

The Diana

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Appellant : The Diana

Judgement :

The Diana - 74 U.S. 354 (1868)

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The Diana

74 U.S. (7 Wall.) 354

APPEAL FROM A DECREE OF THE DISTRICT

COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

SYLLABUS

To justify a vessel of a neutral in attempting to enter a blockaded port, she must be in such distress as to render her entry a matter of absolute and uncontrollable necessity.

The schooner *Diana* was captured, on the 26th of November, 1862, by vessels of war of the United States off Pass Cavallo on the coast of Texas, then in rebellion against the United States, and for some time previously under blockade along the whole line of its coast and taken to Key West for adjudication.

A libel in prize was filed against both vessel and cargo in the District Court for the Southern District of Florida in December, 1862, to which the master of the vessel interposed a claim in behalf of John Cabada, of Campeachy, Mexico, the alleged owner of the schooner, and in behalf of Miguel Canno, a Spanish subject residing at Campeachy, the alleged owner of the cargo. Subsequently a claim was filed by Idela Cabada, alleging that he was owner of the vessel, and that he had let her to one Miguel Canno on freight for a voyage from Campeachy to Matamoras, Mexico, in good faith.

The ship's papers showed that the vessel was on a voyage from Campeachy to Matamoras and was consigned to one San Roman at the port last named. She set sail on the 11th November, 1862.

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When captured, the vessel was near the port of Matagorda, off the coast of Texas. She was fourteen days from Campeachy and was two hundred miles out of her direct course, having deviated therefrom on the third day out from Campeachy.

The master, in his deposition taken *in preparatorio*, testified that

"the first port the vessel would have entered had she not been captured would have been the nearest convenient port of entrance, and the second would have been Matamoras,"

and "that for twenty-four hours previous to the capture, the ship was steering toward the coast of Texas in hopes to make a harbor or beach or something."

One of the seamen found on board testified that but for our capture "the vessel would have entered first the port of Cavallo," and that

"they were running along the coast for an entrance, and that at the time of the capture the captured vessel was only some three miles from the lighthouse on Pass Cavallo Point."

In excuse for the position in which the vessel was found it was alleged that when three days out from Campeachy damage had resulted to the rigging of the vessel, causing her to deviate from her course, and that the master approached the coast "from no other motive than that of seeking shelter to repair the damage of his vessel."

The log book, which had perhaps a somewhat elaborate and artificial aspect, stated that there had been a good deal of heavy weather; that the vessel worked much; that when three days out from Campeachy she "broke the clamp of the peak of the foresail," which it was necessary to wait till daylight to repair, but which then, at six o'clock in the morning, was repaired, the wind then being favorable, as it was generally, for going to Matamoras; that on the 15th she broke the bobstay of the bowsprit; and that "a lashing of rope was made to secure the said bowsprit, having no better means," and that sail was then made with double reefs. It indicated, generally speaking, variable weather, sometimes heavy, sometimes fine; that the vessel, however, required the pumps to be not unfrequently at work; that on the

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25th she became uncertain about her longitude, and that on that day, under light variable winds, she

"luffed all that was possible, for the purpose of finding soundings and determining our longitude, and by that means to enable us to make a straight course for our port of destination, or some port nearby, where we might repair the damages sustained by the vessel and her rigging."

Twenty-four hours afterwards she was captured, being, as already stated, now off the Texan port of Matagorda.

The following letter of instructions, from the owner of the vessel and the owner of the cargo to the master, was found among his papers.

" *[Translation]*"

"CAMPEACHY, November 10, 1862"

"DN. PEDRO JAUREQUIBERRY, present."

"DEAR SIR AND FRIEND: We think it advisable to hand you this letter of instructions, in order that you may remember with greater facility and precision the objects of the voyage to be undertaken today by our pilot boat 'Diana,' of which vessel you are master."

"You have ample authority to dispose of the goods which are on board of the vessel, and to invest the proceeds in the article which we have mentioned to you verbally, not forgetting that our wishes as well as your personal interest consist in making the most of the article referred to."

"Although the vessel goes consigned to Dn. Jose San Roman, you will do what you consider best for our interest. You should not disburse any money while you are able to make purchases from the proceeds of the invoice, and of such ship's stores as you can conveniently dispense with after reserving a sufficient quantity for the return voyage."

"As we are embittered by the war which France has declared against the republic, upon the return voyage you will touch at Sisal or Celestun, where you will receive our instructions."

"You will keep an accurate account of all moneys disbursed by you, in order that we may determine whether to continue or not these expeditions. We omit any further instructions which we

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might give, having full confidence in your intelligence and activity."

"We conclude by wishing you a safe voyage, and by acknowledging ourselves"

"Your friends &c.;,"

"CANNO & CABADA"

The cargo of the *Diana* consisted in part of rice, starch, coarse flannel, paper, nails, rum, brandy, shoes, and segars; articles which were nearly or quite as abundant at Matamoras as at Campeachy, but which were greatly needed in Texas, at the time, as already said, under blockade by the United States.

There was on board, apparently as a passenger, an Englishman, whose name appeared in the ship's papers as George Stites, but whose real name was George Chase, and who was a pilot, and a resident of Lavacca, Texas.

Acting Master Atkinson, of the United States Navy, in his deposition, taken by leave of court, testified that when he boarded the *Diana*, her master said that his purpose was to run the blockade; that he had before attempted to do so at St. Louis Pass and did not succeed, and that the same statement was made to him by the pilot of the *Diana*, who was part owner of the cargo.

Acting Master Samson, also of the United States Navy, in his deposition testified that Chase, the ostensible passenger on board, and who was part owner of the cargo, stated that he was engaged to act as her pilot in entering Matagorda Bay, or any other convenient port of Texas, and that the vessel was intended to violate the blockade; and that Chase made a written acknowledgment to this effect in presence of several witnesses.

On the hearing, it was brought to the notice of the court that a person of the same name with the captain of the *Diana*, and residing at the same place, commanded the schooner *Sea Witch*, which was captured off the coast of Texas for an alleged intention to violate the blockade, and was restored to her owner upon the ground that while on a voyage from

Matamoras to New Orleans, she was driven out of course by heavy weather and had been damaged [[Footnote 1](#)] -- the same excuse which is offered in this case.

The district court decreed restitution, and from the decree the United States appealed.

MR. JUSTICE FIELD delivered the opinion of the Court.

The schooner *Diana* was captured, in November, 1862, off Cavallo, near the entrance of Matagorda Bay on the coast of Texas. According to her papers, she was on a voyage from Campeachy, in Mexico, to Matamoras, at the mouth of the Rio Grande, but at the time of her capture she had been fourteen days at sea and had passed two hundred miles beyond her alleged port of destination. We have no doubt that she was then seeking to enter a blockaded port on the coast. The master states in his deposition that the vessel, if she had not been captured, would have first entered the nearest convenient port, and afterwards gone to Matamoras, and that for twenty-four hours previous to her capture he was steering the vessel toward the coast in hopes of making a harbor or a beach. One of the seamen testifies that the vessel was running along the coast for an entrance; that at the time of her capture she was only three miles from the lighthouse on Pass Cavallo Point, and but for the capture would have entered the port of Cavallo.

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Nor do we doubt that it was the object of the voyage to trade with the enemy, and for that purpose that the owners of the vessel and cargo intended to violate the blockade. The excuse offered by the master for the position in which the vessel was found -- that she had been injured by stress of weather, and he was approaching the coast with no other motive than that of seeking shelter to repair the damage -- is inconsistent with various facts developed by the evidence.

In the first place, the papers of the vessel purport that she was consigned to one San Roman, at Matamoras, but the instructions from the owners of both vessel

and cargo show that this consignment was colorable, and that the master was the real consignee. He was clothed with full authority to dispose of the goods on board, and to invest the proceeds in what is very mysteriously termed *the article*, which they had mentioned to him *verbally*. The article to which allusion is thus made, was cotton, which it was undoubtedly the object of the voyage to procure.

In the second place, the articles which composed the cargo were as abundant and cheap at Matamoras as at Campeachy, whilst they were in great demand and of high price in the country occupied by the enemy.

In the third place, the vessel had on board, ostensibly as a passenger, but under a fictitious name, an Englishman, who was a pilot, and a resident of Lavacca, a town at the head of Matagorda Bay, for which the vessel was evidently directing her course when captured.

Besides these considerations, which are sufficient of themselves to justify the conclusion that a violation of the blockade was in the original intention of the owners of vessel and cargo before the vessel sailed from Campeachy, it was admitted by the master at the time of the capture that it was his purpose to run the blockade, and that he had before attempted, without success, to do so at St. Louis Pass. The Englishman on board, who joined the vessel at Campeachy, also stated that he was engaged to act as pilot of the vessel to enter Matagorda Bay, or any other convenient port of Texas.

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The blockade of the coast of Texas had been established long before the vessel sailed from Campeachy, and its existence was generally known. It is proved that it was known to the owners and master of the captured vessel.

There is another circumstance which may be adverted to in this connection. The master of this vessel was also the master of the *Sea Witch*, which was captured off the coast of Texas for an attempt to violate the blockade, and was released upon the ground, that whilst on a voyage from Matamoras to New Orleans she

was driven out of her course by stress of weather and injuries received -- an excuse similar to the one offered in this case. [[Footnote 2](#)] This circumstance the court will take notice of, and it will justify a rigid scrutiny into the character of the exculpating testimony produced by the master in the present case. Such is the language of the adjudged cases. [[Footnote 3](#)]

The statement of the master as to the extent of injuries which the vessel had received is not supported by the log book. The injuries which are shown by its entries were not of a very serious character -- such as would endanger the safety of the vessel. Much less do the entries show the necessity of any deviation of the vessel from a direct course to Matamoras. The statement is that she deviated from such course on the third day out from Campeachy, because the sea and wind were heavy, and the rigging of the vessel had been damaged. The log book shows that the damage was repaired the following morning, and on the next day that the wind was fair for sailing in a direct course to Matamoras, and so continued nearly all the time up to the capture.

It is undoubtedly true that a vessel may be in such distress as to justify her in attempting to enter a blockaded port. She may be out of provisions or water, or she may be in a leaking condition, and no other port be of easy access. The case, however, must be one of absolute and uncontrollable necessity, and this must be established beyond reasonable

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doubt. "Nothing less," says Sir William Scott, "than an uncontrollable necessity, which admits of no compromise, and cannot be resisted," will be held a justification of the offense. Any rule less stringent than this would open the door to all sorts of fraud. Attempted evasions of the blockade would be excused upon pretenses of distress and danger, not warranted by the facts, but the falsity of which it would be difficult to expose.

The decree of the court below must be reversed, and that court directed to enter a decree condemning the vessel and cargo as lawful prize, and it is so ordered.

[[Footnote 1](#)]

[73 U. S. 6](#) Wall. 242.

[[Footnote 2](#)]

[73 U. S. 6](#) Wall. 242.

[[Footnote 3](#)]

The Juffrouw Elbrecht, 1 Robinson 127; [The Experiment](#), 8 Wheat. 261.

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