

Peisch Vs. Ware

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Appeal No. : 8 U.S. 347

Appellant : Peisch

Respondent : Ware

Judgement :

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Peisch v. Ware

8 U.S. (4 Cranch) 347

APPEAL FROM THE CIRCUIT COURT

FOR THE DISTRICT OF DELAWARE

SYLLABUS

Wine and spirits saved from a wreck and landed are not liable to forfeiture because unaccompanied with such marks and certificates as are required by law, nor because they were removed without the consent of the collector before the

quantity and quality were ascertained and the duties paid.

The award of arbitrators appointed under a mutual mistake of both parties, in supposing themselves bound by law to submit the matter in dispute to arbitration is not obligatory.

The owner of goods cannot forfeit them by an act done without his consent or connivance or that of some person employed or trusted by him.

One-half allowed for salvage in the Delaware Bay.

These cases were appeals from the Circuit Court for the District of Delaware. Peisch and others, owners of the ship *Favourite* and her cargo, libeled Ware and others in the district court for the possession of certain goods, part of that cargo, which the latter had saved from the ship, which had been wrecked in the Delaware Bay.

The cargo consisted principally of wine, brandy, cordials, olive oil, and silks.

On the night of 26 October, 1804, the ship *Favourite*, being at anchor in the Delaware Bay, parted both cables and was driven on to a shoal. The crew cut away all the masts; in the morning, she had drifted over the shoal, but the crew not being able to keep her clear with the pumps, and having eleven and a half feet of water in the hold, they quitted the ship about 9 o'clock A.M. and went to Cape May for assistance. On the same morning about 10 o'clock, the ship was seen from the Town of Lewis, a small town on the shore of the State of Delaware, but not a port of entry, by Thomas Rodney, an inspector and surveyor of the revenue who resided at that place. The ship was then drifting out to sea, without masts, anchors, cables, or rudder. He collected a number of men and boats and went on board the ship, and having towed her on to a shoal called the Shears, they began to discharge the cargo into the boats. Rodney, supposing himself authorized by the wreck law, as it is called, of the State of Delaware, to take the lead in the business of salvage,

appointed Ware to superintend the delivery of the cargo from the ship and went on shore himself, to attend to the landing and storage of the goods saved

On 29 October, the mate with three of the crew returned to the ship in a shallop they had procured at Cape May with intent, as they said, to save what they could of the cargo. They found the ship in possession of Ware and others, who would not suffer the mate to take anything out of the ship except his clothes and those of the crew. The mate then left the ship. There were 48 hands and six boats employed 16 days and 12 nights in saving the goods, besides four flats and seven or eight hands hired occasionally to work in the flats.

On 7 November, Peisch arrived, and on the 9th offered to pay \$4,000 for salvage, which the salvors refused, the goods saved being supposed to be worth about \$14,000, and demanded one-half for salvage. Not being able to agree, the parties supposing themselves bound by the law of Delaware, which requires an arbitration in such cases, referred the rate of salvage to three men, who awarded one-half to the salvors. On 18 November, the collector of the district of Delaware arrived at Lewis, and on the 19th the salvors offered themselves ready to secure the duties upon their half of the goods saved, and requested that the amount of duties might be ascertained at Lewis. This the collector refused, and ordered the goods to be sent to Wilmington, a port of entry, to have the duties ascertained, and Rodney delivered them into his possession. The salvors then sued out a writ of replevin from the state court of Delaware and took the possession of the goods from the collector, who thereupon seized them as forfeited to the United States for breach of the revenue laws.

The first count of the libel filed by the United States claimed the wine, brandy, and cordials as being forfeited because they were unaccompanied with such marks and certificates as are required by law, the duties not having been paid or secured.

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The second count claims them as forfeited because they were removed without the consent of the collector before the quantity and quality of the wines and spirits

and the duties thereon were ascertained according to law, the duties not having been paid or secured.

The third count claims all the goods forfeited because they were found concealed, the duties not having been paid or secured.

On this libel by the United States, the district court decreed that the goods were not liable to forfeiture, but were subject to the terms of the decree of the court in the suit respecting salvage, by Peisch and others against Ware and others, which decree was affirmed in the circuit court, and the United States appealed to this Court.

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MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court as follows:

In these cases, two questions are to be decided by the Court.

1st. Is the cargo of the *Favourite* or any part of it forfeited to the United States?

2d. Are Ware and others entitled to any, and if to any, to what salvage?

The first count in the first libel filed on the part of the United States claims the brandies, wines, and cordials therein mentioned in consequence of their being found in the possession of certain persons therein named unaccompanied

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with such marks and certificates as are required by law, the duties thereon not having been paid, or secured to be paid.

The second count claims them as forfeited because they were removed, without the consent of the collector, before the quantity and quality of the said wines and spirits, and the duties thereon, were ascertained according to law, the duties thereon not having been paid or secured.

The third count claims them because they were found concealed, the duties not having been paid or secured according to law.

The second libel claims certain other goods, which were parcel of the cargo of the *Favourite*, as forfeited by being found unlawfully concealed, the duties thereon not having been paid or secured.

The facts of the case are these: the ship *Favourite*, belonging to Mr. Peisch, of Philadelphia, was discovered about the last of October adrift in the Bay of Delaware, with her masts gone by the board and without anchors, cables, or rudder and in danger of being carried out to sea. A company was formed to save the vessel and cargo, and with considerable labor, in the course of several days, the cargo was unladen and landed at Lewis, a small town on the bay, not a port of delivery, where it was, with the approbation of the collector, left under the care and in the custody of a revenue officer residing at that place, who was one of the party that had originally taken possession of the vessel, and under whose direction the whole business had been in a great measure conducted. On 3 November, while the salvors were unlading the vessel and landing the cargo, an imperfect entry was made by the owners or consignees, after which an award was made between the owners and salvors by which the salvors were allowed one-half the cargo. The owners were dissatisfied with this award, and refused to acquiesce under it. The collector ordered the goods, which had been in the custody of a revenue officer, to be carried to Wilmington for the purpose of

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ascertaining the amount of duties. The salvors objected to this, and requested that the duties might be ascertained at Lewis, offering at the same time to pay the duties on the moiety of the cargo claimed by them under the award. The collector persisting in his determination to remove the goods to Wilmington, the salvors sued out a writ of replevin from the state court, and by force of that writ took the goods out of the possession of the revenue officer. This act is the foundation of the forfeiture alleged in the libels.

The forfeiture said to be occasioned by the goods being found without the marks and certificates required by law, depends upon the 43d section of the act for collecting duties, and on other sections of the same act, which are explanatory of the 43d section. The particular clause giving the forfeiture is in these words:

"And if any casks, chests, vessels or cases, containing distilled spirits, wines, or teas, which by the foregoing provisions ought to be marked and accompanied with certificates, shall be found in possession of any person, unaccompanied with such marks and certificates, it shall be presumptive evidence that the same are liable to forfeiture."

The law then authorizes a seizure, and subjects such distilled spirits, &c., to forfeiture, unless it be proved at the trial that they were imported according to law, and that the duties were paid or secured.

The objects of this clause are those vessels only which "by the foregoing provisions" ought to be marked and accompanied with certificates. To determine its extent, the "foregoing provisions" must be looked into.

This subject is first taken up in the 37th section of the act. That section directs particular and additional entries to be made of distilled spirits, wines and teas, which provisions are adapted to regular importation, not to those articles when saved from a wreck.

The entry is to be made by the importer or consignee, and specifications are required which can only be given by the owner or consignee, when in possession of the papers relative to the vessel and cargo. If a vessel be

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wrecked on the coast, the cargo must be lost or brought on shore without the knowledge of the owner or consignee so as to put it in his power to make the entry, and the salvors are not only not the persons designated by the law to make, but they will often not possess the information which would enable them to make it.

The act proceeds to require that this entry shall be transmitted to the surveyor of the port where the delivery of the cargo is to commence, to whom also every permit for unloading or landing any part of the cargo must be previously produced, who shall record the same and endorse thereon the word "inspected," the time when, and his own name. Goods landed previous to these formalities are to be forfeited.

These regulations obviously respect a regular importation, where all these prerequisites to landing may be performed; not cases where a landing must take place without them. To suppose them applicable to salvage goods, would be to suppose that the legislature designed to prohibit salvage entirely, or to forfeit the cargoes of all vessels which might be wrecked on the coast.

The 38th section requires that all distilled spirits, wines, and teas shall be landed under the inspection of the surveyor, or other officer acting as inspector of the revenue for the port, and therefore can relate only to cases of regular importation at the port of delivery, where the revenue officer may superintend the landing. He is directed to attend at all reasonable times, not at all places.

The 39th section prescribes the duty of the officer of inspection of the port where the spirits, &c., may be landed. He is to ascertain the duties and mark the casks.

The 40th section directs the surveyor, or chief officer of inspection of the port or district in which the said spirits, wines, or teas shall be landed, to give the proprietor, importer, or consignee a general certificate; and the 41st section directs him to give a particular certificate

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for each vessel, which certificate passes with the vessel to the purchaser.

These sections are connected with those which precede them, and relate to regular importations, where the spirits, &c., are landed under a permit at a port of delivery, and there is a proprietor, importer or consignee, or an agent to whom the certificates may be granted; not to spirits, &c., which may, from the nature of

things, lawfully get into the possession of individuals without the knowledge of a revenue officer.

The 42d section only directs that blank certificates shall be provided.

These are the sections which precede that which is supposed to give the forfeiture claimed under this count of the libel.

The first part of the 43d section directs the proprietor, importer, or consignee, who may receive the said certificates, to deliver them with the vessels to the purchaser, and then comes the clause which subjects to forfeiture all vessels containing spirits, &c., which may be found unmarked and not accompanied by certificates, which by the foregoing provisions ought to be marked and accompanied by certificates.

In the foregoing provisions the legislature, in the opinion of this Court, did not intend to comprehend wrecked goods, or goods found under circumstances like those in the *Favourite*, where the vessel was deserted by her crew, and where it might be necessary, for the preservation of the goods, to take them to the nearest accessible part of the coast. Either these spirits and wines would have been liable to forfeiture if brought to land under the most pressing circumstances, where inevitable loss must attend any delay, if a revenue officer should not be present to take possession of them, or the single circumstance of their being found unmarked and unaccompanied with certificates, is not in itself sufficient to forfeit them. The opinion of the Court that it was not the intention of the legislature to subject goods under such circumstances to forfeiture is not formed exclusively

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on the extreme severity of such a regulation. It is formed also on what is deemed a fair construction of the language of the several sections of the law, which seems not adapted to cases like the present.

The second count in the libel claims the goods as forfeited because they were, without the consent of the proper officer, removed from the place where they were

deposited, before the amount of duties was ascertained, the duties at that time not being paid or secured.

Neither this count, nor the first, supposes any forfeiture to have been incurred by the landing of the goods, or the unloading of the vessel. The spirits and wines are presumed to have been legally brought on shore, and it is the removal only which gives title to the United States. The Court therefore is to inquire whether these goods were under such circumstances that a removal, such as has taken place in this case, will produce a forfeiture. This depends on the 51st section of the law, in expounding which, it becomes proper to notice the 50th also. This section prohibits the unloading of any vessel, or the landing of any goods, without a permit granted by the proper officers, and subjects the master or other person having the command of such vessel, and all those who shall be concerned in unloading, removing, or storing such goods, to heavy penalties, and the goods themselves to forfeiture.

It was well observed that the application of this section to cases where the goods must perish, if not immediately brought on shore, and to cases in which a permit cannot regularly be granted, would be not only to prohibit, but to punish every attempt to save a cargo about to be lost on the coast. This construction of the law could only be made where the words would admit of no other. But it is unquestionably a correct legal principle, that a forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of a forfeiture may be employed. The means prescribed to save the forfeiture given in the 50th section cannot be employed where a vessel is deserted by her crew, or cannot be brought into port. The permit cannot be obtained, nor can those steps which must precede the attainment

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of a permit be taken. Upon just legal construction, then, the landing of these goods without a permit did not subject them to the forfeiture of the 50th section. This act is not within the law. The 50th section is calculated for cases in which the general requisites of the law can be complied with, not for salvage goods, in cases where

those general requisites cannot be complied with.

The 51st section relates to the removal of goods from the wharf or place on which they may have been landed in conformity with the directions of the 50th section. It presupposes a permit, and that they were landed under the inspection of a revenue officer, in the manner prescribed by the 38th section.

It presupposes a case in which the gauging and marking may be done, and the other means prescribed for the ascertainment of the duties and security of the revenue may be taken, at the place of landing; not a case in which a landing must be made without a permit, often in the absence of a revenue officer, and where the goods could not be permitted without extreme peril to remain at the place of landing until these measures should be taken.

The Court is also of opinion that the removal for which the act punishes the owner with a forfeiture of the goods must be made with his consent or connivance, or with that of some person employed or trusted by him. If, by private theft or open robbery, without any fault on his part, his property should be invaded, while in the custody of the officer of the revenue, the law cannot be understood to punish him with the forfeiture of that property. In the 52d section, therefore, to which the revenue officers seem to have intended to conform, so far as the case would admit, which directs them in the case of an incomplete entry to store the goods at the risk and expense of the owner or consignee, no forfeiture is annexed to their removal, unless the penalties of the 51st section, or of the 43d section, be applied to the 52d.

The Court is of opinion that those penalties cannot be so applied in this case, not only because, from the whole

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tenor of the law, its provisions appear not to be adapted to goods saved from a vessel under the circumstances in which the *Favourite* was found, but because also the law is not understood to forfeit the property of owners or consignees, on account of the misconduct of mere strangers, over whom such owners or

consignees could have no control.

It has been urged, on the part of the United States, that although the property of the owner should not be forfeited, yet that moiety which is claimed by the salvors has justly incurred the penalties of the law. But if the award rendered in this case be not binding, the salvors could have only a general claim for salvage, such as a court might allow, and if it be binding, still they acquired no title to any specific property. Their claim was in the nature of a general lien, and any irregular proceeding on their part would rather furnish motives for diminishing their salvage, if that be not absolutely fixed by the award, than ground of forfeiture. The irregularity, too, if any, which has been committed by them, being merely an attempt to assert, in a course of law, a title they supposed themselves to possess, and with no view to defraud the revenue, this Court would not be inclined to put a strained construction on the act of Congress in order to create a forfeiture.

The third count in the first libel, and the second libel, claim a forfeiture on the allegation that the goods were concealed. The fact does not support this allegation. There was no concealment in the case.

Taking all the circumstances into consideration, it is the unanimous opinion of the Court that no forfeiture has been incurred and that the libels filed on the part of the United States was properly dismissed.

The next question to be considered is to what amount of salvage are the salvors entitled? That their claim is good for something is the opinion of all the judges; but on the amount to be allowed, the same unanimity does not prevail.

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For the quantum of salvage to be allowed, no positive rules are fixed. It depends on the merit of the salvors, in estimating which, a variety of considerations have their influence.

In the case before the Court, the opinion of the majority is that the sentence of the circuit court ought to be affirmed. This opinion, however, is made up on different

grounds. Two of the judges are of opinion that the award was fairly entered into, and although both parties might be mistaken with respect to the obligation created by the law of Delaware, yet there is no reason to suppose any imposition on either part; nor is there any other ground on which the award can be impeached or set aside. Two other judges, who do not think the award obligatory, view it as the opinion of fair and intelligent men, on the spot, of the real merit of the salvors, and connecting it with the testimony in the cause, are in favor of the salvage which has been awarded, and which has been allowed by the sentences of the district and circuit courts. Three judges are of opinion that the award is of no validity, and ought to have no influence. They think the conduct of the salvors, in taking the goods out of the possession of the revenue officer, though by legal process, is improper, and that the salvage allowed is too great.

They acquiesce, however, cheerfully, in the opinion of the majority of the Court, and express their dissent from that opinion, solely for the purpose of preventing this sentence from having more than its due influence on future cases of salvage.

The sentence of the circuit court is affirmed without costs.