The Pizarro

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Appellant : The Pizarro

Judgement :

The Pizarro - 15 U.S. 227 (1817)
U.S. Supreme Court The Pizarro, 15 U.S. 2 Wheat. 227 227 (1817)

The Pizarro

15 U.S. (2 Wheat.) 227

APPEAL FROM THE DISTRICT COURT

OF THE DISTRICT OF GEORGIA

SYLLABUS

If the court below deny an order for further proof when it ought to be granted, or allow it when it ought to be denied, and the objection is taken by the party and appears on the record, the appellate court can administer the proper relief.

But if evidence in the nature of further proof be introduced and no formal order or objection appear on the record, it must be presumed to have been done by consent, and the irregularity is waived.

Concealment or spoliation of papers is not *per se* a sufficient ground for condemnation in a prize court. It is calculated to excite the vigilance and justify the suspicions of the court, but is open to explanation, and if the party in the first instance fairly, frankly, and satisfactorily explains it, he is deprived of no right to which be is otherwise entitled. If, on the contrary, the spoliation is unexplained or the explanation is unsatisfactory, if the cause labor under heavy suspicions or gross prevarications, further proof is denied and condemnation ensues from defects in the evidence which the party is not permitted to supply.

Under the Spanish treaty of 1795, stipulating that free ships shall make free goods, the want of such a sea letter or passport or such certificates as are described in the seventeenth article is not a substantive ground of condemnation. It only authorizes capture and sending in for adjudication, and the proprietary interest in the ship may be proved by other equivalent testimony. But if, upon the original evidence, the cause appears extremely doubtful and suspicious and further proof is necessary, the grant or denial of it rests on the same general rules which govern the discretion of prize courts in other cases.

The term "subjects" in the fifteenth article, when applied to persons owing allegiance to Spain, must be construed in the same sense as the term "citizens" or "inhabitants" when applied to persons owing allegiance to the United States, and extends to all persons domiciled in the Spanish dominions.

The Spanish character of the ship being ascertained, the proprietary interest of the cargo cannot be inquired into unless so far as to ascertain that it does not belong to citizens of the United States, whose property, engaged in trade with the enemy, is not protected by the treaty.

The ship *Pizarro,* under Spanish colors, was captured on 23 July, 1814, by the private armed schooner *Midas,* Alexander Thompson, commander, on a voyage from Liverpool to Amelia Island, and brought into the port of Savannah for adjudication. Prize proceedings were instituted in the District Court of Georgia against the ship and cargo, and a claim was duly interposed by Messrs. Hibberson & Yonge, merchants, of Fernandina, Amelia Island, for the ship and cargo, as their sole and exclusive property. Upon the final hearing in the district court, the ship and cargo were decreed to be restored, and this decree was, upon an appeal to the circuit court, affirmed, and from the decree of the circuit court the cause was brought by appeal to this Court.

It appears from the evidence that during the voyage, a package containing papers respecting the cargo, directed to Messrs. Hibberson & Yonge, was thrown overboard by the advice and assent of the master and supercargo. The reason alleged for this proceeding is that they were then chased by a schooner which they supposed to be a Carthaginian privateer. The ship's documents, however, were

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retained, in which her Spanish character is distinctly asserted.

These documents were as follows: 1. a certificate of the Spanish consul at Liverpool, dated 11 September, 1813, certifying that the *Pizarro* was a Spanish ship, bound to Corunna; 2. a certificate from the same, of the same date, that Messrs. Hughes and Duncan had shipped 250 tons of salt on board the *Pizarro* for Corunna, consigned to Messrs. Hibberson & Yonge; 3. a certificate of health, dated at Fernandina 20 December, 1813; 4. a letter from Messrs. Hibberson & Yonge of 10 January, 1814, to J. Walton, the navigator or sea pilot, ordering him to sail to Liverpool; 5. a bill of lading, signed by Martinez, the master, for the outward cargo; 6. the affidavit of Messrs. Hibberson & Yonge that they had shipped the same cargo on their own account, consigned to Messrs. Hughes and Duncan, &c.; 7. the shipping articles from Amelia Island to St. Augustine or any other port in Europe and back dated 11 January, 1814; 8. shipping articles from Liverpool to St. Augustine and back to Liverpool, without a date; 9. a license from the Governor of

East Florida authorizing Messrs. Hibberson & Yonge to buy a vessel in the United States, and the copy of a bill of sale from Messrs. S. & R. W. Hale, of New Hampshire, by their agent Kimbell, dated 24 February, 1813, together with an order of the governor of 6 March, 1813, naturalizing the ship or permitting her to sail under Spanish colors.

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In the district court, the cause was heard not merely upon the ship's papers, and the testimony of the master and supercargo, (who were twice examined in open court), but the claimants were also permitted to introduce new proofs and testimony in support of their claim, without any order for further proof.

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MR. JUSTICE STORY delivered the opinion of the Court, and after stating the facts, proceeded as follows:

A preliminary objection has been taken in the argument at bar to the regularity of the proceedings in this cause, and it is urged with great earnestness and force that the further proof was not admissible except under an explicit order of the Court for this purpose, and that the conduct of the master and supercargo in the suppression of the documents of the cargo and in prevaricating in their examination has

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justly forfeited the claim which the owners might otherwise have to introduce the further proof.

The proceedings in the district court were certainly very irregular, and this Court cannot but regret that so many deviations from the correct prize practice should have occurred at so late a period of the war. The ship's papers ought to have been brought into court and verified on oath by the captors, and the examinations of the

captured crew ought to have been taken upon the standing interrogatories, and not *viva voce* in open court. Nor should the captured crew have been permitted to be reexamined in court. They are bound to declare the whole truth upon their first examination, and if they then fraudulently suppress any material facts, they ought not to be indulged with an opportunity to disclose what they please, or to give color to their former statements after counsel has been taken, and they know the pressure of the cause. Public policy and justice equally point out the necessity of an inflexible adherence to this rule.

It is upon the ship's papers, and the examinations thus taken in preparatory, that the cause ought in the first instance to be heard in the district court, and upon such hearing it is to judge whether the cause be of such doubt as to require further proof, and if so whether the claimant has entitled himself to the benefit of introducing it. If the court should deny such order when it ought to be granted, or allow it when it ought to be denied, and the objection be taken by the party and appear upon the record, the appellate court can administer the proper relief.

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If, however, evidence in the nature of further proof be introduced and no formal order or objection appear on the record, it must be presumed to have been done by consent of parties, and the irregularity is completely waived. In the present case, no exception was taken to the proceedings or evidence in the district court, and we should not, therefore, incline to reject the further proof even if we were of opinion that it ought not in strictness to have been admitted.

The objection, which is urged against the admission of the further proof would, under other circumstances, deserve great consideration. Concealment or even spoliation of papers is not of itself a sufficient ground for condemnation in a prize court. It is undoubtedly a very awakening circumstance, calculated to excite the vigilance and justify the suspicions of the court. But it is a circumstance open to explanation, for it may have arisen from accident, necessity, or superior force, and if the party in the first instance fairly and frankly explains it to the satisfaction of the court, it deprives him of no right to which he is otherwise entitled. If, on the other

hand, the spoliation be unexplained or the explanation appear weak and futile, if the cause labor under heavy suspicions or there be a vehement presumption of bad faith, or gross prevarication, it is made the ground of a denial of further proof, and condemnation ensues from defects in the evidence which the party is not permitted to supply.

In the present case, there can be no doubt that there has been a gross prevarication and suppression

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of testimony by the master and supercargo. Nothing can be more loose and unsatisfactory than their first examinations, and the new and circumstantial details given upon their second examinations are inconsistent with the notion of perfect good faith in the first instance. The excuse, too, for throwing the packet of papers overboard is certainly not easily to be credited, for the ship's documents which still remained on board would, in the view of a Carthagenian privateer, have completely established a Spanish character. It is not, indeed, very easy to assign an adequate motive for the destruction of the papers. If the ship was Spanish, it was, as to American cruisers, immaterial to whom the cargo belonged, for, by our treaty with Spain (treaty of 1795, art. 15.) declaring that free ships shall make free goods, the property of an enemy on board of such a ship is just as much protected from capture as if it were neutral. The utmost, therefore, that this extraordinary conduct can justify on the part of the court is to institute a more rigid scrutiny into the character of the ship itself. If her national Spanish character be satisfactorily made out in evidence, the spoliation of the documentary proofs of the cargo will present no insuperable bar to a restitution. Very different would be the conclusion, if the case stood upon the ground of the law of nations, unaffected by the stipulations of a treaty.

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Upon a full examination of the evidence, we are of opinion that the Spanish character of the ship is entirely sustained, and therefore the claimants are entitled

to a decree of restitution. Two objections have been urged against this conclusion: 1. that the ship is not documented according to the requisitions of the treaty with Spain, and therefore not within the protection of that treaty; 2. that it does not

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appear that Mr. Hibberson (who is a native of Great Britain) has ever been naturalized in the dominions of Spain, and therefore he is not a subject of Spain within the meaning of the treaty.

As to the first objection, it is certainly true that the ship was not furnished with such a sea letter, or passport, or such certificates as are described in the 17th article of the treaty. But the want of such documents is no substantive ground for condemnation. It only justifies the capture and authorizes the captors to send the ship into a proper port for adjudication. The treaty expressly declares that when ships shall be found without such requisites, they may be sent into port and adjudged by the competent tribunal, and

"that all the circumstances of this omission having been well examined, they shall be adjudged to be legal prizes unless they shall give legal satisfaction of their property by testimony entirely equivalent."

It is apparent from

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this language that the omission to comply with the requisites of the treaty was not intended to be fatal to the property. And certainly, by the general law of nations as well as by the particular stipulations of the treaty, the parties would be at liberty to give further explanations of their conduct and to make other proofs of their property. If, indeed, upon the original evidence, the cause should appear extremely doubtful or suspicious and further proof should be necessary, the grant or denial of it would rest upon the same general principles which govern the discretion of prize courts in other cases. But in the present case, there is no necessity for such further proof, since the documents and testimony now before us

are, in our opinion, as to the proprietary interest in the ship, entirely equivalent to the passports and sea letter required by the treaty.

As to the second objection, it assumes as its basis that the term "subjects," as used in the treaty, applies only to persons who, by birth or naturalization, owe a permanent allegiance to the Spanish government. It is, in our opinion, very clear that such is not the true interpretation of the language. The provisions of the treaty are manifestly designed to give reciprocal and coextensive privileges to both countries, and to effectuate this object the term "subjects," when applied to persons owing allegiance to Spain, must be construed in the same sense as the term "citizens," or "inhabitants" when applied to persons owing allegiance to the United States. What demonstrates the entire propriety of this construction is that in the 18th article of the

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treaty, the terms "subjects," "people," and "inhabitants" are indiscriminately used as synonymous, to designate the same persons in both countries and in cases obviously within the scope of the preceding articles. Indeed, in the language of the law of nations, which is always to be consulted in the interpretation of treaties, a person domiciled in a country and enjoying the protection of its sovereign is deemed a subject of that country. He owes allegiance to the country while he resides in it -- temporary, indeed, if he has not, by birth or naturalization, contracted a permanent allegiance -- but so fixed that, as to all other nations, he follows the character of that country in war as well as in peace. The mischiefs of a different construction would be very great, for it might then be contended that ships owned by Spanish subjects could be protected by the treaty although they were domiciled in a foreign country with which we were at war, and yet the law of nations would in such a predicament pronounce them enemies. We should therefore have no hesitation in overruling this objection even if it were proved that Mr. Hibberson was not a naturalized subject of Spain; but we think the presumption very strong that he had become, in the strictest sense of the words, a Spanish subject.

The Spanish character of the ship being ascertained, it is unnecessary to inquire into the proprietary interest of the cargo unless so far as to ascertain that it does not belong to citizens of the United States, for the treaty would certainly not protect the property of American citizens trading with the enemy

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in Spanish ships. There is no presumption from the evidence that any American interest is concerned in the shipment. The whole property belonged either to British subjects or to the claimants, and we think the proofs in the cause very strongly establish it to belong as claimed.

The decree of the circuit court is affirmed with costs.

Decree affirmed.