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The Marianna Flora

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Appeal No. : 24 U.S. 1

Appellant : The Marianna Flora

Judgement :

The Marianna Flora - 24 U.S. 1 (1826)
U.S. Supreme Court The Marianna Flora, 24 U.S. 11 Wheat. 1 1 (1826)

The Marianna Flora

24 U.S. (11 Wheat.) 1

APPEAL FROM THE CIRCUIT

COURT OF MASSACHUSETTS

SYLLABUS

In admiralty proceedings, amendments are made in the appellate court not only as to form, but as to matter of substance, as by the filing a new count to the libel, the parties being permitted, whenever public justice and the substantial merits require it, to introduce new allegations and new proofs, *non allegata allegare et non probata probare.*

If the amendment is made in the circuit court, the cause is heard and adjudicated by that court, and (upon appeal) by this Court on the new allegation, but if the amendment is allowed by this Court, the cause is remanded to the circuit court with directions to permit the amendment to be made.

Rights and duties of armed and other ships navigating the ocean in time o peace.

An attack made upon a vessel of the United States by an armed vessel, with the avowed intention of repelling the approach of the former or of crippling or destroying her upon a mistaken supposition that she was w piratical cruiser and without a piratical or felonious intent or for the purpose of wanton plunder or malicious destruction of property is not a piratical aggression under the Act of 3 March, 1819, c. 75.

Nor is an armed vessel captured under such circumstances liable to confiscation as for a hostile aggression under the general law of nations.

The act extends to foreign vessels committing a piratical aggression, and whatever responsibility the nation may incur towards foreign states by executing its provisions, the tribunals of the United States are bound to carry them into effect.

Pirates may be lawfully captured by the public or private ships of any nation in peace or in war, for they are *hostes humani generis.*

American ships offending against our own laws may be seized upon the ocean, and foreign ships thus offending within our territorial jurisdiction may be pursued and seized upon the ocean and brought into our ports for adjudication.

But in such cases the party seizes at his peril, and is liable to costs and damages if he fails to establish the forfeiture.

Ships of war sailing under the authority of their government in time of peace have a right to approach other vessels at sea for the purpose of ascertaining their real characters, so far as the same can be done without the exercise of the right of visitation and search, which does not exist in time of peace.

No vessel is bound to await the approach of armed ships under such circumstances, but such vessel cannot lawfully prevent their approach by the use of force upon the mere suspicion of danger.

Where an aggression was committed by a foreign armed merchant vessel on a public armed ship of the United States under these circumstances and a combat ensued upon mutual misapprehension and mistake, the commander of the public ship was held exempt from costs and damages for subduing, seizing, and bringing into a port of this country for adjudication the offending vessel.

How far the act of the master binds the owner of the vessel.

The original libel filed in the district court against the Portuguese ship *Marianna Flora* and cargo was for an alleged piratical aggression attempted or committed by the ship on the United States armed schooner *Alligator,* Lieutenant Stockton commander, against the Act of Congress of 3 March, 1819, c. 75, entitled, "An act to protect the commerce of the United States and punish the crime of piracy."

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Upon the hearing of the cause in the district court, the judge pronounced an interlocutory sentence of restitution, and subsequently pronounced a further decree for damages amounting to $19,675 for the act of sending in the ship for adjudication and the consequent detention. An appeal was taken by the libellants from both decrees to the circuit court, and afterwards, before the hearing of the appeal, by request of the government of the United States and with the consent of the libellants, the ship and cargo were restored to the claimants, and further

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proceedings respecting the same were abandoned. The only question, therefore, litigated in the circuit court was upon the point of damages, and ultimately a decree was there pronounced reversing the decree for damages, and this constituted the matter of the present appeal.

Pending the proceedings in the circuit court, leave was granted to the libellants to file a new count or allegation, in which the aggression was stated to be hostile and with intent to sink and destroy the *Alligator* and in violation of the law of nations.

The facts which were given in evidence and relied on to support the allegations in the libel were substantially as follows:

On the morning of 5 November, 1821, the *Alligator* and the *Marianna Flora* were mutually descried by each other on the ocean at the distance of about nine miles, the *Alligator* being on a cruise against pirates and slave traders under the instructions of the President, and the Portuguese vessel being bound on a voyage from Bahia to Lisbon with a valuable cargo on board. The two vessels were then steering on courses nearly at right angles with each other, the *Marianna Flora* being under the lee bow of the *Alligator.* A squall soon afterwards came on which occasioned an obscuration for some time. Upon the clearing up of the weather, it appeared that the *Marianna Flora* had crossed the point of intersection of the courses of the two vessels, and was about four miles distant on the weather bow of the *Alligator.* Soon afterwards, she shortened sail and

hove to, having at this time a vane or flag on her mast, somewhat below the head, which, together with her other maneuvers, induced Lieutenant Stockton to suppose she was in distress or wished for information. Accordingly he deemed it his duty, upon this apparent invitation, to approach her, and immediately changed his course towards her. When the *Alligator* was within long shot of the Portuguese ship, the latter fired a cannon shot ahead of the *Alligator* and exhibited the appearance and equipments of an armed vessel. Lieutenant Stockton immediately hoisted the United States flag and pendant. The *Marianna Flora* then fired two more guns, one loaded with grape, which fell short, the other loaded with round shot, which passed over and beyond the *Alligator.* This conduct induced Lieutenant Stockton to believe the ship to be a piratical or a slave vessel, and he directed his own guns to be fired in return; but as they were only carronades, they did not reach her. The *Alligator* continued to approach, and the

Marianna Flora continued firing at her at times until she came within musket shot, and then a broadside from the *Alligator* produced such intimidation that the Portuguese ship almost immediately ceased firing. At that time, and not before, the Portuguese ship hoisted her national flag. Lieutenant Stockton ordered the ship to surrender, and send her boat on board, which was accordingly done. He demanded an explanation, and the statement made to him by the Portuguese master and other officers was that they did not

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know him to be an American ship of war, but took him to be a piratical cruiser. Under these circumstances, without much examination of the papers or the voyage of the ship, Lieutenant Stockton determined to send her into the United States on account of this, which he deemed a piratical aggression. She was accordingly manned and sent, with her officers and crew, under the orders of Lieutenant Abbot, into Boston.

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MR. JUSTICE STORY delivered the opinion of the

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court, and after stating the pleadings, proceeded as follows:

An objection, which is preliminary in its nature, has been taken to the admissibility of this new count to the libel, filed in the circuit court, upon the ground that the original subject matter was exclusively cognizable in the district court, and to allow this amendment would be to institute an original, and not an appellate, inquiry in the circuit court. But the objection itself is founded on a mistaken view of the rights and authorities of appellate courts of admiralty. It is the common usage and admitted doctrine of such courts to permit the parties, upon the appeal, to introduce new allegations and new proofs, *non allegata allegare, et non probata probare.* The courts of the United States, in the exercise of appellate jurisdiction in admiralty causes, are by law authorized to proceed according to the course of

proceedings in admiralty courts. It has been the constant habit of the circuit courts to allow amendments of this nature in cases where public justice and the substantial merits required them, and this practice has not only been incidentally sanctioned in this Court, but on various occasions in the exercise of its own final appellate jurisdiction it has remanded causes to the circuit court with directions to allow new counts to be filed. We may, then, dismiss any further discussion of this objection and proceed to the main questions in controversy. [Here the learned judge recapitulated

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the facts of the case as they have been before stated.]

In considering the circumstances, the Court has no difficulty in deciding that this is not a case of a piratical aggression in the sense of the act of Congress. The Portuguese ship, though armed, was so for a purely defensive mercantile purpose. She was bound homewards with a valuable cargo on board, and could have no motive to engage in any piratical act or enterprise. It is true that she made a meditated and in a sense a hostile attack upon the *Alligator,* with the avowed intention of repelling her approach or of crippling or destroying her. But there is no reason to doubt that this attack was not made with a piratical or felonious intent or for the purpose of wanton plunder or malicious destruction of property. It was done upon a mistake of the facts, under the notion of just self-defense, against what the master very imprudently deemed a piratical cruiser. The combat was therefore a combat on mutual misapprehension, and it ended without any of those calamitous consequences to life which might have brought very painful considerations before the Court.

It has indeed been argued at the bar that even if this attack had been a piratical aggression, it would not have justified the capture and sending in of the ship for adjudication, because foreign ships are not to be governed by our municipal regulations. But the act of Congress is decisive on this subject. It not only authorizes a capture but a condemnation in our courts for

such aggressions, and whatever may be the responsibility incurred by the nation to foreign powers in executing such laws, there can be no doubt that courts of justice are bound to obey and administer them.

The other count, which seeks condemnation on the ground of an asserted hostile aggression, admits of a similar answer. It proceeds upon the principle that, for gross violations of the law of nations on the high seas, the penalty of confiscation may be properly inflicted upon the offending property. Supposing the general rule to be so in ordinary cases of property taken *in delicto,* it is not therefore to be admitted that every offense, however small, however done under a mistake of rights or for purposes wholly defensive, is to be visited with such harsh punishments. Whatever may be the case, where a gross, fraudulent, and unprovoked attack is made by one vessel upon another upon the sea which is attended with grievous loss or injury, such effects are not to be attributed to lighter faults or common negligence. It may be just in such cases to award to the injured party full compensation for his actual loss and damage, but the infliction of any forfeiture beyond this does not seem to be pressed by any considerations derived from public law.

Pirates may, without doubt, be lawfully captured on the ocean by the public or private ships of every nation, for they are, in truth, the common enemies of all mankind, and as such are liable to the extreme rights of war. And a piratical

aggression by an armed vessel sailing under the regular flag of any nation may be justly subjected to the penalty of confiscation for such a gross breach of the law of nations. But every hostile attack in a time of peace is not necessarily piratical. It may be by mistake, or in necessary self-defense, or to repel a supposed meditated attack by pirates. It may be justifiable, and then no blame attaches to the act; or it may be without just excuse, and then it carries responsibility in damages.

If it proceed further, if it be an attack from revenge and malignity, from gross abuse of power and a settled purpose of mischief, it then assumes the character of a private unauthorized war, and may be punished by all the penalties which the law of nations can properly administer.

These latter ingredients are entirely wanting in the case before us, and therefore if the question of forfeiture were now in judgment, we should have no doubt, either upon the act of Congress, or the general law, that it ought not to be enforced.

But in the present posture of this cause, the libellants are no longer plaintiffs. The claimants interpose for damages in their turn, and have assumed the character of actors. They contend that they are entitled to damages, first because the conduct of Lieutenant Stockton in the approach and seizure of the *Marianna Flora* was unjustifiable, and secondly because, at all events, the subsequent sending her in for adjudication was without any reasonable cause.

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In considering these points, it is necessary to ascertain what are the rights and duties of armed and other ships navigating the ocean in time of peace. It is admitted that the right of visitation and search does not, under such circumstances, belong to the public ships of any nation. This right is strictly a belligerent right, allowed by the general consent of nations in time of war and limited to those occasions. It is true that it has been held in the courts of this country that American ships offending against our laws, and foreign ships in like manner offending within our jurisdiction, may afterwards, be pursued and seized upon the ocean and rightfully brought into our ports for adjudication. This, however, has never been supposed to draw after it any right of visitation or search. The party in such case seizes at his peril. If he establishes the forfeiture, he is justified. If he fails, he must make full compensation in damages.

Upon the ocean, then, in time of peace all possess an entire equality. It is the common highway of all appropriated to the use of all, and no one can vindicate to himself a superior or exclusive prerogative there. Every ship sails there with the

unquestionable right of pursuing her own lawful business without interruption; but whatever may be that business, she is bound to pursue it in such a manner as not to violate the rights of others. The general maxim in such cases is *sic utere tuo, ut non alienum laedas.*

It has been argued that no ship has a right to

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approach another at sea and that every ship has a right to draw round her a line of jurisdiction within which no other is at liberty to intrude. In short, that she may appropriate so much of the ocean as she may deem necessary for her protection, and prevent any nearer approach.

This doctrine appears to us novel, and is not supported by any authority. It goes to establish upon the ocean a territorial jurisdiction like that which is claimed by all nations within cannon shot of their shores in virtue of their general sovereignty. But the latter right is founded upon the principle of sovereign and permanent appropriation, and has never been successfully asserted beyond it. Every vessel undoubtedly has a right to the use of so much of the ocean as she occupies and as is essential to her own movements. Beyond this, no exclusive right has ever yet been recognized, and we see no reason for admitting its existence. Merchant ships are in the constant habit of approaching each other on the ocean, either to relieve their own distress, to procure information, or to ascertain the character of strangers, and hitherto there has never been supposed in such conduct any breach of the customary observances or of the strictest principles of the law of nations. In respect to ships of war sailing, as in the present case, under the authority of their government to arrest pirates and other public offenders, there is no reason why they may not approach any vessels descried at sea for the purpose of ascertaining their real characters. Such a right seems

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indispensable for the fair and discreet exercise of their authority, and the use of it cannot be justly deemed indicative of any design to insult or injure those they

approach or to impede them in their lawful commerce. On the other hand it is as clear that no ship is, under such circumstances, bound to lie by or wait the approach of any other ship. She is at full liberty to pursue her voyage in her own way and to use all necessary precautions to avoid any suspected sinister enterprise or hostile attack. She has a right to consult her own safety, but at the same time she must take care not to violate the rights of others. She may use any precautions dictated by the prudence or fears of her officers either as to delay or the progress or course of her voyage, but she is not at liberty to inflict injuries upon other innocent parties simply because of conjectural dangers. These principles seem to us the natural result of the common duties and rights of nations navigating the ocean in time of peace. Such a state of things carries with it very different obligations and responsibilities from those which belong to public war, and is not to be confounded with it.

The first inquiry, then, is whether the conduct of Lieutenant Stockton was, under all the circumstances preceding and attending the combat, justifiable. There is no pretense to say that he committed the first aggression. That, beyond all question, was on the part of the *Marianna Flora,* and her firing was persisted in after the *Alligator* had hoisted her national flag, and of

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course held out a signal of her real pacific character. What then is the excuse for this hostile attack? Was it occasioned by any default or misconduct on the part of the *Alligator?* It is said that the *Alligator* had no right to approach the *Marianna Flora,* and that the mere fact of approach authorized the attack. This is what the Court feels itself bound to deny. Lieutenant Stockton, with a view to the objects of his cruise, had just as unquestionable a right to use the ocean, as the Portuguese ship had; and his right of approach was just as perfect as her right of flight. But, in point of fact, Lieutenant Stockton's approach was not from mere motives of public service, but was occasioned by the acts of the *Marianna Flora.* He was steering on a course which must in a short time have carried him far away from her. She lay to, and showed a signal ordinarily indicative of distress. It was so understood, and from motives of humanity the course was changed in order to afford the

necessary relief. There is not a pretense in the whole evidence that the lying to was not voluntary and was not an invitation of some sort.

The whole reasoning on the part of the claimants is that it was for the purpose of meeting a supposed enemy by daylight, and in this way to avoid the difficulties of an engagement in the night. But how was this to be known on board of the *Alligator?* How was it to be known that she was a Portuguese ship or that she took the *Alligator* for a pirate or that her object in laying to was a defensive operation? When the vessels

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were within reach of each other, the first salutation from the ship was a shot fired ahead, and at the same time no national flag appeared at the masthead. The ship was armed, appeared full of men, and, from her maneuvers, almost necessarily led to the supposition that her previous conduct was a decoy and that she was either a piratical vessel or at least in possession of pirates. Under such circumstances, with hostilities already proclaimed, Lieutenant Stockton was certainly not bound to retreat, and upon his advance other guns loaded with shot were fired for the express purpose of destruction. It was, then, a case of open meditated hostility, and this too without any national flag displayed by the Portuguese ship which might tend to correct the error, for she never hoisted her flag until the surrender. What, then, was Lieutenant Stockton's duty? In our view, it was plain -- it was to oppose force to force, to attack and to subdue the vessel thus prosecuting unauthorized warfare upon his schooner and crew. In taking, therefore, the readiest means to accomplish the object, he acted, in our opinion, with entire legal propriety. He was not bound to fly or to wait until he was crippled. His was not a case of mere remote danger, but of imminent, pressing, and present danger. He had the flag of his country to maintain, and the rights of his cruiser to vindicate. To have hesitated in what his duty to his government called for on such an occasion would have been to betray (what no honorable

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officer could be supposed to indulge) an indifference to its dignity and sovereignty.

But it is argued that Lieutenant Stockton was bound to have affirmed his national flag by an appropriate gun; that this is a customary observance at sea, and is universally understood as indispensable to prevent mistakes and misadventures; and that the omission was such a default on his part as places him *in delicto* as to all the subsequent transactions. This imputation certainly comes with no extraordinary grace from the party by whom it is now asserted. If such an observance be usual and necessary, why was it not complied with on the part of the *Marianna Flora?* Her commander asserts that by the laws of his own country as well as those of France and Spain, this is a known and positive obligation on all armed vessels which they are not at liberty to disregard. Upon what ground, then, can he claim an exemption from performing it? Upon what ground can he set up as a default in another that which he has wholly omitted to do on his own part? His own duty was clear and pointed out, and yet he makes that a matter of complaint against the other side which was confessedly a primary default in himself. He not only did not hoist or affirm his flag in the first instance, but repeatedly fired at his adversary with hostile intentions without exhibiting his own national character at all. He left, therefore, according to his own view of the law, his own duty unperformed, and fortified, as against himself, the very inference that his ship

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might properly be deemed under such circumstances a piratical cruiser.

But we are not disposed to admit that there exists any such universal rule or obligation of an affirming gun as has been suggested at the bar. It may be the law of the maritime states of the European continent already alluded to, founded in their own usages or positive regulations. But, it does not hence follow that it is binding upon all other nations. It was admitted at the argument that the English practice is otherwise, and surely, as a maritime power, England deserves to be listened to with as much respect on such a point as any other nation. It was justly inferred that the practice of America is conformable to that of England, and the absence of any counterproof on the record, is almost of itself decisive. Such,

however, as the practice is even among the continental nations of Europe, it is a practice adopted with reference to a state of war, rather than peace. It may be a useful precaution to prevent conflicts between neutrals and allies and belligerents, and even between armed ships of the same nation. But the very necessity of the precaution in time of war arises from circumstances which do not ordinarily occur in time of general peace. Assuming, therefore, that the ceremony might be salutary and proper in periods of war and suitable to its exigencies, it by no means follows that it is justly to be insisted on at the peril of costs and damages in peace. In any view, therefore, we do not think this omission can avail the claimants.

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Again it is argued that there is a general obligation upon armed ships, in exercising the right of visitation and search, to keep at a distance out of cannon shot and to demean themselves in such a manner as not to endanger neutrals. And this objection, it is added, has been specially provided for and enforced by the stipulations of many of our own treaties with foreign powers. It might be a decisive answer to this argument that here no right of visitation and search was attempted to be exercised. Lieutenant Stockton did not claim to be a belligerent, entitled to search neutrals on the ocean. His commission was for other objects. He did not approach or subdue the *Marianna Flora* in order to compel her to submit to his search, but with other motives. He took possession of her not because she resisted the right of search, but because she attacked him in a hostile manner, without any reasonable cause or provocation.

Doubtless the obligation of treaties is to be observed with entire good faith and scrupulous care. But stipulations in treaties having sole reference to the exercise of the rights of belligerents in time of war cannot, upon any reasonable principles of construction, be applied to govern cases exclusively of another nature and belonging to a state of peace. Another consideration quite sufficient to establish that such stipulations cannot be applied in aid of the present case is that whatever may be our duties to other nations, we have no such treaty subsisting with

Portugal. It will scarcely be pretended that we are bound to Portugal by stipulations to which she is no party and by which she incurs no correspondent obligation.

Upon the whole, we are of opinion that the conduct of Lieutenant Stockton in approaching and ultimately in subduing the *Marianna Flora* was entirely justifiable. The first wrong was done by her, and his own subsequent acts were a just defense and vindication of the rights and honor of his country.

The next inquiry is whether the act of sending in the *Marianna Flora* for adjudication was, under all the circumstances, unjustifiable, so as to carry with it responsibility in damages.

It is argued that, upon examination of the ship's papers, the crew, and the cargo, it must clearly have appeared that the ship was a merchant ship bound on a lawful voyage, and not a piratical cruiser. This state of the case must be admitted to have been apparent. But the real difficulty is of another sort. Her papers and cargo and destination could give no information of the nature of the attack made upon the *Alligator.* However hostile, malignant, or even piratical the aggression might be, the papers could shed no light upon the subject. The owners of the cargo and the owners of the ship (so far at least as their duties and responsibilities were not bound up by the acts of the master, as their agent) might be innocent, the voyage might be of a purely mercantile character, and yet acts of aggression might be committed

which might bring the case completely within the act of Congress or of the general law of nations as a gross and violent injury calling for ample redress. The real duty imposed upon Lieutenant Stockton was not to examine the papers, unless so far as they might explain doubtful circumstances, but to ascertain the nature, object, and intent of the attack upon his vessel. He was bound to exercise an honest and fair discretion on the subject and to obtain such explanations as might guide his

judgment. What was the excuse offered for the attack upon him? It was not that the guns were fired by mistake or accident. They were admitted to have been by authority and design. They were fired after his own flag was displayed and with the express intention of disabling the vessel and destroying the crew. The only excuse offered for this unjustifiable act was that the commander entertained a fear that the *Alligator* was a pirate. But such a fear, unauthorized by any acts on the other side, was no excuse for a wrong which might have led to the most fatal consequences. If the *Alligator* had been seriously injured or any of her crew had been killed, no doubt could exist that under such circumstances the ship ought to have been sent in for adjudication to enforce redress, and also to administer, if necessary, punishment. The attack was not the less inexcusable because the consequences were not as injurious as the master intended.

It is a different thing to sit in judgment upon this case after full legal investigations, aided by

the regular evidence of all parties, and to draw conclusions at sea with very imperfect means of ascertaining facts and principles which ought to direct the judgment. It would be a harsh judgment to declare that an officer charged with high and responsible duties on the part of his government should exercise the discretion entrusted to him at the peril of damages because a court of law might ultimately decide that he might well have exercised that discretion another way. If Lieutenant Stockton had acted with gross negligence or malignity and with a wanton abuse of power, there might be strong grounds on which to rest this claim of damages. But it is conceded on all sides, and in this opinion the Court concurs, that he acted with honorable motives and from a sense of duty to his government. He thought the aggression was piratical and that it was an indignity to the national flag utterly inexcusable. The view now taken by this Court in respect to the whole case, upon a full examination of all the facts, is certainly somewhat different. It leads us to say that Lieutenant Stockton might, without justly incurring the displeasure of his government, have released the ship not because she had done no wrong, but because the wrong was not of such a nature as called for vindictive

redress.

But the question upon which damages must depend is not whether he might not have released the ship, but whether he was at all events bound so to do, and whether that obligation

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was so imperative that the omission ought to be visited with damages.

We are then to consider the real difficulties of Lieutenant Stockton's situation. An attack had been made upon a national ship under his command without cause. It was a hostile act, an indignity to the nation and a trespass upon its rights and sovereignty. It was not an accidental, but a meditated act, not necessarily carrying its own excuse along with it, but susceptible of different interpretations. It was not an affair in which he was at liberty to consult his own wishes or honor merely, although a brave and distinguished officer might naturally feel some solicitude to preserve his high reputation untarnished in the eyes of his government. He was bound to look to the rights of his country. He might well hesitate in assuming the arbitration of national wrongs. He might well feel a scrupulous delicacy in undertaking to waive any claim which the government had authority to enforce or to defeat any redress which it might choose to seek or to prevent any inquiries which, through its established tribunals, it might think fit to institute in respect to his conduct or that of the offending vessel. Considerations of this nature could not but weight heavily upon the mind of a gallant officer, and they are not unfit to be entertained by this Court in forming its own judgment.

It is also further to be observed that the case was confessedly new in its character and circumstances. The researches of counsel throughout

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the progress of this protracted controversy have not discovered any case which in point of law can govern this. If it is new here, it may well be deemed to have been new and embarrassing to Lieutenant Stockton. In such a case, it is not matter of

surprise that he should come to the conclusion that it was not proper to take upon himself the responsibility of a final decision, but to confide the honor of the nation, as well as the rights of the other party, to judicial decision. No inference is attempted to be drawn that his acts were intentionally oppressive and harsh, and it would be going a great way to declare that an exercise of honest discretion in a case of wrong on the other side ought to draw after it the penalty of damages.

There is another more general consideration which is entitled to great weight in this case. In cases of capture, strictly so called, no decision has been cited in which, if the capture itself was justifiable, the subsequent detention for adjudication has ever been punished by damages. As far as counsel have examined or our own researches extend, no such principle has ever been established. The present case stands upon a strong analogy, and to inflict damages would be to desert that analogy. Even in cases of marine torts, independent of prize, courts of admiralty are in the habit of giving or withholding damages upon enlarged principles of justice and equity, and have not circumscribed themselves within the positive boundaries of mere municipal law. They have exercised a conscientious discretion

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upon the subject. A party who is *in delicto* ought to make a strong case, to entitle himself to general relief.

The case of *The Louis,* 2 Dodson 210, is a striking example in illustration of these remarks. There, a French slave ship was, in a time of peace, taken possession of by an English armed cutter after a sharp engagement, in which several men were killed on both sides. The ship was carried into Sierra Leone for adjudication, and subsequently the cause came before the High Court of Admiralty upon appeal. The decision pronounced by Lord Stowell appears to have been made after very full consideration, and is expounded in his most elaborate manner. He decided that the original seizure was totally unjustifiable and that even if the slave trade was prohibited by the French laws (which, he thought, it was not), still it was not for English cruisers to claim a right of search or to seize such vessels to enforce those laws. He therefore pronounced a decree of restitution. But he denied

damages and costs to the claimant. His language on that occasion was

"Upon the matter of costs and damages that have been prayed, I must observe that it is the first case of the kind, and that the question itself is *primae impressionis,* and that, upon both grounds it is not the inclination of the court to inflict such a censure."

Here, then, we have a case of an acknowledged maritime trespass, accompanied with circumstances of immediate and fatal injury in which the original wrong traveled along with

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and infected the whole subsequent proceedings; and yet the court, on account of its being the first instance and of the novelty of the question, deemed it a conscientious exercise of its discretion not to award damages. The case before this Court is also of the first occurrence, and the question is entirely new in its presentation. It has this striking fact, in which it is most favorably distinguished from *The Louis* that the original seizure was justifiable, and if the intent of piratical aggression had been established, condemnation must have ensued.

If, then, this Court should under these circumstances award damages, it would take a new step, never known to have been taken before by a court of admiralty. It would desert the analogy of cases of justifiable capture in matters of prize, and introduce a rule harsh and severe in a case of first impression, whose bearing and character have engaged the bar and bench in several most laborious discussions, and inflict upon an honest exercise of discretion a punishment which has been denied, in *The Louis,* to an inexcusable wrong.

There are one or two other suggestions which were urged in the argument that ought not to be passed over in silence. It is said that the tort, if it ought to be redressed at all by a proceeding *in rem,* was exclusively cognizable in the courts of Portugal. We are not aware of any principle upon which this position can be legally maintained. There is no more reason why the courts of Portugal should hold exclusive

jurisdiction upon this case than the courts of this country. We seen no difficulty in supporting the jurisdiction as concurrent in both nations. But if there be any choice, it seems more properly to belong to the country of the injured than of the offending party.

It is also said that at all events the cargo was not liable to condemnation even if the offending vessel was liable under the act of Congress. Probably this is true in respect to that act. But the second count embraces a wider range, and if it had been proved in its aggravated extent, it does not necessarily follow that the cargo ought to be exempted. That is a question which would require grave deliberation. It is in general true that the act of the master of the vessel does not bind the innocent owner of the cargo, but the rule is not of universal application. And where the master is also agent of the owner of the cargo or both ship and cargo belong to the same person, a distinction may perhaps arise in the principle of decision. But however this may be, in the present case, if the vessel was sent in for adjudication, the cargo must of necessity accompany her; nor could its particular ownership be fully ascertained until the examinations of the crew were regularly taken. There is no evidence in this case to show that at any subsequent period it was desirable or could have been advantageous to the claimants to have separated the ship and

cargo and to have instituted a new voyage for the latter under other auspices.

In the district court an allowance was made of $500, distributable among the crew, on account of their confinement on the passage to Boston upon the ground that the sending in of the vessel was wrongful. That award was reversed in the circuit court, and no appeal was taken by the crew, as, indeed, none could be, on account of the insufficiency of the sum to entitle the parties in interest to appeal. It is only necessary therefore to state that that matter is not now before this Court, and it is to be presumed that the confinement was such only as was indispensable

for the safety of the seizors.

Upon the whole it is the opinion of the Court that the decree of the circuit court ought to be affirmed, and it is accordingly affirmed without costs to either party.

Decree accordingly.

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