

## Rhode Island Justice — 1772 Vintage

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When H.M.S. *Gaspee* was boarded and burned by colonists in the early morning of 10 June 1772, seven miles south of Providence, her commanding officer, Lieutenant William Dudingston, R.N., was gravely wounded. He did not expect to live. Nevertheless, on 12 June the High Sheriff arrested him on the suit of Jacob Greene and others who sought in this way to recover the value of rum, Jamaica spirits and sugar he had seized and caused to be carried to Boston where they were condemned as smuggled goods.

The case came first before the Court of Common Pleas, Kent County Courthouse, East Greenwich, in the July term, 1772, with the following results: "Be it remembered that William Dudingston now residing in Cranston in the County of Providence, gentleman alias mariner, was attached to meet the complaint of Jacob Greene of Warwick. Nathaniel Greene of Coventry, William Greene, Elihu Greene, Christopher Greene, and Perry Greene of Warwick aforesaid, all in the County of Kent, merchants in Company.. ."[1] So begins the judgment handed down against Dudingston on the third Monday in July, by which time the lieutenant had been moved to the safety of a ship in Newport harbor.[2] The record continues,

Whereupon the said Jacob Greene and Company complain of the said William Dudingston in the custody of the Sheriff in an action of the case upon trover [3]-*[action to recover value of goods wrongfully taken or detained]* for that whereas the Plaintiffs on the seventeenth day of February last past were possessed of twelve hogsheads of West India rum, containing about fourteen hundred gallons, forty gallons of Jamaica spirits and one hogshead of Brown sugar. all of the value of two hundred and ninety-five pounds lawful money (as their own proper estate and he so possessed) they afterwards on the same day and year at Warwick aforesaid casually lost the said rum, Jamaica spirit and sugar out of their hands and possession, which Rum, Jamaica Spirits and Sugar aforesaid on the same seventeenth day of February, last past, at said Warwick came to the hands and possession of the Defendant by Findings, who knowing the said Rum, Jamaica Spirits and Sugar to be the goods and chattels of the plaintiffs and of right to belong and appertain to them the plaintiffs, and intending craftily and subtlety to deceive and defraud, the plaintiffs in this behalf, hath not delivered the said Rum, Jamaica Spirits and Sugar to the Plaintiffs although the Defendant was by the Plaintiffs often thereto requested.[4] But the Defendant afterwards, on the nineteenth day of February last past at said Warwick converted and disposed of the said Rum, Jamaica Spirits and Sugar, to the proper use and benefit of him the Defendant, which is to the damage of the Plaintiffs six hundred pounds lawful money. And be it further remembered that here cometh the said William Dudingston and saeth he is not guilty in manner and form as the Plaintiffs have declared against him, and of this puts himself upon the county, and the Plaintiffs in like manner: let therefore a Jury come before the justice here, to try the issue aforesaid. And afterwards (to wit) on Wednesday, the third day of the term, Latham Spence, Jonathan Tibbits, Peleg Salsbury, Arnold Stafford, John Levalley, Thomas Rice the 4th, Elisha Potter, Elisha Greene, David Hopkins, Job Vaughn, Benjamin Nichols and Thomas Arnold [5]... are duly impaneled and sworn the better to try the facts aforesaid, who upon oath return the following verdict. (to wit), 'We find for the plaintiffs two hundred and ninety-five pounds[6] lawful money and cost.' Which verdict is accepted by the court, and afterwards (to wit) on Wednesday aforesaid, here come as well the said Jacob Greene [et al], by James Mitchell Venum their attorney, as the said William Dudingston by James Brenton, his attorney, and the said Jacob Greene [and company] demand judgment of and upon the premise aforesaid, which being by the justices here seen and fully understood, it is therefore considered that the said Jacob Greene [and company] recover and have of the said William Dudingston as well the aforesaid sum of two hundred and ninety-five pounds lawful money for the damages they have sustained by means of the conversion aforesaid, and one pound eighteen shillings and two

pence, like money, for their cost in and about the prosecution of this suit expended. The Defendant appealed and bond is given as the law requires.

Dudingston must have known that the cards would be stacked against him. Captain Linzee of *Beaver* (so wrote that loyal old busy-body, Governor Hutchinson of Massachusetts, to Hillsborough),

kept on hoard his ship in that colony (Rhode Island) and avoided their law suits which the Lieutenant who had command of the schooner [*Gaspee*] has been forced to submit to after a very narrow escape with his life from the wounds he received. They have brought three or four actions against Capt. Linzee since his arrival in Boston. He has a much better chance here than he would have had in that Colony though they have taken care to bring their actions in the County of Bristol [7] which adjoins to Rhode Island. As far as I have been acquainted with them from Admiral Montagu they appear to be groundless and vexatious. I cannot answer for a Jury but the judges" I am very sure will do their part that the Law may have its due course.[8]

If Hutchinson was unsure about the dedication to justice he might find in a Massachusetts jury, it follows that a Rhode Island jury, instructed by judges who were elected, not appointed, would be guided by their chauvinism.

There remained the practical matter, from Dudingston's point of view, of getting the support of the Customs Office in Newport. They had let him down badly before, when they advised him to send a prize to Boston, and then denied it. And indeed there was friction between the two Services: Captain Talbot, of H. M. S. *Lively*, wrote a plaintive letter to Montagu from Delaware Bay, dated 28 June 1772, in which he said

As my purport of my being here is to put in force the laws relating to trade. I beg , Sir. your opinion how far the Revenue will support me and my officers when an action is laid. Justice is out of the question. We are sure it will go against us: no one will be our bail. not a lawyer in the Province that has a salary from the Crown, and any we may employ will seem to act for us. but strictly against us.[10]

Montagu sent Captain Talbot's letter to Stephens. at the Admiralty asking that it be presented to the Lords of the Treasury,

that the officers of the King's ships may know what protection they are to expect from the Customs if they are arrested for executing their duty. At present it is impossible for them to comply with their orders and the service is exceedingly disagree-able to both Captains and Officers.[11]

This exchange brought a ruling from the Treasury Chambers that the Customs House was to support the naval officers in legal matters arising out of their performance of Revenue duties. And Dudingston was to need all the help he could get.

His appeal went to the Superior Court in East Greenwich which styled itself "The Superior Court of Judicature. Court of Assize and General Gaol Delivery." On the third Monday in October 1772, Jacob Greene, accompanied by his kinsmen Nathanael, William, Elihu, Christopher, and Perry Greene, brought transcripts of the judgment they had obtained at the Inferior Court of Common Pleas and demanded judgment of the Superior Court. "Whereupon," reads the record,

... on the third day. of the term, the said William Dudingston is three times solemnly called but cometh not. Whereupon it seemed) to the justice here that the judgment of the Inferior Court he affirmed and that the said William Dudingston is in Mercy of this Court.[12]

Dudingston could not appear; he had gone to England to stand trial at a court-martial. His attorney. James Brenton of Newport. was unable to reach East Greenwich because

it so unfortunately happened that on the Day of the sitting of said Supreme Court. at said East Greenwich. aforesaid, the weather for that and succeeding days proved so exceeding tempestuous and dangerous that your petitioner's Attorney could not by any possibility cross the ferries to attend in season for his trial before the adjournment of said Court, by which means your Petitioner defaulted, and a complaint [was] filed against him for costs.[13]

In fact the weather must have been foul; only three of the Superior Court judges arrived in court: Stephen Potter, Benoni Hall and James Helme; Stephen Hopkins. Chief Justice, and Metcalf Bowler stayed home. So Brenton petitioned the General Assembly that execution of the judgment be stayed, the judgment set aside, and a new trial granted at the next Supreme Court. He filed his petition on 4 November 1772; the General Assembly met on the second Monday in December, and on Friday the 18th the Lower House voted to permit the appeal provided the petitioners lodged the amount of the judgment "in custody of the clerk of said court to be immediately paid to the Respondents if they obtain judgment in their favor but otherwise to be delivered to the Petitioner or his Attorney.[14] The Senate concurred.[15]

At the next term of the Superior Court, which started in April 1773, Brenton arrived on time, and a jury was chosen after he showed the judges the Act of the General Assembly that granted his petition for a new trial, and the Court began "to inquire into the facts." Brenton offered as evidence a copy of a decree he said was given in the Court of Vice Admiralty in Boston. The attorneys for Jacob Greene and Company objected, saying

The Court in which said Decree was given had no jurisdiction of seizures made within the limits of the Colony of Rhode Island, in the first instance, as appears by the Statute of the Eighth of George the Third. His present Most Gracious Majesty, Chapter twenty-second: also, for that of said copy it appears that said decree was made in condemnation of goods seized on the High Seas, whereas the goods said to be converted were taken by the said William Dudingston in Narragansett Bay and within the Colony of Rhode Island: and also, for that a copy attested by a Court of Vice Admiralty is not matter of evidence in a Court of Record without Oath made of the Truth thereof.[16]

But Brenton argued that the decree ought to be accepted as evidence and that the Court of Vice Admiralty had full jurisdiction of the seizure, "it being made at sea, agreeable to the Acts of Parliament." The colonists believed that the term "High Seas" applied to those waters outside the colony's jurisdiction, that is, to that part of the ocean beyond a headland to headland line in which the seas ran high, and not to the waters in the bay and estuaries. But Brenton had other ideas, and although the court does not record his argument, it is likely that he quoted the Statute 28 Henry VIII, which claims jurisdiction over things done not only upon the sea, and in havens, creeks, and rivers, but also "in all places whatsoever within the flowing of the water, to the full sea-mark; and in all great rivers from those bridges downwards that are next the sea." [17] He also claimed that an attested copy of the proceedings of the Vice Admiralty Court was "sufficient matter of evidence in law."

But the judges refused to admit it in evidence, and "let the jury from founding a Verdict thereon he exonerated."

Brenton then offered the jury a copy of Dudingston's commission to serve as a customs officer (his Royal Navy commission was not questioned at this trial), and the attorneys for Jacob Greene and Company looked it over gingerly and said

the same appears to be a Copy of a Commission from William Burch, William Shelton, -- Robinson, John Temple, Charles Paxton [the Commissioners of Customs in Boston] and the said John Temple was removed from his office, as Commissioner, before the said Seizure was made, also for that said Copy is neither attended with the Seal of any Office, or the Oath of the said Richard Reeves, or any other person; also for that the Commission, of which this is said to be a copy, was never recorded in this colony. Neither cloth it appear that the said William was ever sworn to make seizures either by the Board of Commissioners in Boston or any Magistrates in this Colony.

Brenton replied

the said copy is authenticated in the usual and common form of copies issued by the said Board that it is also continued in force notwithstanding the removal of John Temple, Esquire,

before said Seizure; neither was it essential or necessary that said Commission should be recorded in the Colony, and sworn before any Magistrate in this Colony.

The Court ruled that the copy "is rejected."

The case then went to the jury, whose verdict was, "We confirm the former judgment with costs." The Court ruled that Jacob Greene and Company be paid 295 pounds lawful money, and costs, making a total of 300 pounds, eight shillings, and one half penny lawful money. The damages were set at less than half the value placed on the shipment for a very good reason; when Brenton moved for an appeal to the King in Council, the Court would not admit the appeal, "the Damages given by the Jury being less than the sum limited by Act of the General Assembly upon which appeals are granted."

There remained only to issue a writ, commanding the sheriff in Newport County to execute the judgment, and, if he could not

for want of sufficient estate of the said William Dudingston... we further commend you to take the body of the said William into your custody and him safely secure in our gaol in Newport... till he satisfy and pay the aforesaid Jacob Greene and Company the aforesaid sum or he therefrom discharged.

The writ was signed by Stephen Hopkins, a professional politician who served as chief justice.

Charles Dudley, customs officer at Newport, paid the money to Sheriff Walter Chaloner and on May 20, 1773, the Greene's collected their loot.[18] Dudingston, fortunately for him, was still in England, where he had been judged by a far different type of justice — a naval court-martial. At his court-martial he was "honourably acquitted" and soon thereafter promoted. He returned to sea duty off the New England coast during the Revolution and, one may assume, continued to display his habitual zeal in the service of his King.

#### **Notes:**

1. Book 4, Court of Common Pleas, July Term 1764 - January Term 1776, Kent County Courthouse, East Greenwich, Rhode Island. pp. 720-21.
2. Bartlett, p. 47 (Dudingston to Montagu).
3. action to recover value of goods wrongfully taken or detained.
4. This seizure was reported in the Newport Mercury of 24 February 1772.
5. The family names of Greene, Hopkins and Potter appear also among those who attacked the Gaspee.
6. The sum of £300 had been set arbitrarily by the General Assembly as the limit below which no appeal could be made to the King in Council.
7. Bristol County court records are now in the Taunton, Mass. courthouse.
8. All of them firm Tories.
9. Colonial Office 5/761 (Massachusetts Bay), No. 34, folio 432-3, Boston, 4 September 1772. Public Record Office.
10. Colonial Office 5/145, No. 34 (d.), 28 June 1772. Public Record Office.
11. Colonial Office 5/145, No. 34 (b).
12. Book 1. Superior Court, October Term 1751--April Term 1789, Kent County Courthouse. pp. 394-95.
13. General Assembly, House Journal. 18 December 1772.
14. *Ibid.*
15. General Assembly, Senate Journal. 18 December 1772.
16. Book 1, Superior Court, October Term 1751 — April Term 1789, Kent County Courthouse, pp. 398-99.

17. See Arthur Browne, "Civil and Admiralty Law" (2 vols., Dublin, 1802), Vol. 2, pp. 464-67.

18. I have been unable to find the original of this writ in the Kent County Courthouse records. There is, however, a certified true copy of it among the unclassified Gaspee papers in the library of The Rhode Island Historical Society, Providence, Rhode Island. The itemized bill Dudley paid was as follows:

July 1772	. £295	costs	£1	18 sh.	2 d.
October 1772			1	14	7 ½
April 1773			1	14	4

plus 11 pence for execution, making a total of £300 8 ½.