

*The HAZARD's Cargo. (a)

The Cargo of the Ship HAZARD v. CAMPBELL, and others.

Neutral cover of enemy's property.—Further proof.

Time for further proof will not be allowed, where the court is satisfied, that the evidence, as it stands, is not susceptible of any satisfactory explanation.

APPEAL from the sentence of the Circuit Court for the district of Georgia, affirming that of the district court, which condemned the cargo of the Russian ship Hazard, as British property.

The Hazard was captured in December 1813, about six miles from the land of Amelia Island, by a boat from the United States flotilla, and carried into St. Mary's, in Georgia. The boarding-officer, after examining the ship's papers, returned them to the master, and asked the latter's permission to stay on board that night, which was granted; and at the request of the master, the boarding-officer assisted in piloting the ship over the bar of St. Mary's river, and brought her to anchor, after which, he asked again for the ship's papers, and then declared his intention to take the ship to St. Mary's. The master, in his protest, states, that the ship anchored nearer to the Spanish shore and harbor than to any other. The cargo was claimed in behalf of Luning, Gogel & Co., of Gottenburg.

Charlton and *P. B. Key*, for the appellants, contended, 1. That inasmuch as Russia and the United States had both adopted the principles of the armed neutrality, the principle, that free ships should make free goods, was, as between those two nations, to be considered as part of the law of nations, and that the cargo was protected by the Russian flag. 2. That the capture was made within the territorial jurisdiction of Spain, and therefore void. 3. That the boarding-officer practised a *ruse de guerre*, not justifiable towards a neutral. Fraud in war may be practised [*206 towards an enemy, but not towards a friend. *Duponceau's Bynkershoek* 15. There ought to have been a *vis major* on the part of the Americans. They ought not to have decoyed the vessel out of neutral waters in order to capture her. 4. That the testimony was not sufficient to counteract the documentary evidence as to the interest of the claimants: and, 5. That as the original German instructions from Luning, Gogel & Co. were taken away by the captors, and not produced on the trial, the claimants ought to be allowed time for further proof.

Jones and *Pinkney*, contra, insisted, 1. That there was no foundation for the idea, that there can be a law of nations in force between Russia and the United States, which is not equally in force between the United States and all other nations. The United States do not contend, that by the law of nations, free ships make free goods. 2. That there is no foundation in fact for the allegation, that the ship was captured within the jurisdiction of Spain; and if there was, Spain has not complained. 3. The artifice used (if any was used) was perfectly justifiable. A neutral vessel must submit, at all events. The deceit produced no effect of which the claimants can complain. 4. That the evidence of fraud, in the use of the names of Luning,

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Gogel & Co., to cover this property, was too manifest to require argument : and, 5. That in a case so clearly fraudulent as this, further proof ought not to be allowed. It is alleged, that the German instructions have been fraudulently withheld by the captors ; their contents have been stated in substance by the supercargo ; and if they were here, they could not alter the state of the case.

*March 6th, 1815. (Absent, Todd, J.) LIVINGSTON, J., delivered *207] the opinion of the court, as follows :—The ship Hazard and cargo were libelled as prize of war, in the district court of Georgia, where the latter was condemned, and the ship restored to the master, with an allowance for freight. This sentence being affirmed by the circuit court, an appeal as to the cargo was taken to this court.

The cargo was claimed in behalf of Messrs. Luning, Gogel & Co., subjects of Sweden, and residing at Gottenburg. It is impossible to look at the proofs in this cause, without being at once convinced, that this house never had any interest in it. The papers found on board leave not the smallest doubt as to the hostile character of the property, which is also abundantly proved by the witnesses who were examined in the district court. The shipment was made by Mr. Worrall, a British merchant, at Liverpool, and an English supercargo put on board by the name of Diggles, under whom Mr. Dalmer, who filed the claim, was to act as assistant supercargo. Between Mr. Worrall and Mr. Lowden, who makes some figure in this transaction, there is proved to exist such an intimate connection as to render the one chargeable for the declarations and acts of the other, so far as they regard this shipment. Mr. Lowden, in a letter to his correspondent at Charleston, which was on board of the Hazard, says : “There is likely to be a great deal of business done betwixt this and Amelia Island. The vessel that this goes by has about 9000*l.* worth on board. The parties interested are my particular friends.” And a little further on—“It may, perhaps, be satisfactory to know, that we have full and unlimited authority from a respectable house in Gottenburg, to make use of their name upon any occasion whatever ; so that, in case of capture or detention, the necessary proof could easily be produced of the neutrality of the property.” Mr. Worrall writes to Mr. Smith, of Charleston, that “the Russian vessel Hazard, bound to Amelia Island, was laden by him, in conjunction with some other friends.” There was, also, a memorandum on board, for the government of

*208] the supercargo, signed by Lowden, *containing, among others, this instruction, “should you be boarded at sea by men of war or privateers, you must uniformly declare the property to belong to Luning, Gogel & Co., of Gottenburg, as it is represented to be by the documents accompanying the cargo. Men of war are apt to board under false colors, and if you don't stick to the text, you may be deceived.” It may be asked here, why was the supercargo thus cautioned to be on his guard, unless he was in the secret, as he doubtless was, that the documents were colorable, and the property in fact British ?

Mr. Dalmer, in the claim interposed by him for the cargo, does not swear to its neutrality, but only that the gentlemen at Gottenburg are owners thereof, as far as he is informed ; and it is deserving of attention, that Mr. Diggles, the supercargo, not only does not unite with the assistant super-

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cargo in filing this claim, but, on being brought before the commissioners, refuses to be sworn or examined as a witness in the cause. On his examination, sometime afterwards, before the district judge, he states that "he is not acquainted with the owners of the cargo, or any part of it, and cannot swear that Luning, Gogel & Co. are the owners: that he received his instructions from Mr. Worrall, as agent of that house."

There was a short letter of instructions on board, to Diggles and Dalmer, dated 8th October 1813, and proved to be signed by Luning, Gogel & Co., but the body of which must, no doubt, have been written by Mr. Worrall, or under his direction. Now, although the invoice be made out in the name and for the account and risk of Luning, Gogel & Co., and a letter of instructions signed by them was found on board, it would be giving more weight to these formal documents than they are entitled to, should we say, that they have satisfied us, notwithstanding the mass of evidence which this cause presents to the contrary, that the property was other than British, through every stage of this transaction. Indeed, the advocates of the appellant, despairing to convince the court of its neutrality, rely principally on an irregularity in the capture, and on a suppression by the captors of a letter of instructions *from Luning, Gogel & Co., which it is said [*209 came to their hands.

The capture, it is alleged, was made within the limits and jurisdiction of Spain. Of this there is no sufficient evidence, which renders it unnecessary to say, what influence that fact, if established, might have on the ultimate decision of the court. The suppression of the paper in question is also very imperfectly made out; and if it had been brought into court, and formed part of the evidence in the cause, it could not possibly do the appellant any good; for a paper merely signed by Luning, Gogel & Co., and converted into a letter of instructions, by Mr. Worrall, in Liverpool, to suit his own purposes, as must have been the case here, could have but little effect in removing any one of the numerous doubts which the circumstances of this case are so well calculated to excite.

A motion has also been made for an order for further proof. If the court entertained any difficulty as to the reality of this transaction, or believed that Messrs. Luning, Gogel & Co. could prove that they were, in fact, the owners of this property, perhaps, it might listen to the application, late as it is; but believing, as it does, that the evidence as it now stands, is not susceptible of any satisfactory explanation, and that the captors have made out a clear title to the whole cargo shipped by Mr. Worrall, it cannot, in justice to them, make any such order. The sentence of the circuit court is, therefore, unanimously affirmed, with costs.

Sentence affirmed.