

*The Brig ALERTA and Cargo, BOSQUET, Claimant, v. BLAS MORAN, Libellant. (a)

Restoration of neutral property.

The district courts of the United States (being neutral) have jurisdiction to restore to the original Spanish owner (in amity with the United States), his property captured by a French vessel, whose force has been increased in the United States, if the prize be brought *infra præsidia*.¹

THIS was an appeal from the sentence of the District Court for the district of New Orleans (which has the jurisdiction also of a circuit court). The facts of the case were stated by WASHINGTON, J., in delivering the opinion of the court, as follows :

This is the case of a libel filed in the district court of New Orleans, by Blas Moran, a subject of the king of Spain, and a native and resident of the island of Cuba, setting forth, that he is the owner of the brig Alerta and cargo, consisting of 170 slaves, which, on a voyage from the coast of Africa to the Havana, was, some time in the month of June 1810, when within a few leagues of Havana, captured on the high seas by the L'Epine, bearing French colors ; that a prize-master was put on board the Alerta, and seventeen of the slaves taken out, after which, the prize was ordered to steer for the Balize, and was finally brought to the port of New Orleans, with the remainder of her cargo, consisting of 153 slaves. The libel alleges that the L'Epine was not duly commissioned to capture the property of Spanish subjects, or, if so commissioned, that she was armed and equipped for war in the port of New Orleans, and manned by sundry American citizens and inhabitants of the territory of New Orleans, contrary to the law of nations. The prayer of the libel is for restitution and damages.

The claim of the prize-master admits the capture of the Alerta, as lawful prize of war ; and asserts, that the L'Epine, at the time of the capture, was and still is legally authorized to capture all vessels and their cargoes belonging to the subjects of Spain, as enemies of France. He further states, that after the capture, he was compelled to enter the port of New Orleans, by stress of weather, *want of provisions, and the inability [*360 of the Alerta to keep the sea, and prays to be dismissed.

The evidence in the cause establishes the following facts : That some time in April 1810, this privateer, commanded by Captain Batigne, and bearing a commission from the French government, to make prizes on the high seas, entered the port of New Orleans. The captain had with him a letter of instructions from his owner, directing him to deposit what money he might take as prize, in the Bank of New Orleans ; to put into one of the ports, as being in distress, and in case he should hear of the capture of Guadaloupe, he was to renew his crew, for the purpose of conveying his prizes to France. Some time in the course of the succeeding month, Batigne presented two petitions to the collector of the port of New Orleans, stating that the L'Epine had been compelled by stress of weather to put into that port, and that he had necessarily incurred expenses for refitting

(a) March 10th, 1815. Absent, TODD, Justice.

¹ See La Armistad de Rues, 5 Wheat. 385 ; Stoughton v. Taylor, 2 Paine 653 ; The Nancy, The Santissima Trinidad, 7 Id. 284 ; The Gran Bee 73. Para, Id. 471 ; The Santa Maria, Id. 490 ;

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and victualling the privateer, and for defending himself against a criminal prosecution for piracy, to an amount exceeding \$5000, and praying for permission to enter and sell such part of his cargo, as would enable him to discharge that sum. He also applied to the collector, about the same time, for permission to purchase provisions for his crew, amounting to thirty persons, on his intended voyage to France, and intimated, that he should take with him about ten passengers, if permitted to do so; but this permission being refused, he professed to relinquish his intention of taking passengers on board.

Having obtained permission to purchase provisions, and to dispose of a part of his cargo, it appears, that he paid off his crew, and sailed from New Orleans, soon afterwards, with a crew of from fifty to sixty men, composed partly of persons obtained at New Orleans, and partly of those who had entered that port with him. With this force on board, he went to sea, and soon afterwards fell in with the *Alerta*, bound from Africa to the Havana, which, together with her cargo, consisting of 170 slaves, he captured as prize of war, put a prize-master on board, and ordered her to steer towards the Balize. On her passage, the *Alerta* suffered very considerably in a gale; and her crew, together with the slaves on board, were *361] much distressed for want of provisions, when she was, *at the request of Captain Batigne, visited and relieved by Captain Allen, and conducted safely to New Orleans, where he libelled the vessel and cargo for salvage.

The court below, upon the libel of the Spanish owners, decreed restitution to the libellant of the ship and the 154 slaves left on board of her by the privateer, subject to all expenses for the support of the negroes, and such salvage as should be decreed by the court, together with costs of suit, and such damages as the court should thereafter decree.

J. Woodward, for the appellant, contended for the following points:—
1. That the authority to capture is complete, and the capture in all respects legal and operative. 2. That it does not appear that the equipment of the *L'Epine* was in violation of any law of the United States, or in such manner as to affect the prize in question. 3. That there is error in the decree of the court below, in decreeing restoration to the libellant, Blas Moran. 4. That should it be the opinion of this court, that the *Alerta* and cargo are not prize of war, the restoration should be subject to a salvage to the captors; and submitted the case to the court, upon the following written argument.

In this case, the appellant will not controvert the jurisdiction of the court to inquire as to the commission or authority under which the privateer acted, but will content himself with showing that, for all the purposes of this case, the commission is regular. There are no appearances which justify a presumption of fraud, on the face of the commission. The court will inspect it. The district court agrees, that if the case stood on this point alone, it would be left to the foreign tribunal. The official signatures are *362] proven. The commission being *thus established, this court will not go into a question of regularity, which may or may not be material, according to the local usage in the French ports, as to issuing or using those commissions.

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It appears, by the captain's petition to the collector, which is sworn to, that he, the captain of the *L'Epine*, was tried at New Orleans, on this transaction, as a pirate, and I think, the presumption must be, that he was acquitted. The validity of his commission must have been passed upon, on this trial, for if he acted without commission, he was a pirate. He cannot be looked upon as a pirate, because he has acted openly, under the authority of, at least, a regularly-executed commission, and in full communion with the consul of his own nation, at New Orleans. If not a pirate, he was a legal captor so far as respects the commission.

But it is said, that the equipment of the *L'Epine*, by force of which she made the capture in question, was contrary to the laws of the United States, and that, therefore, our courts have a right to restore the prize. The inference of law may be true, but the fact is not established. Indeed, it might not be indecorous to suppose, from a comparison of the testimony with the result in the court below, that, by possibility, clamor or prejudice, which too often insensibly intervene in such cases, had not been without their effect. The acting consul at New Orleans swears, that the additional number of men went on board as passengers, that no money was paid to them, and that, if they were to have formed an augmentation of the crew, he must have co-operated. The circumstances corroborate this fact: they were foreigners; they were emigrants. It does not appear, in any instance, that a person was taken on board as an addition to the crew. There might have been a difference between the number reported, and the number on board, but it is also true, that there were some secreted on board, unknown to the captain, until he got to sea. This is not an unusual case, with respect to such vessels. But the testimony shows the conduct of the captain to have been honorable on this point. If, after leaving the jurisdiction of the United States, any of those Frenchmen had entered into the service, as foreigners, this is a crime personal to themselves, and which cannot affect the privateer or her prize, unless by the captain's original procurement, he knowing them to be American citizens. Would the evidence *which [363 the court will, of course, read, be sufficient to establish the penalties under the act of congress? If not, it will not be sufficient to establish the forfeiture of vessel and cargo, as against the captors, whose possession I consider firm under the capture. The whole conduct of the captain has been in open day, and under the express view of the collector. It must be presumed fair.

But it is said, that the last entrance into the port of New Orleans was not in good faith. It is said, that by the letter of instructions, &c., the *L'Epine* had an original intent to go into New Orleans, to deposit cash in the bank there. This intent was contingent and remote, and it does not appear, that the contingency of getting cash had happened. But the original intent is immaterial, provided the distress were the true and immediate cause. I need not refer the court to authorities, under the navigation laws of England, to decide this point, but if desired, they can be produced. This intent might have been effected, without a violation of our laws, as the money might have been sent in, without the vessel. But this charge of original intent is contradicted by the fact, as the *L'Epine* passed, frequently, with a fair wind, when she might have entered, and did not, but kept at broad

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capturing distance, 80 miles from the Balize, although there were no enemy ships to prevent her entering the port.

If the court should be of opinion, contrary to the crude reasoning now submitted, that the Alerta and cargo ought of right to be restored, then it appears to me, that the captors are entitled to salvage, and not Mr. Allen, the pilot, as a condition precedent to the restoration. The deposition of Allen himself will show, that when he, for the first time, boarded the Alerta, she was within a day of Barrataria, had weathered the storm of the 26th, was riding in a calm sea, at anchor, twelve feet water, and the crew amusing themselves in catching sea birds, and supplying themselves by salting them, of which they had several barrels. She had plenty of provisions at that time, to carry her to Barrataria, and Allen states, that she could have gotten there, but had a storm happened, he should not have liked to have risked himself in her. But as to the L'Epine, she overtook the Alerta, in actual distress, after she had been recently cast on shore and greatly injured, with *364] but half a barrel of bread, half a barrel of pork, *for 150 slaves, and twelve other persons, and indeed, the L'Epine, was visited by Mr. Martinez, from the Alerta, on account of this distress. The testimony shows that she could not have reached a harbor, but for the aid from the L'Epine. Then, unless the act of bringing in the Alerta were piratical, the L'Epine acted as humanely and as beneficially to the owners, in bringing in the Alerta, as in any other case of salvage.

There was no argument on the part of the appellee.

March 10th, 1815. (Absent, Todd, J.) WASHINGTON, J., delivered the opinion of the court, as follows :—The only question for the consideration of this court is, whether the court below had jurisdiction of this cause, for the purpose of restoring the property to the libellant? The jurisdiction is asserted upon two grounds. 1. That the force of the privateer, by means whereof this capture was made, had been increased at New Orleans, contrary to the laws and in violation of the neutrality of the United States. 2. That the commission of this privateer had expired, before the capture was made.

As this court is satisfied with the sentence of the court below, upon the first ground of jurisdiction, the opinion will be confined to that point. The general rule is undeniable, that the trial of captures, made on the high seas, *jure belli*, by a duly-commissioned vessel of war, whether from an enemy or a neutral, belongs exclusively to the courts of that nation to which the captor belongs. To this rule there are exceptions, which are as firmly established as the rule itself. If the capture be made within the territorial limits of a neutral country, into which the prize is brought, or by a privateer which had been illegally equipped in such neutral country, the prize courts of such neutral country not only possess the power, but it is their duty to restore the property, so illegally captured, to the owner. This is necessary to the vindication of their own neutrality.

*365] *A neutral nation may, if so disposed, without a breach of her neutral character, grant permission to both belligerents, to equip their vessels of war within her territory. But without such permission, the subjects of such belligerent powers have no right to equip vessels of war, or to increase or augment their force, either with arms or with men, within the

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territory of such neutral nation. Such unauthorized acts violate her sovereignty, and her rights as a neutral. All captures made by means of such equipments are illegal, in relation to such nation, and it is competent to her courts to punish the offenders, and in case the prizes taken by her are brought *infra præsidia*, to order them to be restored.

These principles are believed to be fully warranted by the general law of nations, by the decisions of the courts of this country, and by the laws of the United States. By the act of June 1794, the enlisting, within the territory of the United States, persons to serve as soldiers and marines on board of any vessel of war or privateer, in the service of any foreign state, with the exception of the subjects of such foreign state, transiently within the United States; the fitting out and arming any vessel in the service of a foreign prince or state, at war with any other nation, which is at peace with the United States; and the increasing or augmenting the force of any armed vessel of war, in such foreign service, by adding to the number of her guns, and the like; are declared to be offenses against the United States, and are punishable by fine and imprisonment; and the 7th section of the law provides for the detention of all such vessels as have been so fitted out, or as have so increased or augmented their force, together with such prizes as they may have made, in order to the execution of the prohibitions and penalties prescribed by that act, and to the restoring of such prizes, in cases where restoration has been adjudged.

Thus, if there were any doubt as to the rule of the law of nations upon this subject, the illegality of equipping a foreign vessel of war within the territory of the United States, is declared by the above law; and the power and duty of the proper courts of the United States, to restore the prizes made in violation of that law, is clearly recognised.

*But it is insisted for the claimant, in this case, that the persons [*366 persons taken on board at New Orleans, by the captain of the privateer, formed no part of the crew, at the time the privateer left that port, but that they were received merely as passengers; that they were emigrants from other nations, and not citizens of the United States; and that their subsequent change of character from passengers to crew, cannot attach any crime to the captain of the privateer, under the laws of the United States, or affect his right to the prizes which he might afterwards make on the high seas.

This argument is unsupported by the facts proved in the cause. It appears, that Captain Batigne proposed, in the first instance, to the collector of the port of New Orleans, to take on board ten passengers for France, provided he should be permitted to do so, and that he afterwards stated to the collector, that as there was some difficulty in obtaining such permission, he should decline taking them. But what places this subject beyond all doubt is, that it appears from some of the ship's papers of the privateer, that advances were made to these alleged passengers, with a deduction of three per cent. for the marine invalids, agreeable to the ordinances of France, and the *role d'équipage* contains the number of prize-shares opposite to their names. These facts, being unexplained by any testimony in the cause, which deserves to be respected, leave no doubt, that the persons taken on board at New Orleans were engaged originally as an addition to the crew of the privateer. Some of the persons so enlisted are proved to be native citizens;

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others were residents domiciled in New Orleans, some with and others without families ; and others again were slaves belonging to the citizens of that place, who appear to have been seduced from the service of their masters. It is quite immaterial, whether the persons so enlisted were native American citizens, or foreigners domiciled within the United States ; since neither the law of nations, nor the act of congress, recognise any distinction, except in respect to subjects of the state in whose service they are so enlisted, transiently within the United States ; and it may well be doubted, whether this exception in the act of congress was not virtually repealed by the non-inter-
*367] course law. But it appears, that some of these persons *were emigrants from Cuba, and were, at that time, residing and domiciled in New Orleans.

It is next contended on behalf of the claimant, that in case the court should affirm the decree directing restitution, it ought to be done, upon the condition of the libellant paying salvage, not to the captain of the gunboat who furnished the Alerta with provisions, and conducted her to New Orleans, but to the privateer.

This claim is entirely inadmissible. Salvage is allowed as a reward for the meritorious conduct of the salvor, and in consideration of a benefit conferred on the person whose property he has saved. What are the pretensions of Captain Batigne to the reward he claims ? He fits out his vessel at New Orleans, in contravention of the law of nations, and of the United States ; and finding on the high seas a vessel and cargo, belonging to the subjects of a nation at peace with the United States, within a short distance of the Havana, her port of destination, he employs the force thus illegally taken on board, to make prize of both vessel and cargo, and taking her out of her course, he conducts her towards the Balize, near to which she is found by Captain Allen in distress, in consequence of a severe gale, to which she had been exposed, and of the want of provisions. Her wants being relieved by that officer, he conducted her in safety to New Orleans. Nothing could be more remote from the intentions of the captain of the privateer, than to render a service to this ship and her cargo. So far from it, he committed an unwarrantable spoliation of the cargo, by selling fourteen of the slaves, part thereof, to an American whom he met at sea ; and he most certainly intended to have smuggled the residue of the slaves into Grand Terre, or some other part of the coast, and there to have disposed of them. It would ill become any court of justice, and much less an American court, to bestow a reward on a person who had thus violated the laws of the United States, in one instance, and meditated a violation of them in another : and it would be still worse, to give such reward, at the expense of the injured Spaniard.

Upon the whole, it is the opinion of this court, that the sentence appealed from ought to be affirmed, with costs.

Sentence affirmed.