

## The Dashing Wave

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Court : US Supreme Court

Decided On : 1866

Appeal No. : 72 U.S. 170

Appellant : The Dashing Wave

### Judgement :

The Dashing Wave - 72 U.S. 170 (1866)

U.S. Supreme Court The Dashing Wave, 72 U.S. 5 Wall. 170 170 (1866)

## The Dashing Wave

72 U.S. (5 Wall.) 170

*APPEALS FROM DECREES OT THE UNITED*

*STATES DISTRICT COURT AT NEW ORLEANS*

## SYLLABUS

1. A neutral, professing to be engaged in trade with a neutral port under circumstances which warrant close observation by a blockading squadron, must keep his vessel, while discharging or receiving cargo, so clearly on the neutral side of the blockading line as to repel, so far as position can repel, all imputation of intent to break the blockade. Neglect of that duty may well justify capture and

sending in for adjudication, though, in the absence of positive evidence that the neglect was willful, it might not justify a condemnation.

2. Where a party whose national character does not appear gives his own money to a neutral house, to be shipped with money of that house and in their name to a neutral port in immediate proximity to a blockaded region, and an attorney in fact, on capture of the money and libel of it as prize, states that such neutral house are the owners thereof and that "no other persons are interested therein," the capture and sending in will be justified, though in the absence of proof of an enemy's character in the party shipping his money with the neutral's, a condemnation may not be.

3. On a capture of a vessel unobservant, through mere carelessness, of the duty first above mentioned and containing money shipped under the circumstances just stated, a decree was made restoring the vessel and cargo, including the money, but apportioning the costs and expenses consequent on the capture ratably between the vessel and the coin, exempting from contribution the rest of the cargo.

During the late Rebellion and while the coast of the Southern states, including that of Texas to the mouth of the Rio Grande, was under blockade by the United States, the *Dashing Wave*, a British-owned brig, was captured at anchor by a United States gunboat off the mouth of that river, the dividing

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stream between the United States and Mexico, a neutral, and libeled as prize of war in the District Court of New Orleans. The vessel was employed as a general ship on a voyage from Liverpool to Matamoras, a Mexican town on the Rio Grande directly opposite to Texas. She had been freighted at Liverpool in 1862 with an assorted cargo, consigned by ten or more shippers to various persons and firms described as resident at Matamoras. There was no contraband aboard. The most remarkable shipment was one of 12,000 gold coin in the name of Lizardi & Co., British subjects of Liverpool. By claim put in after the libel filed for Lizardi & Co. by

their agent at New Orleans, it was claimed as their property, it being stated that no other persons were interested therein. Correspondence found on board the captured vessel showed, however, that 7000 of the 12,000 were owned by one H. N. Caldwell, and had been shipped to the Matamoras consignee for the purchase of cotton either in Texas or Matamoras on the joint account of Lizardi & Co. and Caldwell.

The residence and business of Caldwell were not fully disclosed in the record. It did not appear that he was a British merchant, nor that he had any commercial domicil in Mexico, nor yet that he was a rebel enemy. He had apparently married in England shortly before the vessel sailed, and was on board with his wife and servant at the time of capture. The nationality of the wife and servant the captain stated to be English, but he did not know what that of Caldwell was. They were all permitted to go ashore with their luggage by the boarding officer. Caldwell had apparently no interest in the vessel or cargo. He appeared by the letters to have been engaged in cotton transactions and to have proposed to Lizardi & Co. the plan of shipping all the gold to Mexico as their own property. Caldwell made no claim for any part of the gold, nor did he personally appear in any way in the case.

On the proofs *in preparatorio*, the place of capture, as respecting the middle or dividing line of the Rio Grande, appeared doubtful.

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The testimony of naval witnesses, examined under an order which had been obtained by the captors for further proof as to the place of capture and the character of the cargo, asserted that the vessel, when seized, was on the northern -- that is to say the American -- side of the boundary line, and in our waters. The master swore to the contrary.

In point of fact, as appeared by a Coast Survey chart, on which her exact position was marked by a witness of the captors, the master was wrong. The vessel was in waters actually blockaded. The position of the vessel made access to our coast, then in possession of enemy rebels, and under blockade, as easy as to that of

Mexico, a neutral. ( See chart opposite, inserted for convenience, laterally.)

The district court at New Orleans made two decrees, one restoring the vessel and cargo -- a decree from which the United States now appealed, the second refusing damages and ordering payment of costs and charges (exceeding \$12,000) by the claimants -- from which decree the claimants appealed.

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THE CHIEF JUSTICE delivered the opinion of the Court.

Two decrees were rendered in the District Court for the Eastern District of Louisiana, the first directing restitution of the vessel and cargo, the second refusing damages and ordering payment of costs and charges by the claimants. The United States appealed from the first; the claimants took an appeal from the second.

The proofs show that the *Dashing Wave* was a neutral vessel, bound from Liverpool to Matamoras, with a cargo of general merchandise and coin, no part of which was contraband.

It is clear, therefore, that the decree of restitution must be affirmed.

The only question which requires much consideration relates to the rightfulness of capture. And this question resolves itself into two:

1. Was there anything in the position of the *Dashing Wave* at the time of capture which warranted the opinion of the captors that she was engaged in breaking the blockade? and

2. Was there anything in the papers on board the brig relating to the cargo which justified the seizure?

It is claimed for the captors that she was taken in Texan waters lying convenient to the blockaded coast. The preparatory evidence left her position in much uncertainty, but the testimony taken under the order for further proof, in connection with the chart upon which her position is marked by one of the witnesses, establishes it beyond reasonable doubt. She was anchored north of the line between the

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Mexican and Texan waters, with as easy access to the land on the rebel as on the Mexican side.

We think it was the plain duty of a neutral claiming to be engaged in trade with Matamoras, under circumstances which warranted close observation by the blockading squadron, to keep his vessel, while discharging or receiving cargo, so clearly on the neutral side of the boundary line as to repel, so far as position could repel, all imputation of intent to break the blockade. He had no right to take, voluntarily, a position in the immediate presence of the blockading fleet from which merchandise might be so easily introduced into the blockaded region.

We do not say that neglect of duty in this respect on the part of the brig, especially in the absence of positive evidence that the neglect was willful, calls for condemnation, but we cannot doubt that under the circumstances described, capturing and sending in for adjudication was fully warranted.

The other question relates wholly to the papers concerning the shipment of coin. There is no evidence which affects with culpability any other part of the cargo.

The coin is claimed by Lizardi & Co., neutral merchants of Liverpool, but the proof shows that one H. N. Caldwell was the real owner of the larger part of it. A letter dated August 17, 1863, and addressed by Caldwell to Lizardi & Co., states his intention, in view of "the uncertain state of our political affairs," to take gold to

purchase cotton instead of taking goods to Mexico, if he can arrange for an advance of 5,000, making, with certain credits in his favor with Lizardi & Co., and 3,000 which he had in bank, a total of 12,000 with which to operate.

In the same letter he further proposed that the whole amount should be shipped to J. Roman, of Matamoras, as the property of Lizardi & Co. The next day Lizardi & Co. acknowledged the receipt from Caldwell of a check for the 3,000 in bank, and agreed to his proposals. Three days later, Lizardi & Co. addressed a letter to Roman advising him of the arrangement with Caldwell and distinguishing expressly the 5,000 advanced by them from "the other

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7000 of the said gentleman." These letters were found on board the brig.

Caldwell was a passenger on the brig, but was allowed to leave before any question of his character was made. What was that character in fact? Was he a rebel enemy or a neutral?

The tenor of his letter to Lizardi & Co., his proposal that the specie should be shipped as their property when seven-twelfths of it belonged to himself, and especially the circumstance that he has never made claim in this suit to any part of it except through Lizardi & Co., indicates that he was not a neutral, but an enemy.

On the other hand, there is no positive proof of his enemy character, though further proof was allowed to the captors.

This evidence, in our judgment, does not warrant condemnation of the specie, but it does, as we think, justify the capture.

We shall therefore affirm the decree of the district court, restoring the vessel and cargo, but direct that costs and expenses consequent upon the capture be ratably apportioned between the brig and the shipment of coin and that the residue of the cargo be exempted from contribution.

*Decree and directions accordingly.*

