

Bingham Vs. Cabot

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Court : US Supreme Court

Decided On : 1795

Appeal No. : 3 U.S. 19

Appellant : Bingham

Respondent : Cabot

Judgement :

Bingham v. Cabot - 3 U.S. 19 (1795)

U.S. Supreme Court Bingham v. Cabot, 3 U.S. 3 Dall. 19 19 (1795)

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ERROR TO THE CIRCUIT

COURT OF MASSACHUSETTS

SYLLABUS

It is not necessary to state in the record of a case in the circuit court the absence of the district judge to show that the court was properly constituted, a judge of the Supreme Court holding the same in the absence of the district judge.

A certificate of the Governor of the Island of Martinique, acting within his legitimate authority in reference to a matter in the island, is proper evidence.

The letters of the agent of Congress resident abroad during the Revolutionary War, addressed to that body relative to the business of his trust, the resolutions of Congress on the subject, and certified copies of the same from the office of the Secretary of State, are evidence in a suit against the agent instituted by individuals claiming damages for acts done as a public agent.

Questions of prize are exclusively of admiralty jurisdiction.

If the record shows an inferior court had not jurisdiction of a case, the Supreme Court will not award a *venire facias de novo*.

This was a writ of error to remove the proceedings from the Circuit Court, for the District of Massachusetts, and on the return of the record, it appeared that the defendants in error, being joint owners of the armed ship called the *Pilgrim*, formerly commanded by Hugh Hill, had instituted an action on the case against the plaintiff in error in the Circuit Court for the District of Massachusetts of June Term, 1794, in which a declaration was filed containing the following counts:

1st Count. That the plaintiff in Error, at St. Pierre, on 8 May, 1779, was indebted to the defendants in error in the sum of \$16,969.69, for goods sold and delivered, according to the account annexed, which account was in these words:

"William Bingham Esq. to the owners of the privateer ship *Pilgrim*, commanded in the late war by Hugh Hill on her first cruise,"

Dr.

1779, 8th May

To 1,000 barrels of flour he received at Martinique,

or from on board the privateer *Hope*, Ole Heilm,

master, captured by the ship *Pilgrim*, and carried

into Martinique, previous to 8 May, 1779, at 140

livres currency per barrel, livres 140,000, which

sum in the currency of the United States, is \$16,969.69

Interest to 9 January 1793 13,915.84

\$30,885.53

2d Count. *Quantum valebat* for 1,000 barrels of flour, with an averment that they are worth \$16,969.69.

3rd Count. Money had and received by the plaintiff in error, to the use of the defendant in error.

4th Count. That the plaintiff in error was bailiff of the same flour, to sell and account for it to the defendants in error, with an averment that the flour had been long sold but never accounted for.

5th Count. *Quantum valebat* for 500 barrels of the like flour, with an averment that it was worth \$10,000.

6th Count. *Quantum valebat* for one undivided moiety of 1,000 barrels of flour, with an averment that it was worth \$10,000. The plea of *nonassumpsit* was entered to this declaration, and thereupon issue was joined.

The material facts attached to the cause were of the following import: *The Pilgrim*, being on a cruise off the Rock

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of Lisbon, on 19 November, 1778, captured a brig called the *Hope*, Ole Heilm commander, and put on board William Carlton, as a prize master, who carried the supposed prize on 15 January, 1779, into Martinique, where the plaintiff in error

resided as a public agent of the United States. On examination it appeared that the prize was Danish property, and that her cargo belonged to Portuguese merchants, both those nations being at peace with France and America, but there being no courts of admiralty established at that time in Martinique, competent to decide on the validity of captures as prize, made by American vessels, and the neutral captain after a long detention, on account of repairs, being solicitous to depart, the Marquis de Bouille, governor of the island (to whom authority was delegated by the Constitution of the French government, to supply the deficient parts of the civil polity) made the following order, dated 2 October, 1779, which was registered in the Admiralty Office of the Borough of St. Pierre.

"Francis Claude Amour, Marquis de Bouille, Marshal de Camp, of the King's armies, Commander General of the French troops, militia, fortifications, and artillery of the French Windward Islands and Governor and Lieutenant General of the Islands of Martinique and Dominigue. We do certify that the American privateer, named the *Pilgrim*, having conducted into the Island of Martinique, a Danish brigantine, loaded on account of the subjects of His Most Faithful Majesty, as far as appeared to us, and not on account of the subjects of the King of England, we have ordered that the said cargo in litigation should be sold and the freight paid to the captain of the Danish brig out of the cargo under the care and direction of William Bingham, agent of Congress. And the net proceeds of said cargo, deduction made of all other charges, should remain in the hands of said Bingham to deliver it to whomsoever it may appertain, agreeable to the judgment and orders of Congress."

"BOUILLE"

Before, however, the Marquis de Bouille's orders were issued, Mr. Bingham had taken the cargo of the *Hope* into his custody, and on 2 February, 1779, addressed a letter to the Commercial Committee of Congress in which, after mentioning the capture and arrival of the prize, he states,

"that upon receipt of the papers (of which he then transmitted copies) found on board, he laid them before the judge of the Court of Admiralty at Martinique, who

was of opinion that neither the vessel nor cargo could with any propriety be molested on the high seas, by either American or French armed vessels. But [Mr. Bingham adds] that as this vessel is incapable of proceeding

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on a European voyage, without great repairs, which will naturally subject her to a considerable detention, and as her cargo consists of a perishable commodity, he shall dispose of it at Martinique, pay the captain his freight, what damages he may be entitled to, and shall give him permission to take his departure. Indeed the General insists that the cargo should be disposed of, as the island is in great want of flour, and as the sales will be more advantageous to the owners here, it may make the misfortune less heavy on the concerned. The proceeds, after paying the necessary expenses of the vessel, shall be placed [continues Mr. Bingham] to the credit of the Commercial Committee of Congress, to assist in paying the advances which he had made at Martinique on the public account; and he is the more inclined to convert it to this use as he is persuaded that Congress will not have to reimburse it until the claim of the real owner in Europe is made clear and manifest. It appeared by an account of sales, signed by Mr. Bingham on 8 May, 1779, that the flour had been sold, at different periods from 21 January to 8 May, 1779, and that the net proceeds, which he placed 'to the credit of the Owners of prize flour,' amounted to livres 107,621 14 6."

The owners of the *Pilgrim* being dissatisfied with the proceedings that had taken place in relation to the cargo of the *Hope*, instituted in the Common Pleas of Suffolk County, Massachusetts, an action of trover for the 1,000 barrels of flour, in the name of William Carlton, the prize master, against Mr. Bingham, and attached Mr. Bingham's property, in the hands of Mr. Thomas Russel, of Boston, to answer the judgment of the court. To this action (which was brought to October Term, 1779) the defendant pleaded not guilty, issue was thereupon joined, and judgment was rendered for the defendant. An appeal was brought to the Supreme Judicial Court of Massachusetts, at February Term, 1781, by William Carlton; it was tried on 17 February, 1784; a verdict was given for Mr. Bingham the defendant, and judgment was entered accordingly. When this action at law was commenced, Mr.

Bingham by a letter dated at Martinique, 6 October, 1779, and addressed to the Commercial Committee of Congress, remonstrated against the proceeding, as he had acted *bona fide*, in his official character, and Congress passed the following resolutions upon the subject:

"November 30, 1779. Resolved, That Mr. Bingham's letter of 6 October last, with the papers enclosed therein, and marked No. 1, 2, 3, 4, together with a certified copy of his appointment to the place of Continental Agent, be transmitted by the President to the

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Legislature of the State of Massachusetts Bay, with the following letter: "

"Gentlemen,"

" I am directed by Congress to transmit to you the enclosed papers from Mr. Bingham. They contain an account of his proceedings relative to a vessel, said to be Danish property, captured by the sloop *Pilgrim*, and carried into Martinique, about which, as he says, a suit is now commenced against him in your superior court. Upon a full examination of the papers, you will judge of the measures which ought to be adopted to prevent, on the one hand, injustice to individuals, and on the other the embarrassment of agents who are obliged to conform to the will of the ruling powers at the place of their residence. As courts are now instituted at Martinique for the trial of such causes, Congress submit to you whether it would not be advisable to stop the suit already commenced, till judgment is obtained upon the principal question, after which it will be in Mr. Bingham's power to discharge himself, by delivering to the true owners the property placed in his hands for their use. If you should be of a contrary opinion, they request you to furnish Mr. Bingham's agent with the enclosed papers. I am, &c.;"

The Legislature of Massachusetts taking no order on this application, Congress again entered upon the subject, and on 20 June, 1780,

"Resolved that the General of Martinique, in ordering the cargo of the brig *Hope* to be sold, and the money to be deposited in the hands of Mr. W. Bingham till the legality of the capture could be proved (no courts being at that time instituted for the determining of such captures in that island) showed the strictest attention to the rights of the claimants and the highest respect to the opinion of Congress: "

"That Mr. W. Bingham, in receiving the same, only acted in obedience to the commands of the General of Martinique, and in conformity with his duty as agent for the United States."

"Resolved that Congress will defray all the expenses that Mr. William Bingham may be put to by reason of the suits now depending, or which may hereafter be brought against him in the State of Massachusetts Bay, on account of the brig *Hope* or her cargo claimed as prize by the owners, master, and mariners of the private ship of war called the *Pilgrim*. "

"And whereas the goods of the said William Bingham to a very considerable amount are attached in the said suits now depending in the hands of the factors of the said W. Bingham to his great injury, "

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"Resolved that the General court of the State of Massachusetts Bay, be requested to discharge the property of the said W. Bingham from the said attachment, Congress hereby pledging themselves to pay all such sums of money, with costs of suit, as may be recovered against the said W. Bingham in either or both the above actions."

"Resolved that the Navy Council at Boston be directed to give such security, in the name of the United States, as the court may require, and to direct the counsel now employed by Mr. Bingham in the defense of the said actions."

Such were the circumstances of the cause now under consideration when it came to trial in the circuit court before Justice Cushing an associate judge of the Supreme Court alone. Mr. Bingham's counsel offered to give the following

documents in evidence to the jury: 1. Office copies certified under the hand and seal of the Secretary of State, of the papers found on board the *Hope*, of depositions relating to the capture, taken officially before Mr. Bingham as a public agent; of Mr. Bingham's letter of 2 February, 1779, and other subsequent correspondence and depositions in relation to the capture, addressed to the commercial committee of Congress; and of the Marquis de Bouille's order. These documents were stitched together and were included in one certificate from the Secretary of State. 2. The account Sales of the flour at Martinique, dated 8 May, 1779, and the account Sales of the property which had been attached in the action of Trover, brought by *Carlton v. Bingham*. 3. The record in the Inferior and Superior courts of Massachusetts, in the case of *Carlton v. Bingham*. 4. The Resolutions of Congress passed respectively on 3 Nov. 1779, and 20 June, 1780. But the court rejected all the evidence (though it would seem from the record that a part of it must have been admitted in the course of the plaintiff's proofs) and a bill of exceptions was tendered and allowed in the following words:

"And the said William Bingham being now here in court by James Sullivan and Christopher Gore, Esquires, his attorneys, the issue joined in the same case, and a jury on the same duly and legally empanelled, prays leave to file a bill of exceptions to the determination of the said court here had on the evidence, which by the said Bingham is offered in this case, and by which determination the said evidence is excluded, and the said Bingham is denied the advantage of giving the same to the jury in the same case, viz., the several copies attested by Thomas

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Jefferson, and which are hereunto annexed, and numbered from one to eighteen inclusively, and also three other papers, numbered 23, 24, 25, all which papers had a tendency to prove that no interest ought to be allowed by the jury, on the sum for which the plaintiffs declare, in their third count, or damages, for the detention of the money therein mentioned and declared on, and by the exclusion whereof, the said Bingham does sustain manifest injury and wrong, as he conceives. And the said Bingham further files his exception to the determination of the same court, by which the papers numbered from 27 to 36, inclusively, were

excluded; and which papers contain a complete record of the Supreme Judicial Court of the Commonwealth of Massachusetts, wherein William Carlton, who had been, as the said Bingham avers, and as appears by the evidence in the case, in possession of the same flour declared on in the said third count in the plaintiff's declaration, had sued in an action of trover for the same, and by which record it appears that such proceedings were had in the same court, as would fully show, as the said Bingham conceives, that the said plaintiffs had no legal right to change the same action, after the judgment in the same record specified, into an action of assumpsit, or as principals to implead the said Bingham again after the cause of action had been tried, adjudged, and determined, in an action of trover, wherein the special bailiffs of the plaintiffs, as the said Bingham avers, in this suit had so impleaded the said Bingham to verdict and judgment in the same cause, and for the same cause of action. And that the determination to reject the same papers is wrong because that if the same papers are admitted to be given to the jury, the evidence therein contained will have a legal tendency to lessen the damages, if not wholly defeat the action of the plaintiffs."

"And the said Bingham further files in this his bill of exceptions, that the court did reject and refuse to have read to the jury in the trial as evidence, a resolution of the Congress of the United States of America, of 13 November, 1779; also another resolution of the same Congress of 20 June, 1780, both which were concerning the subject matter of the suit."

"Wherefore, that justice, by due process of law, may be done, in this case, the said Bingham by the undersigned his counsel, prays the court here that this his bill of exceptions may be filed and certified as the law directs."

"JA. SULLIVAN"

"C. GORE"

"June 16, 1794. Allowed to be filed per Wm. Cushing, judge of said circuit court. "

A verdict was then given for the defendant in error upon the third count for money had and received, damages \$29,780.16, and for the plaintiff in error on all the other counts, and thereupon judgment was rendered for damages and costs. A motion was made on behalf of the plaintiff in error for a new trial, on two grounds: 1. excessive damages; and 2. a misdirection in the judge's charge to the jury, the judge having directed the jury

"that the law was such, that, on the evidence offered in the cause, the plaintiffs ought to recover; whereas the evidence given was such as clearly proved, that the flour mentioned in the third count, was the joint property of the plaintiffs below, as they were owners of the ship *Pilgrim*, and of the masters, mariners, and company on board the same ship, to-wit, of the plaintiffs below, and Hugh Hill and others, jointly; by which evidence, if any contract was proved in the case, it was a contract between the said Bingham with the plaintiffs and diverse other persons jointly, who are not plaintiffs, or mentioned in the writ, and who are now alive within the United States."

But a new trial was refused.

On the return of the record (to which were annexed several depositions and papers produced in the court below, as well as the papers referred to in the bill of exceptions) the following errors were assigned, the defendant in error pleaded in *nullo est erratum*, and issue was thereupon joined:

1. That judgment had been given for the plaintiff, instead of the defendant below, on the 3rd Count.
2. That the circuit court, proceeding as a court of common law, in an action on the case, for money had and received, etc., had no jurisdiction of the cause; the question, as it appears on the record, being a question of prize, or no prize, or wholly dependent thereon, and, as such, it was, exclusively of admiralty jurisdiction.
3. That the evidence referred to in the bill of exceptions ought not to have been rejected on the trial of the cause.

The judges, after some advisement, delivered their opinions *seriatim*.

PATTERSON, JUSTICE.

I am clearly of opinion that the certificate of the Marquis de Bouille, registered in the admiralty of Martinique, ought to have been admitted as evidence upon the trial of this cause. He was Governor of the island, possessing a high executive and superintending control, and we must presume that he acted on this occasion with legitimate authority.

Those letters which were written to Congress by Mr. Bingham at the time of the transaction, should likewise, in my opinion, have been submitted to the jury. On the arrival of the captured vessel, the governor might have awarded absolute restitution: but, choosing to adopt a middle course, he directed the cargo to be sold, and the proceeds to remain in the hands of Mr. Bingham as the Agent of Congress, till Congress should instruct him how to act. In the character of a public agent, therefore, Mr. Bingham received the property; and his cotemporaneous correspondence on the subject, in that character, with the American government, was, certainly, proper evidence, to show the original nature and complexion of the facts in controversy. I have more doubts on the admissibility of the other letters referred to in the bill of exceptions; but in relation to them it is unnecessary to give a decided opinion.

With respect to the Resolutions of Congress, two questions may be proposed in order to determine whether they ought to have been admitted as evidence: 1. had Congress authority

to pass such Resolutions? and 2. did the resolutions relate to the subject of the controversy? I have lately had occasion, in the case of *Doane v. Penhallow*, to express my sentiments at large on the authority of Congress (of which, in its application to the present object, I do not entertain the slightest doubt). And no

man of common candor can hesitate for a moment to pronounce that the resolutions have an immediate and necessary connection with the merits of the cause. They ought, then, to have been admitted, but what should be their force and operation is another point not at present before the Court.

I am also of opinion that it was improper to reject the depositions, which Mr. Bingham had taken in his public, official, character to ascertain the circumstances of the capture, and the property of the vessel and cargo, at the time the supposed prize was carried into Martinique.

IREDELL, JUSTICE.

It appears satisfactorily to me, that many of the documents offered in evidence have been improperly rejected. From an inspection of all the papers which are attached to the record the nature of the dispute may be easily ascertained. The plaintiffs allege that Mr. Bingham received, on their account, as their agent, property which had been captured by them as prize, and that whether the capture was lawful or not, he was bound to account to them, though they might be responsible to the original owners if any wrong had been committed. To this charge, Mr. Bingham answers that he never was the agent of the plaintiffs, but a public agent, and that he did not receive the property from them on their account, but from the Marquis de Bouille on account of the true owners. Admitting either of those positions, a direct and certain consequence will ensue. If the plaintiffs are right, the consequence is that Mr. Bingham ought to surrender the prize property or account for its proceeds to them, and though they, as captors, may be sued by the neutral claimants, the existence of a neutral claim will not justify his refusal so to surrender or account. But if the defendant is right, the consequence is that he ought not to deliver up the property to the plaintiffs until it has been ascertained that the capture was lawful, which must be done through the medium of a prize court, not by a judgment in a court of common law. From this view of the controversy, therefore, it must be of great moment that Mr. Bingham should have an opportunity to show that he had acted throughout the business as the public agent of the United

States and that his communications to Congress were open, fair, and faithful. If indeed he had given parol testimony on these points, his opponents might have called for the records of the appointment and correspondence as affording higher proof. I am therefore of opinion that Mr. Bingham's official letters (some of which were written before any dispute existed or could reasonably be anticipated) ought not to have been rejected.

The resolutions of Congress likewise were proper evidence; -- not, indeed, to prove that the plaintiffs were not entitled to the money in question, but to prove that the defendant was recognized in the transaction as the agent of Congress. The Resolutions are not to be considered as the mere expression of a congressional opinion, but as an acknowledgment that Mr. Bingham was a public agent, and that the public, as his principal, was accountable for the money.

The certificate of the Marquis de Bouille, whether regarded as an original order or as the evidence of a parol order, previously given, ought to have been laid before the jury. The Marquis acted officially, as governor and commander in chief, and we must presume that he exercised a lawful authority in a lawful manner.

Under these circumstances, it only remains to consider what course should be pursued by the court in order to give the defendant the benefit of a trial, upon a full view of his legal proofs. I think for that purpose that a *venire facias de novo* ought to issue. For although a court of common law has no jurisdiction of the question of prize, yet whether it is necessary in the present case to determine that question must depend upon the facts which are established at the trial. On a count for money had and received, &c.;, the court below has, *prima facie*, jurisdiction, and if the jury shall think Mr. Bingham was merely the agent of the plaintiffs, the validity of the capture as prize can form no ingredient in deciding the issue. If, on the contrary, the jury shall think Mr. Bingham acted as a public agent, its verdict must be in his favor, as he was bound to keep the property for the real owners, and the captors can never show that they are the real owners until the vessel and cargo have been condemned as prize by a competent tribunal. The captors may then

proceed against Mr. Bingham in a court of admiralty whose decree of condemnation, operating against all the world, would entitle the captors to receive the money, and justify Mr. Bingham or Congress in paying it.

WILSON, JUSTICE.

In several instances I concur in the sentiments that have been delivered by the judges who have preceded me, but I think it is unnecessary to specify the particulars

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or to amplify the reasons, since I continue clearly in my opinion on the point, which was separately argued, that this cause is exclusively of admiralty jurisdiction. On that ground I choose entirely to rest the judgment that I give, but it leads inevitably also to another conclusion, that, the court not having jurisdiction, a *venire facias de novo* (which in effect directs the exercise of jurisdiction) ought not to issue. I am therefore for pronouncing simply a judgment of reversal.

PATTERSON, JUSTICE.

I cannot agree to send a *venire facias de novo* to a court which, in my opinion, has no jurisdiction to try or to decide the cause.

CUSHING, JUSTICE.

I shall give no opinion upon the question of affirming or reversing the judgment of the court below. My brethren think there is error in the proceedings, and they are right to rectify it. On the question, however, of awarding a *venire facias de novo*, I agree with JUDGE IREDELL. But as the Court is equally divided, the writ cannot issue.

Judgment reversed, but no writ of venire facias de novo was awarded.