

The Fanny

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Decided On : 1824

Appeal No. : 22 U.S. 658

Appellant : The Fanny

Judgement :

The Fanny - 22 U.S. 658 (1824)

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The Fanny

22 U.S. (9 Wheat.) 658

APPEAL FROM THE CIRCUIT

COURT OF MARYLAND

SYLLABUS

Case of capture by an armed vessel fitted out in the ports of the United States in breach of the neutrality acts. Claim by an alleged *bonae fidei* purchaser in a foreign port rejected, and restitution decreed to the original owners.

A *bonae fidei* purchaser, without notice, in such case is entitled to be reimbursed the freight which he may have paid upon the captured goods, and the innocent neutral carrier of such goods, the same having been transshipped in a foreign port, is entitled to freight out of the goods.

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This was the case of a libel filed by the Consul-General of Portugal on behalf of certain Portuguese subjects, owners of a number of hides which had been brought from St. Thomas to Baltimore in the brig *Fanny*. The facts proved in the cause which the court considered to be material are the following:

Sometime in the year 1817, Robert M. Goodwin, Clement Cathill, James Halsey, and John R. Mifflin, all of them citizens of the United States and denominated "The American concern," fitted out, at Buenos Ayres, a brig, called *La Republicana* as a privateer to cruise against the subjects of Spain and Portugal under a commission obtained for her from Jose Artigas. Thus prepared, she sailed under the command of Obadiah Chase, also a citizen of the United States, and in February, 1818, she captured the Portuguese brig *Aurora*, which, with her cargo, were sent to St. Barts, and there sold as American property for about 20,000 dollars. With this money, thus raised, Goodwin proceeded to Baltimore, and there invested it in the purchase of a new brig, called the *Athenea*, which had been lately built at that port. Having changed her name to that of the *New Republicana*, both privateers shipped their crews at Baltimore, together with their munitions of war, except the cannon and carriages for the latter vessel, which, with a view of deceiving the custom house officers, were put on board of a small schooner and were transferred to this privateer a few miles below the 22 U.S. 660 fort. The commission, together with other papers belonging to the *Republicana*, were delivered to the *New Republicana*, and both the privateers proceeded to sea, the latter under the command of the above mentioned Clement Cathill, one of the owners. She soon after fell in with the Portuguese ship *Don Pedro de Alcantara*, laden with a valuable cargo of hides, sugar, &c.;, which she captured on 22 September, 1818, and ordered in to the Five Islands, there to await the orders of

Goodwin. At this place, Goodwin transshipped the principal part of the cargo into several small vessels, which proceeded to the Island of St. Thomas consigned to Souffron & Co., merchants of that place. The residue of the cargo, except a small part which was afterwards taken, together with the Don Pedro, by Commodore Jolly, commanding a squadron belonging to the Republic of Colombia was also carried by Goodwin to St. Thomas in the old privateer, at which place it is probable the whole or a great part of the captured property was sold. Nathaniel Levy, the American consul at that island, purchased 4,004 of the hides, which, together with 555 logs of lignum vitae, he shipped in the brig *Fanny* to Baltimore, where she arrived in January, 1819, consigned to Lyde Goodwin. On the 21st of this month, the hides and lignum vitae were libeled as Portuguese property, illegally taken on the high seas, and on the 27th of the same month the lignum vitae was released from the operation of the libel.

To this libel a claim was filed by Lyde Goodwin, as agent of Levy, in which it is asserted that

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the hides had been purchased by Levy, in the regular course of trade, from Souffron & Co., and all knowledge of the matters alleged in the libel is denied. On 15 March the hides were delivered upon stipulation, having been appraised at the sum of \$12,000.

In the progress of the cause in the district court, the owners of the brig *Fanny* presented to the judge a petition setting forth that on 6 October, 1818, Nathan Levy entered into a charter party of affreightment with the petitioners for the brig *Fanny*, on certain terms stated in the petition, for a voyage from Baltimore to St. Lucie, and if required, to three other ports in the West Indies, and thence back to Baltimore. That under this charter party, the said brig took in a cargo at Baltimore and sailed to St. Lucie and to three other ports, and finally delivered the cargo to the said Levy, who afterwards shipped on board the said brig, at St. Thomas, 4,000 hides and 555 sticks of lignum vitae, to be carried to Baltimore, where she arrived on 17 January, 1819. That upon her arrival and when the master was

about to deliver the cargo to the consignee of Levy, this libel and claim were filed, and the cargo was taken from the possession of the master by the marshal under the process of the said court. That there was then due to the petitioners on the said charter party the sum of \$2,094.50, as admitted by the said Levy, which they pray may be paid out of the proceeds of the hides and lignum vitae. This petition was accompanied by an account dated 28 December, 1818,

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signed by Nathan Levy, acknowledging a balance of \$2,094.50 to be due the said brig *Fanny* on the charter party. Below this account is the following entry, not signed by any person: "The freight on the homeward cargo, consisting of 4,004 hides and 555 sticks of lignum vitae, \$1,047.25." The court made an order that the agent of the claimant should pay the freight on the above goods to the amount of \$1,047.25.

The district court decreed the claimants to pay to the libellant the appraised value of the hides, as mentioned in their stipulation, together with interest and costs, after deducting the amount of freight theretofore ordered to be paid. This decree being wholly affirmed by the circuit court upon an appeal, both parties appealed from that decree to this Court.

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

The above case presents two questions for the consideration of this Court. 1. Whether the court below was correct in restoring to the Portuguese owner that part of the cargo of the *Fanny* which was restored? and 2. whether the freight which was ordered by the court to be paid to the owners of that vessel ought in whole or in part to have been deducted from the appraised value of the hides?

Upon the first question it is to be observed that the facts above stated are incontestably proved by the evidence in the cause. That the capturing vessel, the

New Republicana, was built at Baltimore,

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purchased at that place by citizens of the United States, and there manned and fitted for sea, armed and equipped as a vessel of war, within the waters and jurisdiction of the United States, and with such equipments left the United States to cruise against the vessels and property of Spanish and Portuguese subjects on the high seas, and upon such cruise captured the *Don Pedro de Alcantara*, with a valuable cargo belonging to Portuguese subjects were facts too clearly proved to be questioned; nor were they questioned by the counsel for the claimants. It is established by evidence equally clear and uncontradicted that the 4,004 hides which were brought in the *Fanny* from St. Thomas to Baltimore, upon which the sentence of the court below operated, formed a part of the cargo of the *Don Pedro de Alcantara* at the time of her capture, and that they were the property of Portuguese subjects.

This, then, is the case of property belonging to the subjects of a friendly power, captured on the high seas by a privateer owned and commanded by citizens of the United States, fitted and equipped as a vessel of war, within the waters and jurisdiction of the United States, and according to the uniform decisions of this Court in similar cases as well as in others where similar equipments have been made within the waters of the United States by foreigners, the property so illegally captured and brought within our jurisdiction must be restored to the original owners unless it could be maintained that the sale of it to the claimant divested those owners of their right

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to the same. But it is to be remarked in the first place that the asserted purchase of these hides by Levy is unsupported by any evidence whatever. He alleges in his claim that he purchased the hides for a valuable consideration from Souffron & Co. in the regular course of trade, but this allegation is not upheld by any written document or by the testimony of a single witness. The cause was depending more

than two years in the courts below, during all which time it was fully in the power of the claimant, a resident of the Island of St. Thomas, to have proved the reality of this purchase by the testimony of the vendors or otherwise if the fact had been as it was alleged.

But admitting the truth of the asserted sale to Levy, he was nevertheless a purchaser from the agent of a tortious possessor of property to which he had no title whatever, and who consequently could transfer none to his vendee. The proceedings in the vice-admiralty court of Margarita by Commodore Jolly, against the *Don Pedro de Alcantara* and the small part of her cargo which had not been transshipped at the Five Islands, so far from amounting to a sentence of condemnation, even of the property libeled as prize of war, proceeded upon the ground of a recapture from a noncommissioned privateer, for which the recaptor was rewarded by a liberal salvage, and the residue of the sales of the property was decreed to the Portuguese owners in case they should claim the same within the period of a year and a day. This Court is therefore of opinion that

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the decree of the circuit court, so far as it restores to the libellant the 4,004 hides or their proceeds, is right and ought to be affirmed.

The second question respects the freight, which the decree of the court below ordered to be deducted from the appraised value of the hides, and it is attended by no difficulty but such as arises from the confined and imperfect statement of the facts appearing in this record. That the freight of the *lignum vitae*, which did not belong to the libellants and against which the proceedings were abandoned, ought not to have been paid out of the proceeds of the hides is a matter which we think is quite too clear to be disputed, and we think it probable that the mistake was occasioned by an oversight in the judge of the district court, from his not knowing or recollecting, when the petition for freight was before him, that the *lignum vitae* had been released from the operation of the libel. The decree, then, must of course be reversed for this reason and the cause remanded for further proceedings in order to ascertain and separate the freight upon that article from

that due upon the hides.

But there is apparently error in the decree in respect to the whole of the freight, which it is possible may be explained and removed by a further examination of this subject in the court below. The petition for freight claims the precise sum of \$2,094.50, as the balance acknowledged to be due by the claimant, and the account, signed by him on 28 December, 1818, which accompanied the petition, amounted

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to an acknowledgment that that sum was then due. The items of that account are, freight on 1,095 barrels of flour, out and home, per charter party, 5 cases of furniture, 36 bags of corn, and 7 days demurrage. Below that account is stated the freight due upon the hides and lignum vitae, amounting to \$1,047.25. It would seem, therefore, as if the freight upon the hides and lignum vitae, which arrived in Baltimore some time in January, 1819, was not included in the account signed by the claimant, and if so, it was not claimed to be due, nor required by the petition to be paid. Yet the order of the court was that it should be paid, and it was accordingly deducted from the appraised value of the hides. If the case should turn out to be such as is above supposed, it would seem to warrant the conclusion that the freight upon the hides had been paid by Levy, in which case it ought not to be deducted from their appraised value unless the reality of the asserted purchase of the hides by Levy should be made to appear to the satisfaction of the court below, without which we are of opinion that he is to be considered as a *malae fidei* possessor, and consequently as not entitled to be reimbursed the freight so paid out of the property of the Portuguese owners. If, on the other hand, it should appear that the claimant was a *bonae fidei* purchaser of the hides without notice, or that the freight upon them had not been paid by him to the owners of the *Fanny*, then it was properly deducted.

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DECREE. This cause came on to be heard, &c.;, on consideration whereof it is DECREED and ORDERED that so much of the decree of the said circuit court as orders that the claimant pay to the libellant the appraised value of the hides in the proceedings mentioned, together with interest and costs of suit, be and the same is hereby affirmed with costs, subject, however, to such deduction for freight as the said circuit court may hereafter direct, to be paid out of said appraised value, as may be hereafter decreed under the further proceedings in this cause. And as to so much of said decree of said circuit court as directs the amount of freight to be deducted, agreeably to the previous order of said circuit court, the same is hereby reversed and annulled. And it is further ORDERED that said cause be remanded to the said circuit court for further proceedings to be had therein according to law for the purpose of ascertaining upon further proof whether the claimant had paid the freight of the hides to the owner of the *Fanny*; and if so whether the claimant was a *bonae fidei* purchaser of said hides without notice. And if the said court should be satisfied from such further proof that the said claimant Nathan Levy has paid the owner of the *Fanny* for said freight or that he was not such *bonae fidei* purchaser without notice, then with instructions not to allow a deduction of freight from the said appraised value. But if the said claimant was such *bonae fidei* purchaser without notice or if said freight had not been paid by said claimant to

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the owners of the *Fanny*, then the freight for the hides, excluding the freight on the lignum vitae, to be deducted from the appraised value of said hides.