, is material for him to make answer unto, protesting that the said schooner, called the Eleanor, or the goods, wares, and merchandise on board thereof, never were seized and detained by the said respondent; the said respondent does answer and say, that during the existence of war between the United States of America and the united kingdom of Great Britain and Ireland, and their dependencies, to wit, on or about the sixteenth day of Oct. 1812, last, the said John Rodgers, being commander of the said United States frigate, the President; and the said John Smith, commander of the said United States frigate the Congress, he, the said John Rodgers, being then and there the commanding officer of a fleet or squadron, consisting of the ships aforesaid; and as such, it being the duty of the said respondent, in and with this ship, and the ships of his squadron, to cruise for, and to seize and bring into port for adjudication, the ships and vessels, and property of every description he, or they, might meet with belonging to the said united kingdom of Great Britain and Ireland, or the subjects thereof: And for this purpose, to search and examine all vessels whatsoever which he or they might fall in with on the high seas according to the law of nations, and the rights of belligerant powers; he did, in and with the respective ships of his squadron, namely Congress and President, in about the longitude of 53 19 west, and the latitude 37 32 north, on the high seas, fall in with the aforesaid schooner or vessel called the Eleanor: That the said John Rodgers, of the aforesaid frigate, President, being at the time engaged in taking possession of a vessel called the Swallow, come up with the said schooner, and brought her

to; did, as I was afterwards informed, despatch one Joseph J. Nicholson an officer and several men, from on board the said frigate, with instructions to go on board the said schooner, and to request the commander thereof to repair, with the said vessel's papers, on board the said frigate, for the purpose of submitting the same to the inspection and examination of him, the said Smith; and in the mean time the said Nicholson who was despatched as aforesaid, from the said frigate, should remain on board the said schooner and conduct her in such manner, during the examination and inspection of the papers as aforesaid, as that she should remain subject to the control and the signals of the said frigate; that, in pursuance of the said instructions, as the said respondent is informed and verily believes, the said Nicholson with the men who were despatched with the men as aforesaid, did proceed on board the said schooner, while she was on her larboard tack; that on entering on board he found the crew thereof in great confusion; the vessel being then under a double reefed mainsail, jib, foretopsail sheeted home and clewed on the cap, the rest of the sails and rigging in a confused and disordered situation; that the said Nicholson immediately requested the master of the said vessel to repair on board the said frigate with one of his mates and with their papers, which request was complied with without hesitance: That he, the said Nicholson, thereupon wore the said vessel on the starboard tack, in order to come up with the Congress, and to maintain a convenient position near to her; that he soon after discovered the Congress to wear, and thereupon wore the schooner also, in order to keep on the same tack with the frigate; that about an hour afterwards, and whilst the said schooner was in this situation,

the said Nicholson perceiving a squall approaching, and that the sails of the said vessel were in an improper and dangerous condition, ordered the crew to assist in taking in sail, and to prepare the vessel against the impending danger; which order every individual of the said vessel's crew, except the mate, did refuse to obey, and most of them abandoned their stations, and went below.

In this situation, and being altogether unable, without the assistance of the crew, to manage and conduct the said vessel, she was overtaken by the squall, and both her masts carried overboard, and she reduced to a wreck. And the said respondent doth say from the information received from captain Smith that the master of the said schooner and her papers, were detained on board the said frigate Congress, for the space of one or two hours only, and for no longer time than was indispensably requisite for such an inspection and examination, as he was authorized to make, in order to ascertain the character of said vessel, and whether she were or were not subject to capture, and to be sent into port for adjudication according to the laws of war; and that after he was made acquainted with the disaster before recited, he did render to the officers and crew of the said schooner, all such assistance as was deemed necessary for their safety and convenience, and for the preservation of the said vessel and cargo; and that immediately after the papers of said vessel had been examined as aforesaid, which was effected as speedily as the nature of the case would admit, the same were restored to her commander, and he permitted to take possession of, and proceed with his said vessel and the cargo on board, in such manner as he might deem proper, and for this purpose, every possible facility and assistance

were tendered to him. And the said respondent doth furthermore say, that he is credibly informed, and doth verily believe that very soon after the said Nicholson from the Congress frigate, had entered on board the said schooner, he did truly represent to the officers and crew thereof, the national character of *the two ships of war*, BY WHICH he had been detained as aforesaid, as also the true cause of such detention. In all which matters and things, the said respondent says, that he did proceed, and do as he lawfully might. And he does utterly deny that the said schooner and her cargo, or any part thereof were, or was by the misconduct, "negligence, or want of care of the officers of the said frigates, or any of them wrecked, lost, or destroyed, as the said complainants in their libel or complaint have alleged.".

And for cause why the said respondent does not proceed in this honourable court, to the legal adjudication of the said schooner Eleanor, her tackle, apparel, and furniture, and the goods, wares, and merchandise, which were laden therein, whether good and lawful prize or not, and why restitution, in value of the same, should not be decreed to the said complainants, in manner as propounded in the said libel or complaint, he, the said respondent does allege that he is not now in possession of the said schooner or her aforesaid cargo, or any part thereof; nor ever was in possession of, or had the custody of the same, except in the manner, and under the circumstances herein stated, and set forth; but that the same were given up to the master thereof as before alleged. And all this the said respondent is ready to verify. Whereupon he humbly prays to be dismissed from the said libel and complaint, with the

said costs and expenses by him most wrongfully sustained in that behalf.

JOHN RODGERS.

Sworn to, in court, this 1st day of February, 1813.

WM. S. SHAW, Clerk.

A true Copy.

(ATTEST) *Wm. S. Shaw, Clerk.*

I, Joseph James Nicholson, of Baltimore, in the State of Maryland, of lawful age to give testimony, do testify and say, That, in the month of October, in the year of our Lord eighteen hundred and twelve, the United States frigate Congress, to which I then and ever since have belonged, in the capacity of second lieutenant, under the command of John Smith, esquire, and the frigate President, commanded by John Rodgers, esquire, who was commodore of the squadron, consisting of those two frigates, sailed from the port of Boston, on a cruise; that, on the sixteenth of said month, between the hours of eleven and twelve o'clock, P. M. while the Congress was lying to, on the larboard tack, I discovered to the windward a sail standing to the eastward and before the wind, and immediately thereupon the Congress made sail in chase after her, she being about one mile and a half distant; after chasing her about three quarters of an hour, during which time the Congress fired two fore-castle guns, we came up to her; being directed by captain Smith to board the chase and send her master and one of his mates, with her papers, on board our frigate, and

to follow the frigate, I went in our boat and boarded her on her starboard side, my boat's crew consisting of a midshipman and four men; on getting on board, I met a boy who lighted me up her side, and whom I afterwards heard called by the name of "Norris," and I inquired for the master; he immediately appeared; and pursuant to my instructions, I required him to go on board the Congress, with one of his mates and his ship's papers; said master, whose name I understood to be John Graham, accordingly went in the frigate's boat, taking with him his mate and papers, to the Congress, and I remained on board the chase, which I then found to be the schooner Eleanor, of Baltimore; shortly after I had boarded, but whether before or after her master had left her I cannot recollect, I was repeatedly asked by the boy before-mentioned, what ship it was that I came from, and I replied, she was his majesty's ship Shannon, and directly afterwards, going aft, I met the supercargo and recognised him for an old acquaintance, whom I had often seen in Baltimore. At first he did not know me, but after some conversation, the particulars of which I do not now recollect, and being told my name, he recollected me. I then told him the name of our frigates, that we were Americans, what port we were from, and of the prizes we had taken. I wore ship twice, one or two of his men assisting me to shift the main boom and the gib sheet; afterwards, finding the crew would not obey my orders, I requested the supercargo to inform them who and what I was. Observing the Congress to leave us, owing as I then supposed to the bad steerage of the schooner, she carrying a strong weather helm, I went forward, and seeing the men there hauling down the jib, I asked them the reason of their so

doing, and their reply was that the jib-sheet had become unhooked or had parted. My impression then was that they intended to do all they could to thwart and oppose me. When I went on board the schooner, I found her under a double reefed mainsail, the peak not entirely up, and a jib—the foretopsail sheeted home, clewed on the cap—the square sail and rigging foul and flying about in every direction. On going aft subsequent to remarking the situation of the jib I found the main boom playing about and in a dangerous state, owing to its not being confined to the crotch rope, and I ordered it to be secured, but could get no assistance except from the man at the helm. About a quarter past two o'clock, A. M. it was squally, and I ordered hands to be placed by the throat and peak haulyards, intending, if the squall should prove heavy, to take in the mainsail, but I could not cause my orders to be obeyed. Immediately after I had given these orders the mainmast went, falling directly fore and aft; and shortly afterwards, before I could get forward, the foremast went by the board, in a quarterly direction. The cause of the falling of the mainmast, as I then supposed, was the schooner's having too much after sail, which brought her head to wind and reel, and the main boom having considerable play, which strained the mainmast. After she was dismasted the crew were alarmed, and became disposed to assist me. I then ordered the pump to be sounded, and it was reported to me, there was no water in the well. I then ordered a light to be put on the stump of the foremast and the mainmast, to be secured in board, and caused a number of guns to be fired off. At half past three o'clock, A. M. or thereabouts, we came within hail of the Congress, and informed captain Smith

of our situation, and he sent a boat, with the master of the schooner, on board her. I offered to take the supercargo beforementioned on board the frigate with me, and to give him a birth in my state-room, and we went together in said boat to the Congress.

J. J. NICHOLSON.

Question, by William Prescott, esquire. Did you chase the schooner, under British colours?

Answer. As my station was forward, I was not in the way of knowing what orders were given, and therefore cannot tell; but I know not of any colours being hoisted.

Question, by the same. How near was the frigate Congress to the schooner when the beforementioned guns were fired? and were they loaded with balls?

Answer. I cannot tell the distance, as I was attending to my duty on the forecastle; and the guns not being fired from my division, I know not whether they were loaded; but my supposition is, they were loaded with ball, that being the practice of all national vessels in time of war.

Question by the same. Was the supercargo present when you represented to the boy that the frigate was his majesty's ship Shannon?

Answer. He might have been present, and I believe he was, some of the time.

Question. When you first disclosed to the supercargo that you were an officer from an American frigate, did you request him not to communicate it to the crew?

Answer. I did.

Question. Was the refusal of the crew to obey your orders owing to their belief that you were from an English frigate?

Answer. I think it was; they persisted to consider me a British officer, notwithstanding all my endeavours to convince them of the contrary, from the time when I observed the Congress was leaving us.

Question. Did the mate obey your orders?

Answer. He did.

Question. At what distance was the frigate from the schooner when her masts were carried away?

Answer. I cannot tell, but I then saw the lights of the frigate appear and disappear at times.

Question. Was the schooner by your taking command of her, carried out of the course of her voyage to Bordeaux?

Answer. She must have been, but I cannot say how many points; I did all I could to follow the Congress in every direction she took, pursuant to the order of captain Smith, and I think if the crew had obeyed my orders the masts not would have been carried away.

J. J. NICHOLSON.

A true copy,

Attest, JNO. W. DAVIS, *Clerk.*

(COPY.)

United States frigate President,
Boston, October 7th, 1812.

SIR,

In the event of parting company, the following you are to consider as the limits of your cruise:

To steer in a direction for the Azores, and reaching the longitude of 34 or 35 degrees west, to shape a course for the Cape de Verd Islands—off which, say from 25 to 50 leagues to the west-

ward, after cruising one week should you not fall in with me, to steer for the island of St. Paul, (latitude 00d. 55m. N. and long. 29d. west,) and not finding me then, after cruising ten days, to steer westward to the longitude 34, whence after cruising five days you are to proceed to the United States; passing to windward of Barbadoes—off which, should your water and provisions not be too far expended, you may cruise such length of time as you may deem advisable.

It is impossible to foresee the events which may arise to make it necessary for you to deviate from these instructions—much must necessarily be left to your own judgment; and although the object of your cruise is to capture and destroy the enemy's ships, and by the exercise of every means in your power, to harrass and perplex his East-India and Brazil commerce; you are nevertheless not to expose the health of your crew, or hazard the safety of your ship to effect this, without having sufficient reason to believe, that in doing so. the object to be obtained is decidedly of primary importance to the risk attending its accomplishment. I have mentioned the number of days you are to cruise at each of the places assigned you as the most advisable cruising grounds—you are at liberty, nevertheless, to cruise as many days more or less, at either, as your supply of water and provisions may, on calculation, sanction.

St. Pauls, you will recollect, is a point which all the enemy's homeward bound East India, as well as a large portion both of his outward and homeward bound Brazil commerce passes.

New-York, New-London, or Newport, are the most advisable ports for you to return to, but should you have reason to believe that these are invested, you are at liberty to make any other in

the United States, giving me, as also the navy department on your return, an account of your cruise.

I have the honour to be, &c. &c.

JOHN RODGERS.

Capt. John Smith, commanding
United States' frigate Congress.

I, John Rodgers, now resident in the city of Washington, in the District of Columbia, do testify and declare, that soon after the commencement of a certain process in the admiralty, which is now pending in the circuit court of the United States, for the first circuit, wherein John Donnell, of the city of Baltimore, is complainant against John Smith, esq. late deceased, and myself, on account of the alleged illegal seizure and detention on the high seas, by the said Smith, as commander of the United States frigate Congress, and myself, as commander of the late United States frigate President, of a certain schooner called the Eleanor; that is to say, in the winter of eighteen hundred and thirteen, being with the said Smith in Boston, we respectively engaged George Blake, esq. the attorney of the United States for Massachusetts district, as our proctor and counsel to manage in our behalf, the defence in that suit; that in pursuance of the said Blake's request, and in order to enable him to frame a proper answer to the complaint, I caused lieutenant Nicholson, whom I understood to have been the officer from the said frigate Congress, who boarded the said schooner Eleanor, and who was actually on board said ves-

sel when the disaster complained of occurred, to prepare and hand to the said Blake, a brief statement of the facts and circumstances attending the seizure and detention of that vessel. Such a statement, I understood, was made by said Nicholson to said Blake; and being shortly afterwards informed by said Blake that an answer to the complaint of said Donnell had been prepared, I called with capt. Smith upon the said Blake, on or about the first of February of the said year eighteen hundred and thirteen, for the purpose of examining and making oath to the said answer. I well remember that the district court of the United States, in which our counsel, Mr. Blake, appeared to be much occupied, was then in session, and that we met him for the purpose of making the proper attestation to the said answer in that court. The paper containing the said answer was there handed to capt. Smith and myself, by said Blake, and as it appeared, on a hasty and cursory examination, to contain a correct statement of the principal and most prominent circumstances attending the seizure of the said schooner Eleanor, it was thereupon immediately, and without a critical and minute consideration of the particular phraseology of the instrument, subscribed and attested to by the said Smith and myself. I furthermore, testify and declare, that in all the conferences which I ever had with my counsel, Mr. Blake, relative to the subject in question, I uniformly stated to him my intention of assuming, as a principal ground of my defence against the claim of Mr. Donnell, that whatever injury he might have sustained on account of the capture and detention of the said schooner Eleanor, was altogether the effect of a course of procedure which had been pursued by captain Smith, without any particular order, pri-

vity, or agency, on my part; and that however captain Smith might be considered responsible for the consequences of the disaster alluded to, I ought to be regarded, as in reality I was, a perfect stranger to, and in no degree instrumental in producing the same

I furthermore declare, that at the time of subscribing and making oath to the answer as aforesaid, it did not occur to me that it contained any statement or expression which could in legal construction warrant the conclusion that I intended to unite with the said Smith in a joint defence against the said suit, or to hold myself as his commodore in any degree responsible for his particular acts in regard to the seizure and detention of the said schooner Eleanor; and if the said answer, in the form in which it now appears in the case, does admit of such construction, it has been owing altogether to the misapprehension of my counsel, Mr. Blake, in framing the said answer contrary to my intentions and not in conformity with the true state of my case. I furthermore testify and declare, that at the time of the seizure and detention of the said schooner Eleanor by the frigate Congress, and also at the time when the disaster alluded to is stated to have occurred on board the schooner, my own ship, the President, was not in sight; and in regard to the boarding the said schooner by the Congress, no instruction or command whatsoever was given by me, directly or indirectly, to capt. Smith, or to any of his officers or crew, nor had I then or at any time subsequently, any connexion or concern with the said transaction; except that after the frigate Congress came up with the President, and I was informed of the misfortune which had happened to the schooner, I provided for the accommodation of the officers

and crew of that vessel, another vessel called the Swallow, with which they returned to the United States.

Boston, January 26, 1806.

Dear Sir,

I regret being under the necessity to state to you, that owing to the circumstance of my not having received, until very nearly the close of the late session of our circuit court your last affidavit in the case of Donnell, we are deprived of the benefit of Judge Story's opinion on the merits, in the present stage of the cause. It seems he had considered it unadvisable even to look into the papers until every portion of the evidence on both sides should have been introduced; and having, therefore, delayed the investigation until the reception of the above mentioned affidavit, which left him only a day or two preceding his departure for Washington, it became impossible for him, as he assures me, in the midst of the necessary preparation for his journey, to pay the least attention to this subject, much less to attempt an adjudication of the cause, with that deliberation which its importance certainly demanded. Under such circumstances, and especially it having been understood by the court and the council on both sides, at the opening of the argument, that a decree of some sort should be delivered before the close of the term, it was deemed necessary by the judge, according to the uniform practice of the subordinate courts in such cases, to enter an "affirmance" of the former decree, "pro forma, and without prejudice to either party," with a view to take the cause, for a final argument and determination, to the supreme court.

This course of procedure can, as you will at once perceive, be attended with no other injury or inconvenience to you than as it may have been deemed desirable to have obtained *in this early stage* of the cause, the deliberate opinion of judge Story, which, I am extremely confident, would have been favourable to you; with this other consideration, moreover, that being appellant, you are, of course, under the necessity of paying, in the first instance, for the transcript of a voluminous record, and also of filing a bond with sureties to respond the final judgment and costs. In every other point of view, as the case, whatever might have been the decision in the circuit court, would most certainly have had a final hearing and determination at the supreme court, the circumstances before stated are altogether unimportant. By way of facility, with regard to giving the bond, an agreement of counsel has been entered of record, that it shall be delivered to judge Story at Washington on or before the 20th of February, and its sufficiency is also to be left to his judgment.

Accompanying this, I take the liberty to hand you a form for such a bond as will be proper on the occasion; and so soon as the clerk, who is now employed in making it out, shall have completed his transcript of the record and proceedings, it shall be forwarded to you without the least delay. In the mean time, permit me to advise you to request your counsel at Washington (Mr. Pinkney undoubtedly) to cause the appeal and appearance to be immediately entered. Should it be the desire of your counsel, preparatory to the final hearing, to be made acquainted with the points and the authorities in their support which were relied upon in your defence at the circuit court, I presume Mr. Dexter, who will be attending the su-

preme court, will be able to communicate the requisite information. I will, myself, moreover, in the course of a few days, send you my own list of authorities.

Have the goodness to favour me with a line by the returning mail, if possible, that I may be assured this shall have reached you.

In extreme haste, I am, dear sir, with the greatest esteem and respect, your friend and most obedient servant,

GEO. BLAKE.

P. S. The sum to be paid to the clerk for cost of the transcript will probably be 50 or 60 dollars.

Honourable John Rodgers.

Boston, December 13, 1815.

DEAR SIR,

I had the pleasure to receive by the mail of this morning, your letter of 8th instant, the affidavit and "extracts" which it contained, will undoubtedly be sufficient, with the aid of my own affidavit, to insure success to my motion, for leave to withdraw the answer which was first given by you, in the case of Donnel, jointly with captain Smith, and to enable you to file a separate and distinct answer. It seems however, that you have inadvertently omitted to notice that part of my last letter on this subject, wherein you were requested to prepare, and forward to me such an answer. I beg leave therefore, to suggest the necessity of your doing this, with as little delay as possible. The court, which is now under a temporary ad-

journment, will be convened again, probably for the last time during the present term, on the 24th of this month, at which time the judges will, I presume, expect to receive your final reply to the libel and complaint in question. I pray you therefore, to send it to me if practicable, by the returning mail. In framing this answer, it will be necessary for you barely to transcribe the former answer of yourself, and captain Smith, of which a copy was transmitted with my last letter, omitting only such expressions as may seem to have indicated an acquiescence on your part, to unite with him in a joint defence; and super-adding also, that part of the statement contained in your present affidavit, which goes to show the distance of the President Frigate from the Congress, at the time when the disaster complained of occurred. It would be advisable moreover, to state in your answer, the nature of your cruising orders to captain Smith, with reference to your journal, &c. &c.; and to negative most expressly, the having given any order by "word," "writing" or "signal," with regard to the pursuit and detention of this particular vessel, the Eleanor. In all other respects, the answer now to be filed, ought to conform to the former one, in as much as we shall not be allowed to exhibit a statement substantially at variance with that already presented, nor indeed to do more than merely to explain what might have seemed ambiguous in our former answer, or to subjoin a statement of such other facts and circumstances, essential to the points in issue, as may seem to have been heretofore inadvertently omitted. The cause having already undergone a very full argument on all the points, I indulge in the hope, that I may have the pleasure of announcing to you a favourable decision, very soon

after I shall have received your answer as above proposed.

In much haste, I am dear sir,
With the greatest respect and esteem,
Your most obedient servant,

GEO : BLAKE.

P. S. I forgot in my last, to state that the libel of captain Ham, et al. against yourself and captain Smith, which was long depending in our district court, was a short time since abandoned.

John Rodgers, esq.

Boston, October 20, 1815.

My dear Sir,

I have to perform the unpleasant task of making known to you the sad result which has attended the first hearing of the libel which has so long been pending against yourself and our deceased friend capt. Smith, in favour of John Donnell, as owner of the schooner Eleanor and cargo. This cause which had been lingering along from term to term in our district court, was necessarily, a few weeks since, brought to trial; and after a very full argument, in the course of which, as I flatter myself, nothing was omitted which could have been urged in your defence, a decree was passed against you for the supposed value of the vessel and cargo. From this decree, an appeal in your behalf was interposed as a matter of course, and the cause is now open for a rehearing in the circuit court, whose session commenced here a day or two since. What may be the result of a se-

cond and more thorough investigation of the case it is impossible to predict. I cannot, however, but entertain very strong hopes, (although it must be confessed that the evidence brought into the cause by the libellant wears, at present, a pretty formidable aspect,) that the liberal and enlightened judge of the circuit court, who has been somewhat remarkable for his predisposition in favour of *belligerant rights*, will take a very different view of the principles urged in your defence, from that by which the judge of the court below seems to have been governed in making his decision. I pray you, at any rate, my dear sir, to be assured that no effort on my part shall be wanting to obtain a more favourable decision in the second trial. Permit me, however, to observe, that as this cause is now beginning to assume a pretty serious and imposing aspect, I am extremely unwilling to endure the responsibility of continuing to act as counsel in the defence singly and alone, especially as two gentlemen, each of whom being at least of equal professional standing with myself, are associated against me on the other side; I must beg therefore you would have the goodness, with as little delay as possible, to authorize me to take to my aid some professional gentleman of distinction, (say Dexter or Otis,) whose co-operation with me in your defence, would, I am persuaded, be not less advantageous to you, (or rather to the government, by whom you will undoutedly, in any event, be ultimately indemnified,) than it would be grateful and acceptable to myself. It is proper for me furthermore to suggest that in case the decree of the district judge should be affirmed on the appeal, which I cannot believe to be a very probable result, the cause cannot be transferred for a final decision in

the supreme court of the United States until a bond with sufficient sureties, not for costs merely, but for the entire amount of the damages which may be awarded, shall have been filed in our circuit court, with condition to abide and perform the final judgment. I deemed it prudent to give you this latter intimation thus seasonably, inasmuch as in a case of such magnitude, one moreover in which the United States will undoubtedly consider themselves responsible ultimately, the final determination ought to be and unquestionably will be in the highest court of the nation.

That you may be acquainted, in some measure, with the grounds upon which the district judge has seen fit to pronounce against you, I take the liberty to hand you the enclosed copy of his decree. Should you deem it to be useful to know more of the present posture of the case, and to become acquainted with the nature and bearing of the evidence on either side, I will, with much pleasure, transmit to you a transcript of the entire record, or such parts thereof as you may be inclined to inspect. In a word, I will immediately comply with any directions which you may think proper to give me in relation to this subject. Least you should suppose me to have been remiss in having omitted to communicate to you the foregoing circumstances instantly, and without the least delay, I beg leave to observe, that on the day succeeding my argument in your case at the district court, I left town, with my family, on a journey to the country, from whence I returned not until yesterday, and that the decision of the judge was pronounced during my absence.

I have only time to subjoin a request that you would be pleased to offer my most cordial salutations, as well as those of Mrs. B. to Mrs. Rodgers

and family, who will very long be holden in most affectionate remembrance by numerous friends in this quarter; and accept for yourself assurances of the unremitted esteem and respect with which

I am, dear Sir,

Your friend and obed't serv't,

GEO. BLAKE.

John Rodgers, Esq.

(PRIVATE)

Boston, November 20th, 1815.

Dear Sir,

On receiving your letter of 26th October, I called immediately an Mr. Dexter, and according to your suggestion, engaged him as associate counsel with me, in your controversy with Donnell.

The cause has since been very fully, and in reference to one of your advocates, I may add very ably argued, in the circuit court. A decision will not be pronounced until about the middle of December, to which time the court will speedily be adjourned. In the mean time, with reference to one of the strongest grounds assumed in your defence at the trial, to wit, that the distance of your own ship the President from the Congress and the Eleanor, when the latter vessel was brought to and boarded by captain Smith, must have precluded the possibility of your having given any particular orders, or having had any immediate concern or agency in that transaction, it was deemed advisable by your counsel, at the hearing, to propose such an amendment and modification of the present state of the pleadings as should leave you to stand on ground rather more distinct and inde-

pendent of captain Smith than you are supposed to do according to the answer in its present form. With this view, and especially as the court, towards the close of the hearing, intimated a doubt whether, by uniting with captain Smith in the *answer* and *justification*, you had not, upon strict legal principles, presumptively admitted that he acted, in making the seizure, under your authority and command, a motion was submitted for leave to sever the answer, and to file a separate answer, which should clearly disconnect you from him. Upon this motion, the court assented to the modification proposed, provided it should be shown satisfactorily, by your affidavit and my own, that the joint answer in its present shape had been put in merely through the misconception of your counsel as to what might be the legal effect of such a joinder in pleading. The doubt thus intimated by the court did not, I confess, at the trial, nor does it now on further reflection, strike me with much force, inasmuch as the answer in its present form, though joint, exhibits such a presentment of facts as clearly shows that the seizure was effected by the Congress alone, and altogether independently of the President, and without the possibility of having received any previous special orders from that ship relative to the transaction. Still however for the sake of greater safety, in a case of so considerable magnitude, and on a point of so much importance, (*e majori cautela*, as we say in law latin,) it is undoubtedly advisable to put in a separate answer. In order to enable you to frame such an one, which, with regard to the principal facts stated, must correspond with your former answer, I take the liberty to forward herewith a copy of the latter, together with a loose draft of an affidivit in such form as will, I presume,

be found to accord substantially with your own recollection of the facts and circumstances therein refered to. Should this however not be the case you will be pleased to make such additions and qualifications as shall render your statement more conformable with the facts in the case.

It is particularly desirable, that your affidavit should describe with some degree of precision, the relative position of the President with regard to the Congress and Eleanor at the time the latter was boarded, as also where the disaster took place, and that the nature of the cruising orders given by yourself to captain Smith should be distinctly stated, so as to show very clearly that you had no privity or connexion with the individual transaction alluded to. With regard to this latter object it would be well also to obtain, if possible, some other evidence besides that resulting from your own declaration: such, for example, as the affidavit of some officer belonging to the President, who may have been acquainted with the orders which were given by you from time to time to captain Smith. With a view to assist your recollection of the circumstances attending the transaction, I forward you likewise a copy of the very full deposition of lieut. Nicholson, which was used at the tritrial, and constituted in fact, the principal part of your evidence in the case.

As it is not quite certain that the court may not resume its sittings at an earlier period than the middle of December, may I be permitted to request that you would furnish me with the proposed answer and affidavit duly executed, with as little delay as the nature of your other numerous avocations will admit. I have only to add, that both the instruments above-mentioned ought regu-

larly to be executed, and sworn to before some judge of a court of the United States.

With the most cordial esteem and respect,

I am, dear Sir,

Your most obedient,

GEORGE BLAKE.

John Rodgers, Esquire.

P. S. Although no very strong intimation of an opinion proceeded from the Judge in the course of the trial, I was nevertheless happy to perceive that the obvious inclination of his mind throughout the trial was in favor of our defence. I am at any rate very sanguine in the belief, and such I find to be the decided impression of my colleague, Mr. Dexter, that the decision of the Circuit Court, as well as the final determination in the Supreme Court, should the cause go there, cannot but be favourable, on any of the grounds which we have assumed.

As before, yours,

G. B.

Washington, Oct. 25, 1815.

DEAR SIR,

I have received your letter of the 20th instant, with the enclosed copy of the decree of Judge Davis, in favour of the owner of the schooner Eleanor of Baltimore. Had it appeared in evidence that the Eleanor's loss had been occasioned by any orders given by me to the captain of the Congress, I should suppose the Judge had some reason for such a de-

cision; but as this is not the case, I am at a loss even to conjecture on what ground his decree has been founded—as I cannot believe that the mere circumstance of my being captain Smith's senior officer, could justify such a decision; otherwise, I should be left to conclude, that in this instance, law and justice were directly at variance.

It would appear by the decree, that the strongest argument used in favor of the plaintiff was, that the Eleanor's loss was occasioned by the boarding officers representing the President and Congress to be British frigates; now if the boarding officer did make this representation, it neither did nor could have caused the crew to mutiny, unless they were all mad; for you must understand, that lieutenant Nicholson, the boarding officer, was, immediately on going on board, recognised by the supercargo of the Eleanor as his *schoolmate;* of course, if the crew remained longer in ignorance of the character of the ships, it was the fault of the supercargo, and he ought to be accountable for any evil consequences which might have resulted afterwards.

I notice what you say respecting the employment of additional counsel, and would advise your uniting the services of Mr. Dexter; for although I do not believe that Judge Story will see the affair in the same light that Judge Davis did, or that any other abilities, than your own, would be requisite, still it would not be adviseable to omit any thing which might tend to a fuller elucidation of the case; and more particularly, as in the event of my being cast, the United States will be bound in justice, not only to pay the costs of the suit, but to indemnify me to the fullest extent. Should you have occasion for lieut. Nicholson, the officer that boarded the Eleanor, a summons will find him at Phila-

delphia, as he is attached to the navy yard at that place.

With great regard and esteem,
believe me, dear sir,
your obedient servant,
JOHN RODGERS.

George Blake, Esq.
District Attorney, Boston.

Jno. Rodgers, Esq.

Boston, December, 29, 1815.

Dear Sir,

I have the pleasure to acknowledge the receipt of your letter of instant, enclosing your answer according to the late arrangement to the libel of J. Donnell. On the receipt of these papers I was really in hopes I should not again have had occasion to address you on this subject, until the cause should have had its final decision in this district. It seems however that further disclosures are required, and that a final decree will be delayed until these shall have been produced. I received last evening from one of the counsel of Donnell the enclosed billet requiring peremptorily the production of a transcript of your sailing orders to captain Smith, at the commencement of the cruise in question. It is obvious they can have no essential bearing on the points in issue : still it is necessary they should be produced ; and I will thank you therefore to forward the documents to me authenticated in like manner with those heretofore transmitted, with as little delay as possible.

In extreme haste, I am,
Dear sir,
Very truely, your friend and obed't.
G. BLAKE.

SIR,

YOU are hereby notified to produce the sailing orders, and all other orders given by Commodore Rodgers to Captain Smith on the cruise, during which the Eleanor, belonging to John Donnell, Esq. of Baltimore, was captured by the President and Congress frigates, under the command of Commodore Rodgers, and afterwards lost.

Yours respectfully,
SAMUEL HUBBARD.

George Blake, Esq.
Dec. 26, 1815.

Washington, Feb. 6, 1816.

SIR,

AT the time the accident happened to the schooner Eleanor, of which her detention by the frigate the Congress is alleged to have been the cause, the frigate the President was not in sight; neither was the Congress or the Eleanor to be seen from the President until 7 hours after the accident occurred. Capt. Smith having left the Eleanor, made sail to the eastward, (where I was engaged in disposing of the cargo and crew of the British packet, the Swallow, which I had captured the preceding evening,) for the purpose of communicating to me the disaster that had happened to her.

With respect to the Eleanor, captain Smith had no orders from me, either written, verbal, or by signal; and to shew more distinctly that I had no agency in the transaction, which it is alleged, occasioned the loss of the Eleanor, it is only necessary to observe that I did not know what the Eleanor was, or whether the Congress had board

ed her, until 8 o'clock in the morning, although she had left me at 11 o'clock the preceding night in chase of her.

I have the honor to be,
Very respectfully, sir, yours, &c.
JOHN RODGERS.

Hon. Burwell Bassett,
Chairman of a Committee of Congress.

Washington, February 6, 1816.

SIR,

It has been alleged that the crew of the Eleanor mutined, owing to their believing the President and Congress to be British frigates. This was not the case: the crew was disaffected, before the Eleanor fell in with the Congress; as was fully evinced by their behaviour while the Eleanor was under the examination of the Congress. They then beat, violently, and abused the master of the Eleanor, who, previous to leaving me, expressed his apprehensions of their proceeding to the last degree of violence, unless I would take from him Peter Michael, Joseph Pierson, and James Murray, who, he alleged, were the ring-leaders in the mutiny. He declared to me, that he preferred abandoning his vessel, to remaining on board with them; and I did, in consequence, receive them on board the President.

I have the honour to be,
With great respect,
Sir, your obedient servant,
JOHN RODGERS

Honourable Burwell Bassett,
Chairman of a committee
of Congress.