tending through a long series of years down to the present time.

We cannot doubt that the power exists in the legislature, and it is not for this court to revise the facts upon which it has seen fit to exercise it.

Mr. Justice DAVIS dissented.

JUDGMENT AFFIRMED.

THE DASHING WAVE.

1. A neutral, professing to be engaged in trade with a neutral port, under circumstances which warrant close observation by a blockading squadron, must keep his vessel, while discharging or receiving cargo, so clearly on the neutral side of the blockading line as to repel, so far as position can repel, all imputation of intent to break the blockade. Neglect of that duty may well justify capture and sending in for adjudication; though, in the absence of positive evidence that the neglect was wilful, it might not justify a condemnation.
2. Where a party, whose national character does not appear, gives his own money to a neutral house, to be shipped with money of that house and in their name, to a neutral port in immediate proximity to a blockaded region, and an attorney in fact, on capture of the money and libel of it as prize, states that such neutral house are the owners thereof, and that "no other persons are interested therein," the capture and sending in will be justified; though in the absence of proof of an enemy's character in the party shipping his money with the neutral's, a condemnation may not be.
3. On a capture of a vessel unobservant, through mere carelessness, of the duty first above mentioned, and containing money shipped under the circumstances just stated, a decree was made restoring the vessel and cargo, including the money; but apportioning the costs and expenses consequent on the capture ratably between the vessel and the coin, exempting from contribution the rest of the cargo.

DURING the late Rebellion, and while the coast of the Southern States, including that of Texas to the mouth of the Rio Grande, was under blockade by the United States, the Dashing Wave, a British-owned brig, was captured at anchor by a United States gunboat, off the mouth of that river, the di-

viding stream between the United States and Mexico, a neutral, and libelled as prize of war in the District Court of New Orleans. The vessel was employed as a general ship on a voyage from Liverpool to Matamoras, a Mexican town on the Rio Grande, directly opposite to Texas. She had been freighted at Liverpool in 1862 with an assorted cargo, consigned by ten or more shippers to various persons and firms described as resident at Matamoras. There was no contraband aboard. The most remarkable shipment was one of £12,000 gold coin, in the name of Lizardi & Co., British subjects of Liverpool. By claim put in after the libel filed for Lizardi & Co., by their agent at New Orleans, it was claimed as their property, it being stated that no other persons were interested therein. Correspondence found on board the captured vessel showed, however, that £7000 of the £12,000 were owned by one H. N. Caldwell, and had been shipped to the Matamoras consignee for the purchase of cotton either in Texas or Matamoras on the joint account of Lizardi & Co. and Caldwell.

The residence and business of Caldwell were not fully disclosed in the record. It did not appear that he was a British merchant, nor that he had any commercial domicil in Mexico, nor yet that he was a rebel enemy. He had apparently married in England shortly before the vessel sailed, and was on board with his wife and servant at the time of capture. The nationality of the wife and servant the captain stated to be English; but he did not know what that of Caldwell was. They were all permitted to go ashore with their luggage by the boarding officer. Caldwell had, apparently, no interest in the vessel or cargo. He appeared, by the letters, to have been engaged in cotton transactions, and to have proposed to Lizardi & Co. the plan of shipping all the gold to Mexico as their own property. Caldwell made no claim for any part of the gold, nor did he personally appear in any way in the case.

On the proofs *in preparatorio* the place of capture, as respecting the middle or dividing line of the Rio Grande, appeared doubtful.

The testimony of naval witnesses, examined under an order which had been obtained by the captors for further proof as to the place of capture and the character of the cargo, asserted that the vessel, when seized, was on the northern, that is to say, the American side, of the boundary line, and in our waters. The master swore to the contrary.

In point of fact, as appeared by a Coast Survey chart, on which her exact position was marked by a witness of the captors, the master was wrong. The vessel was in waters actually blockaded. The position of the vessel made access to our coast, then in possession of enemy rebels, and under blockade, as easy as to that of Mexico, a neutral. (See chart opposite, inserted for convenience, laterally.)

The District Court at New Orleans made two decrees: one restoring the vessel and cargo—a decree from which the United States now appealed; the second refusing damages and ordering payment of costs and charges (exceeding $12,000) by the claimants—from which decree the claimants appealed.

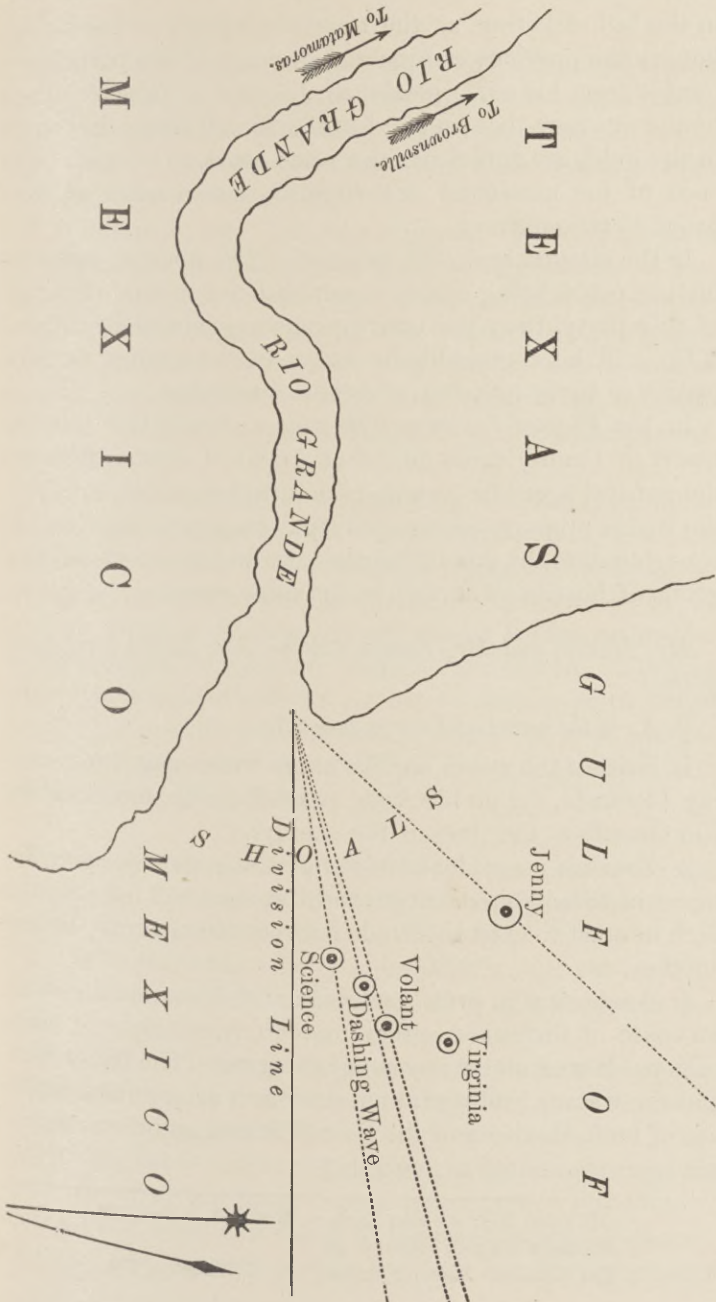
Mr. Ashton, Assistant Attorney-General, for the United States:

1. The position of the vessel, even if in Mexican waters, was so dubious as justly to expose her and her cargo to condemnation for violating blockade. She had no right to put herself in a position where she could, by night or in a moment when the blockading fleet was distant, land her cargo on the coast of Texas, a coast unquestionably blockaded.

2. There should be no final decree of restitution without *further proof* adduced by the claimants touching the commercial domicil and nationality of Caldwell.

The record contains no evidence in favor of the neutral character of Caldwell, but, on the contrary, it strongly suggests that he was a hostile person. His presence on board the captured vessel with his wife and servant; the professed ignorance of the master and mates of the nationality and business of the party; the suggestion, in his correspondence with Lizardi & Co. that the gold,—of which he himself owned the largest part,—should be covered and consigned,

Sketch showing the position of vessels.



in the bill of lading, as the neutral property of the British house; the previous commercial dealings of the party as inferable from his correspondence; the rash or false statement by the attorney that no one but the Lizardis were interested in the gold, are sufficient, in a prize court, to warrant inference of his unneutral character, in the absence of clear proof to the contrary.

If the claimants should neglect or fail, upon an order for further proof being made, to establish the neutral character of this party, then the entire property claimed by Lizardi & Co. will be confiscable by reason of the attempt of those parties to cover property of hostile ownership.

In the *Phœnix Insurance Company* v. *Pratt*,* the Supreme Court of Pennsylvania held that a neutral master, who was the general agent for a cargo of neutral ownership, subjected the whole property of the principal on board the vessel to condemnation, by attempting to cover in his own name other goods of hostile ownership in the same vessel.

Mr. Marvin and Mr. Evarts, contra; Mr. Evarts for Lizardi & Co.:

I. *As to the vessel and cargo generally.*

1. Neither the vessel nor the cargo was engaged in breaking blockade, for no blockade existed at the mouth of the Rio Grande at the time of the capture.†

2. There is no evidence of the existence of any enemy interest in either ship or cargo, and the court will not presume such interest to exist in a trade between one neutral port and another.

3. Anchoring in even American waters would of itself be no cause of forfeiture, either under any principle of international law or under any act of Congress. The Rio Grande and the waters leading into and from it are common to the use of both Mexico and the United States, and their use has not been prohibited to neutrals.‡

* 2 Binney, 308; see also Earle *v.* Rowcroft, 8 East, 126.

† See the Peterhoff, *supra*, p. 28.

‡ The Schooner Fame, 3 Mason, 147; 5 Wheaton, 374.

II. *As to the £12,000 gold coin.*

1. There is no support for a surmise that the consignment was not what the documents show it to be; one, namely, from the shippers, Lizardi & Co., to their consignee, at Matamoras, there to be employed as the means of commercial transactions intrusted to him.

It is not perceived that any question of *enemy property* arises upon the special employment or application of this capital, indicated in the correspondence; which, on the contrary, confirms the integrity of the transaction of the consignment of the specie, and its employment as destined to the actual and active care of the commercial house at Matamoras, to which it was addressed, and in the commerce of that place.

That this money might be applied by the consignee under his instructions from, and accountability to, Lizardi & Co., to trade in cotton, and for account of Caldwell, seems unimportant in its bearing on the question of prize or no prize. Trade in cotton at Matamoras was wholly lawful, no matter what the origin, or who the vendor of the cotton. Nothing appears to expose Caldwell, or his connection with or interest in the possible transactions in which the specie might be used, to any other construction or consequences than would apply to Lizardi & Co.

The opportunity for further proof has been asked for and obtained by the captors, and no damnatory evidence has been produced by them.

2. The capture was wholly unjustifiable, and the restitution decreed should have been attended with damages and costs.

When captors intercept an open prosecution of an apparently lawful trade, and visitation exhibits every trait of honest neutrality, and the commerce thus indicated is not only lawful, but is constantly engaged in by our own vessels, the integrity of the prize courts demands the infliction of damages and costs as a check to the speculative cupidity of captors. The features of this case are not distinguishable

from those of the Magicienne, intercepted in her voyage to Matamoras, and brought into Key West. She was promptly restored, the diplomatic claim for damages immediately recognized, and, upon adjustment, paid by authority of an act of Congress.*

The CHIEF JUSTICE delivered the opinion of the court.

Two decrees were rendered in the District Court for the Eastern District of Louisiana, the first, directing restitution of the vessel and cargo; the second, refusing damages, and ordering payment of costs and charges by the claimants. The United States appealed from the first; the claimants took an appeal from the second.

The proofs show that the Dashing Wave was a neutral vessel, bound from Liverpool to Matamoras, with a cargo of general merchandise and coin, no part of which was contraband.

It is clear, therefore, that the decree of restitution must be affirmed.

The only question which requires much consideration relates to the rightfulness of capture. And this question resolves itself into two:

1. Was there anything in the position of the Dashing Wave, at the time of capture, which warranted the opinion of the captors that she was engaged in breaking the blockade? and—

2. Was there anything in the papers on board the brig, relating to the cargo, which justified the seizure?

It is claimed for the captors that she was taken in Texan waters, lying convenient to the blockaded coast. The preparatory evidence left her position in much uncertainty, but the testimony taken under the order for further proof, in connection with the chart upon which her position is marked by one of the witnesses, establishes it beyond reasonable doubt. She was anchored north of the line between the

* Diplomatic Correspondence, 1863, Part 11, pp. 511, 513, 565, 587, 588, 636.

Mexican and Texan waters, with as easy access to the land on the rebel as on the Mexican side.

We think it was the plain duty of a neutral claiming to be engaged in trade with Matamoras, under circumstances which warranted close observation by the blockading squadron, to keep his vessel, while discharging or receiving cargo, so clearly on the neutral side of the boundary line as to repel, so far as position could repel, all imputation of intent to break the blockade. He had no right to take, voluntarily, a position in the immediate presence of the blockading fleet, from which merchandise might be so easily introduced into the blockaded region.

We do not say that neglect of duty, in this respect, on the part of the brig, especially in the absence of positive evidence that the neglect was wilful, calls for condemnation; but we cannot doubt that under the circumstances described, capturing and sending in for adjudication was fully warranted.

The other question relates wholly to the papers concerning the shipment of coin. There is no evidence which affects with culpability any other part of the cargo.

The coin is claimed by Lizardi & Co., neutral merchants of Liverpool; but the proof shows that one H. N. Caldwell was the real owner of the larger part of it. A letter, dated August 17th, 1863, and addressed by Caldwell to Lizardi & Co., states his intention, in view of "the uncertain state of our political affairs," to take gold to purchase cotton, instead of taking goods to Mexico, if he can arrange for an advance of £5000, making, with certain credits in his favor with Lizardi & Co., and £3000 which he had in bank, a total of £12,000, with which to operate.

In the same letter he further proposed that the whole amount should be shipped to J. Roman, of Matamoras, as the property of Lizardi & Co. The next day Lizardi & Co. acknowledged the receipt from Caldwell of a check for the £3000 in bank, and agreed to his proposals. Three days later Lizardi & Co. addressed a letter to Roman, advising him of the arrangement with Caldwell, and distinguishing expressly the £5000 advanced by them from "the other

£7000 of the said gentleman." These letters were found on board the brig.

Caldwell was a passenger on the brig, but was allowed to leave before any question of his character was made. What was that character in fact? Was he a rebel enemy or a neutral?

The tenor of his letter to Lizardi & Co., his proposal that the specie should be shipped as their property, when seven-twelfths of it belonged to himself; and especially the circumstance that he has never made claim in this suit to any part of it, except through Lizardi & Co., indicates that he was not a neutral, but an enemy.

On the other hand, there is no positive proof of his enemy character, though further proof was allowed to the captors.

This evidence, in our judgment, does not warrant condemnation of the specie, but it does, as we think, justify the capture.

We shall therefore affirm the decree of the District Court, restoring the vessel and cargo, but direct that costs and expenses consequent upon the capture, be ratably apportioned between the brig and the shipment of coin, and that the residue of the cargo be exempted from contribution.

DECREE AND DIRECTIONS ACCORDINGLY.

NOTE.

At the same time with the preceding appeal and cross-appeal, and by the same counsel, were argued two cases; one an appeal and cross-appeal, as the preceding, from the District Court of the United States for the Eastern District of Louisiana; the other, an appeal from the same court.

The first case was that of

THE SCIENCE.

The Science had been captured by the American war steamer Virginia, on the same day as the Dashing Wave, and the same decrees were entered in the District Court in respect to vessel and cargo, and similar appeals were taken.