

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Our Sovereign Lady the Queen v. McCleverty (the "Telegrafo" or "Restauracion"), from the Vice-Admiralty Court of the Virgin Islands ; delivered 20th February, 1871.

Present.

THE MASTER OF THE ROLLS.
SIR JAMES W. COLVILLE.
JUDGE OF THE HIGH COURT OF
ADMIRALTY.

THIS is an Appeal from a Sentence of the Judge of the Court of Vice-Admiralty in the Virgin Islands.

By that Tribunal a warrant of arrest had been decreed, on the motion of the Advocate for the Crown, in a prosecution against a steam-vessel called the "Telegrafo," or "Restauracion," as a pirate vessel. Her owner appeared under protest, to the jurisdiction of the Court, and, after hearing an elaborate argument from Counsel which occupied several days, the learned Judge pronounced for the protest, and decreed restitution to the claimant, but gave no damages or costs. From this sentence the Crown has appealed, and the claimant has adhered to the Appeal so far as the sentence affected the question of damages and costs.

The proceedings in the Court below were confined to what is known in the Admiralty Court as an Act on Petition, in which the Protest was set out. An Answer to that Act was given in on behalf of the Crown, and a Rejoinder on behalf of the claimant.

The averments in these summary pleadings were supported, as is usual, by affidavits from both

parties ; some of those filed on behalf of the claimant were set aside by the Court as having been, in the circumstances, improperly filed, and these have been printed in the papers laid before this tribunal. Their Lordships have, however, been careful to confine their attention to those affidavits and documents which the Court below admitted and referred to. Even these, it must be observed, exceeded, to a certain extent, the technical limits within which, having strict regard to the character of the proceeding, namely, a Protest to the Jurisdiction, they would have been kept by a Court more accustomed to exercise jurisdiction of this kind ; and it has been contended at this bar by the Law Officers for the Crown, the Appellant, that the Protest upon the question of jurisdiction, the only question for consideration in the Court below and here, is not sustained by the evidence, that that Protest should be overruled, and that they ought to be allowed to establish by plea and proof in a formal manner, and according to due course of law, the merits of their case against the steam-ship.

The protest and the answer, however, raise various important questions of public and international law which appear to have been fully argued in the Court below, are referred to in the Judgment of that Court, and have been much insisted upon by the Appellant before this tribunal, namely, whether the acts of the former master and crew of this vessel were of a piratical or belligerent character, whether, if piratical, they were done within the territorial waters of a foreign State, and therefore justiciable only by that State, or whether, being done upon the seas, though within territorial waters they were not, according to the Law of Nations, justiciable, as piratical, by the tribunals of every State.

It appeared, however, to their Lordships, during the course of the argument that there were facts admitted or proved in this case, as it was conducted by both parties in the Court below, which rendered any decision upon these grave and important matters unnecessary.

The protest among other allegations contained the following :—

“ Nor had the said Isaac Farrington, the seizer, in the absence of any adjudication pronouncing the said steam-ship to have been engaged in acts of

piracy, or to have been the property of pirates, any authority to seize and detain the said steam-ship, which had been purchased at public auction by the said Augustus McCleverty, nor can the said steam-ship 'Restauracion,' late 'Telegrafo,' thus illegally seized be brought within the jurisdiction of or her alleged acts of piracy be recognizable by this Honourable Court."

The answer does not deny the facts of the sale and ownership as here stated, but alleges that the ship being found in the port, justified the seizure and warranted the jurisdiction of the Court.

On the 3rd of May, 1869, the "Telegrafo" was at Santo Marco, a Haytian port; at which time it would appear that a civil war existed, or an insurrection had broken out in the Island of San Domingo. The "Telegrafo" afterwards equipped as an armed vessel, did various acts of hostility, alleged on the one side to be piratical and on the other to be belligerent upon various parts of the coast of San Domingo. She was then owned and commanded by one Domingo Acevedo. On the 8th of June she was commissioned by the Revolutionary Government of San Domingo, having on board her Gregorio Luperon, General-in-chief of the Republican forces; on the 6th July she landed troops at Barrahona on the island, and about the 12th July she came into the port of Road Town, Tortola; on the 21st July she was sold by public auction for 10,025 dollars in a formal and regular manner by her owner to her present possessor Mr. McCleverty, and she paid to the British Government certain dues upon the auction according to the law of the place; and it was not till the 19th January, 1870, that she was arrested by a warrant from the Court of Vice-Admiralty, as a piratical vessel; she was at that time and had been since the month of July, in the possession of a British owner, not connected in any way with her previous action, whether piratical or belligerent, on the coast of San Domingo; not an Agent acting collusively for her former owner, for no such suggestion is made in the affidavit which led to the warrant or in the subsequent affidavits filed by the Court, but a *bond fide* purchaser, at a public sale for value. This being the state of facts apparent on the face of the proceedings, and taken into the consideration of the Court, their Lordships

were anxious to know on what authority of principle or precedent this vessel could be arrested as belonging to a pirate.

No precedent has been cited to their Lordships but it has been strongly contended that the principles of law applicable to the cases of piracy warrant the arrest. Many authorities were cited for the purpose of establishing the position that the goods of pirates cannot be transferred by the pirates to a third party. That goods piratically taken cannot be transferred to a third party as against their legitimate owner is an undoubted proposition of public and of international law, but the further and different proposition that the ship of the pirate which has not been taken from another person cannot be transferred to an innocent purchaser for value, is not supported by any of the authorities cited. The goods of pirates are forfeited to the Crown in her Office of Admiralty, but not until after conviction, and the ship of the pirate, but not until after condemnation; or, as it is correctly stated in Bacon's Abridgement, "Piracy," "the goods of pirates *not taken from others*, belong, *after attainder*, to the Crown or its grantee; and those of which others have been despoiled will be forfeited in the same manner if the owners come not within a reasonable time to vindicate their property."

The cases establish this position, that the Court of Admiralty has jurisdiction to entertain a suit, usually though not always instituted in a civil form, for restitution of goods piratically taken on the high seas. The question of restitution might, in fact, be raised by two modes of civil proceeding—either by what is technically called a *cause of possession*, as in the "Segredo" or "Eliza Cornish" (1 Spinks, 37), in 1853, and in a recent case, the "Mary, otherwise Alexandra," in which the United States of North America were the claimants; or by a *cause of piracy, civil and maritime* ("*causa spoli civilis et maritima*").

In the case of the "Hercules," Chitty (2 Dodson, Ad. Rep., 369), Lord Stowell considers the whole question of the authority of the Court of Admiralty in this matter.

And it is necessary to observe how clearly the important distinction is taken between private owners seeking a restitution of their goods, and the

Crown or Lord High Admiral proceeding *pro publicâ vindictâ*, for condemnation or conviction.

In the "Hercules," an application was made to the Court on behalf of Spanish subjects, who prayed restitution of certain monies in possession of the Court, alleged to be the proceeds of goods piratically taken. Lord Stowell, in the course of his Judgment, observed—

"The objections stated in argument are principally three: first, that there should be a preceding conviction of piracy; that this has not been generally required is sufficiently clear. It is true that where Lord Admiral proceeds, *pro interesse suo*, upon his Royal grant of *bona piratarum, &c.*, their own proper goods, not goods of other unlawfully taken on the seas, he must show that the party has been attainted of piracy, *Primston and others v. The Admiralty*; but when a person, so despoiled of his own goods, proceeds merely for restitution, no such preliminary is required. Some of the proceedings here are by articles, which of themselves are of a criminal nature, and, therefore, could not have been preceded by a conviction. Others, as in the case of *Egglefield and others*, merely civil, by libel, or without reference to any antecedent conviction, nor has any such antecedent conviction been traced. In the case reported in *Bulstrode (Pelaye's case)* likewise in the 4th Institute, where the Spanish Ambassador proceeded for the restitution of Spanish goods taken on the high seas from Spanish subjects (and the Ambassador of that country appears to have been a frequent party in suits of this nature), and where the adverse party, Pelaze was a Jew, setting up a commission from Morocco, the Court said he could not be proceeded against criminally, for it was not a robbery (I presume on account of his commission), but that they might deal civilly with him for them in the Admiralty, and that he ought to answer for them there civilly. And *per curiam* he may answer the suit as to the point of restitution. And it appears, as far as I can collect it, the settled law that without a conviction the party might proceed for what is termed the *point of restitution*."

In another part of his Judgment Lord Stowell says:—

"A third objection is, that the act of piracy, being a crime, could not be considered by the common law as the proper subject of a civil suit for restitution. And it is certainly a known principle of common law that a civil suit cannot be founded on a felony, for that would approach to what is termed a compounding of a felony. The civil demand merges in the felony. The common law rather, perhaps, considers that demand as in the nature of a debt arising upon something like a contract, and *ex maleficio non oritur contractus*. Whether this principle was imported (though with a more technical meaning) from the civil law (where I am not certain it is to be found in terms), or whether this mode of considering the demand as merged, is not a principle coeval and congenial with the fundamental principles of

the common law itself, is more than I can presume to say. But I take the rule to be confined to such *maleficia* as the law technically considered as felonies, or as felonies and something more than felonies, as high treason. To misdemeanours, or other offences differently qualified, the policy of the law has not applied it. Now piracy is certainly not considered as a felony at the common law. It is expressly so laid down by Lord Hale. Pardón of all felonies reacheth not piracy. The principle, therefore, does not reach it, at least in its ordinary extent; and looking to what has taken place in the cases of prohibition alluded to, I am led rather to infer that it could not be extended to a crime belonging to, and den by, another system of jurisprudence, and where reasons of legal policy and convenience rather appear to oppose its introduction; for though the law may very justly and commodiously apply its own peculiar principles to its subjects in their ordinary transactions, governed immediately by its own rulers, and may, therefore, compel such individuals to give up, *pro publicâ vindictâ*, and for the protection of the community, their own private claim of indemnification for any wrong they may have suffered, it by no means follows that where the wrong done is *contra jus gentium*, and the foreign sufferer, standing upon that law, requires a reparation, the common law of this country would impose upon him the burthen of sacrificing his private rights, so founded, to the duty of protecting the interest of the country of the offender, by confining the whole of his remedy to the useless privilege of a criminal prosecution.

“As far as I am enabled to infer from the cases of attempted prohibition, the common law has made no such demand, but has admitted the prosecution of a civil suit for the *point of restitution*, either exclusively of a criminal prosecution, or in conjunction with it.”

To the same effect is the old case *Radley and Belbow v. Eglesfield and Whital*, reported in *Ventris*, p. 173, and referred to by Lord Stowell in this Judgment.

The present case, however, is clearly distinguishable from all these cases; here no private owner is seeking restitution of his ship, but the Crown is proceeding *pro publicâ vindictâ*, without previous condemnation or conviction, against a vessel neither now piratically owned nor stated to have been piratically taken from any previous owner.

There is no authority, their Lordships think, to be derived either from principle or from precedent for the position that a ship duly sold, before any proceedings have been taken on the part of the Crown against her, by public auction to a *bond fide* and innocent purchaser can be afterwards arrested and condemned, on account of former piratical acts, to the Crown. The consequences flowing from an opposite doctrine are very alarming. In this case

six months have elapsed between the sale and the arrest; but, upon the principle contended for, six or any number of years and any number of *bond fide* sales and purchases would leave the vessel liable to condemnation on account of her original sin. Their Lordships are of opinion that the taint of piracy does not, in the absence of conviction or condemnation, continue, like a maritime lien, to travel with the ship through her transfers to various owners.

Assuming, therefore, that this vessel had been piratically navigated previous to her transfer (a fact which their Lordships are very far from saying appears upon the affidavit which led to the warrant of arrest), their Lordships have arrived at the conclusion that the Court ought not to have arrested a vessel which for many months had been in the undisputed possession of a *bond fide* purchaser by public auction on account of piratical acts alleged to have been committed from on board of her before the sale took place. Their Lordships, therefore, will humbly advise Her Majesty that the sentence of the Court below should be affirmed, so far as relates to the dismissal of this suit.

Their Lordships will direct that the Respondent have his costs of the Appeal to Her Majesty in Council, but not the costs of his own adherence to the Appeal, and no costs in the Court below and no damages.

