36TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REP. C. C. No. 215.

# ELLIOTT WOODBURY AND EZRA FOSTER.

FEBRUARY 11, 1860.—Reported from the Court of Claims; committed to a Committee of the Whole House, and ordered to be printed.

*To the honorable the Senate and House of Representatives of the United States in Congress assembled:*

The Court of Claims respectfully presents the following documents as the report in the case of

ELLIOTT WOODBURY AND EZRA FOSTER vs. THE UNITED STATES.

1. The petition of the claimant.
2. United States solicitor's brief.
3. Opinion of the court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the [ L. . ] seal of said court, at Washington, this fifth day of December, A. D. 1859.

SAM'L H. HUNTINGTON,
*Chief Clerk Court of Claims.*

---

*To the honorable the Court of Claims of the United States:*

The petition of Elliott Woodbury and Ezra Foster, both of Beverly, in the county of Essex and State of Massachusetts, respectfully shows: That on and previous to the fifth day of August, one thousand eight hundred and forty-six, your petitioners were the sole owners of the brig "Casket," whereof Henry E. Woodbury, of Beverly aforesaid, was master, and that on the said day the said brig was at anchor on the high seas, to wit: off the port of Kabenda, on the western coast of Africa, and was engaged in lawful commerce and in prosecuting a lawful voyage, as after mentioned.

That the said vessel so being was, on the said day and at the said place, seized by the United States sloop-of-war "Marion," under the command of Lewis E. Simonds, a lieutenant in the United States navy, duly commissioned, and acting under due authority from

the United States, under the allegation that the said vessel was engaged in the slave trade, in violation of the laws for suppressing the same.

That the said Lewis E. Simonds, lieutenant as aforesaid, forcibly took possession of said vessel, put a prize crew on board of her, and sent her to Boston, in the State of Massachusetts, and there delivered her to the United States marshal, under the charge as aforesaid.

That thereupon a libel was filed against said vessel, in the name and on behalf of the United States, by Robert Rantoul, jr., district attorney of the United States for that district, and the condemnation of the said vessel was thereby claimed, on the allegation that she was concerned in the slave trade.

That the said libel was filed in the district court of said district on the ninth day of October, one thousand eight hundred and forty-six, and was continued to the following December term of the court, and that at said term the cause was heard upon evidence and arguments of counsel on both sides; and the court did thereupon order, adjudge, and decree that the said vessel was innocent, that the said charge was void, that the said libel should be dismissed, and that the said brig and appurtenances should be delivered to the claimants thereof, being these petitioners.

That by reason of said seizure petitioners lost the use of said vessel from the time of seizure until December, one thousand eight hundred and forty-six, when the marshal restored her to her said master.

That at the time of seizure the said vessel was in the course of performing certain articles of agreement, contained in a certain charter party entered into by and between the said Henry A. Woodbury, master of said brig, and Don Francisco Y. Urguellez, of Rio Janeiro, in Brazil, South America, a copy of which, marked "A," and which petitioners pray may be taken as part hereof, is hereunto annexed. That in consequence of the said seizure the said Henry A. Woodbury was prevented from fulfiling his part of said agreement, and thus forfeited to the said Urguellez the sum of two thousand dollars, pursuant to its terms.

That by the terms of the said charter party the said master was to receive one thousand five hundred mill reis, equal to eight hundred and fifteen dollars United States currency, a month, for the use of said brig, commencing on the twenty-eighth day of May, one thousand eight hundred and forty-six; but that the same became wholly lost by reason of such seizure and non-performance by the brig.

That while the said brig was in the custody of the United States officers, as aforesaid, and when she was remanded to the possession of her said master, in December, one thousand eight hundred and forty-six, divers injuries and losses had been sustained by her, through the neglect, wantonness, and misconduct of the persons in charge of her. The sails and rigging were very greatly damaged. A house on deck over the long boat, in every respect well finished and in good order, was broken and ruined, and the cabin was much injured. The stores on board, consisting of beef, pork, bread, coffee, sugar, flour, &c., and adequate to a full supply for five months from the time of seizure, were consumed. The hull of said brig was injured, and her tackle, apparel, and furniture were damaged.

That to restore the said vessel to the same order, and replace her at Kabenda, as seized, would require at least three months' time.

That these petitioners had to keep the said vessel insured during her seizure, and were also put to very considerable costs and charges in procuring evidence and counsel to repel the untrue charges aforesaid, and to vindicate their rights in the premises, and that petitioners themselves have also been greatly harassed, and put to trouble and anxiety thereby, as well as defamed in their good name and reputation among their fellow-citizens, by being subjected to the suspicion of having been guilty of the odious and illegal crime of participation in the slave trade.

That petitioners, claiming to hold the said Lewis E. Simonds personally responsible for all the foregoing losses and damages, caused him to be sued therefor, in the district court of the United States for the district of Rhode Island, on or about the twenty-fifth January, one thousand eight hundred and forty-seven; and that in the June term of the said court, in the year one thousand eight hundred and fifty, Mr. Justice Woodbury pronounced the judgment of the court, which recognized the right of petitioners to the compensation demanded, but held that the cause of action lay against the United States, and not against the defendant Simonds, who was only their officer, and executed their laws and orders, and that petitioners should seek relief in Congress, to which judgment petitioners beg to refer.

That accordingly petitioners presented their claim to the House of Representatives in the year one thousand eight hundred and fifty-two, and again in the year one thousand eight hundred and fifty-three, through the late Hon. Robert Rantoul, of Massachusetts, and the same was referred to the Committee on Claims, but that no report was made or action had upon it, so far as petitioners know, and with Mr. Rantoul's death the proceedings dropped.

That petitioners claim that the United States, as the aggressors and actors, by their officers as aforesaid, are liable to them in the premises for the following damages, which petitioners hereby claim of and from the United States, viz:

| | | |
|---|---|---|
| 1. | For the rate of the charter party aforesaid, from the 28th day of May, 1846, to the —— day of December, same year, when vessel was delivered back to petitioners, at $815 a month, the rate of charter party—say six months and a half..... | $5,397 50 |
| 2. | For three months further, at the same rate, the period necessary to repair the said vessel from injuries by the United States, and to replace her at point of seizure.... | 2,445 00 |
| 3. | For the penalty or forfeiture, created by non-performance of the vessel's contract under the charter party... | 2,000 00 |
| 4. | For injuries aforesaid to the vessel, her hull, tackle, furniture, use of provisions, &c..... | 1,000 00 |
| 5. | For insurance on the said vessel during her seizure..... | 140 00 |
| 6. | For costs and counsel of petitioners in the premises, this sum being actual outlay..... | 976 85 |
| 7. | For interest on these payments, commencing three | |

months after restitution of the vessel—say 15th March, 1847, until rendition of judgment of this court..... .....
8. For the personal damages of petitioners.....$10,000 00
9. For expenses incurred in forwarding witnesses, and loss of time in seeking them, and attending the various proceedings in this case..... 500 00

That petitioners are the sole owners of this claim, subject to the commission of their counsel, and no other parties are interested in it; and they pray the certificate of this honorable court, in their favor against the United States, for the foregoing sums, to be reduced into an aggregate when complete by the filling in of interest, or for such other sum as may seem meet to justice and equity in the premises.

ELLIOTT WOODBURY,
EZRA FOSTER,
By PLATT & STEWART,
*Their Attorneys in fact.*

PLATT & STEWART,
*Attorneys for Petitioners.*

*City and County of New York, ss:*

Zephaniah Platt, of the firm of Platt & Stewart, attorneys in fact for the petitioners in this case, being duly sworn, maketh oath and saith that the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

Z. PLATT.

Sworn and subscribed this 25th day of July, 1855, before me.
WASHINGTON R. NICHOLS,
*Commissioner of Deeds.*

---

IN THE COURT OF CLAIMS.

ON THE PETITION OF ELLIOTT WOODBURY AND EZRA FOSTER.

*Brief of the Solicitor of the United States.*

This is a claim founded on the alleged illegal seizure of the brig "Casket," on the coast of Africa, by Lieutenant Simonds, commanding United States sloop-of-war "Marion."

The only question presented is, whether the government is responsible to its citizens for the illegal acts of public officers. That it is not has been decided by this court in the case of Cassius M. Clay, and by the Supreme Court in the case of Mitchell *vs.* Harmony, 13 Howard, 137, and is so laid down in Story on Agency (§§ 319, 319*a*, 319*b*, and 320.) An officer, like every agent, to bind his principal, must act within the scope of his authority, and to pronounce the act of an officer to be illegal, is to declare it to have been an act not within the scope of his authority; and upon this it depends whether he is himself personally responsible, or whether the government is responsible. Mitchell's case was one in which Harmony's trade with Chihuahua had been interrupted, and Mitchell defended the action

brought against him by Harmony, to recover damages for losses he had sustained in consequence, by contending that he was authorized by the laws of war to make the seizure. But the Supreme Court held that the facts did not authorize the seizure, and, therefore, that Mitchell was a trespasser, and bound to make good the loss. If the traffic had been in fact illegal, or if it had been a case in which private property had been taken for public use or destroyed to prevent its falling into the hands of the enemy, there would have been no personal liability on the part of Mitchell in either case, or of the United States in the first instance; because, in that case, the property was forfeited by the owner by reason of his own improper conduct. In the other cases there would have been no liability on the part of Mitchell, but then the government would have been liable; because, as he acted in official character, and within the scope of his authority, the case would have been the same as that of Hodgson *vs.* Dexter, 1 Cranch.

There have been instances, it is true, and Mitchell's case is one of them, where Congress has indemnified public officers who have been mulcted for illegal acts done by them whilst in public service. This has been done, however, not under the idea that the government was legally bound to indemnify either those who had suffered by illegal acts of its officers, or the officers who have been compelled to pay the sufferers for those acts. These acts have been passed in consideration of the special circumstances of each case, and on the production of satisfactory evidence that the officers acted in good faith, with the single object of promoting the public service, and committed the error under such circumstances as to excuse them, in a measure, for the mistake.

Under the principle asserted here, the government would be liable without regard to such considerations, and it would not devolve on the officer himself or the sufferer to show that the error was one that a man, using ordinary consideration, and acting for the public benefit alone, might have committed. The government would, in all cases, be responsible to the sufferer absolutely on the first instance, unless it could establish collusion between the officer and the claimant.

There is no difference between a claim against the United States founded upon an injury committed by an officer acting beyond his authority, and an injury committed by any other person. Everything done by the officer beyond the letter of his authority is done as much on his own responsibility as the acts of any citizen.

No judicial authority is cited for the propositions of the claimant. His counsel, however, supposes that there is some analogy between the claims allowed against foreign governments and against our own, in some instances, perhaps, by commissioners under treaties, and refers particularly to the cases of barque Jones, the Hermosa, the Enterprize, and others, considered by the late joint commission between the United States and Great Britain, which were claims made by the United States against England on account of injuries committed by British officers against the property of American citizens.

Responsibility from a government to an individual is not varied by the fact that the individual is a foreigner, and that the reclamation is made by the agency of the foreign government to which the indi-

vidual belongs, and which represents the rights of its citizens or subjects against foreign governments. (See Vattel, B. II, ch. VI, §§ 71, 72, 73, 74, 75 ) These sections speak of the duties of one government to other governments and their citizens in respect of injuries committed by individuals under its allegiance, and fix a liability on the government of the aggressor only when that government is itself in default for failing to deliver up or to punish, &c., or when it assumes and justifies the acts of its offending citizens.

Of this character were the acts referred to in the treaties in question, not that the nation who assumed the responsibility of these illegal acts meant thereby to say, in all cases, that the acts had been authorized, or to admit the principle that it was bound to other governments or individuals for the illegal acts of its citizens or officers, but only that, in the special cases provided for by treaty, it was deemed expedient to do so, just as it has been deemed expedient by Congress to indemnify certain officers, collectors, &c., for their illegal acts.

M. BLAIR.

---

IN THE COURT OF CLAIMS.

MAY 31, 1859.

ELLIOTT WOODBURY AND EZRA FOSTER *vs.* THE UNITED STATES.

LORING, J., delivered the opinion of the court.

The petitioners are citizens of Beverly, in the county of Essex and State of Massachusetts. They allege in their petition that, on the 5th of August, 1856, the brig Casket, belonging to them, while on the high seas, to wit, at anchor off Kabenda, on the coast of Africa, was seized by Lieutenant Simonds, commanding the United States sloop-of-war Marion, on the allegation that she was engaged in the slave trade; that a prize crew was put on board of her, and that she was sent into the port of Boston, in the State of Massachusetts; that she was there libelled by the United States, and her condemnation claimed on the allegation that she was engaged in the slave trade; that upon a hearing it was decreed "that the said vessel was innocent, and that the said charge was void; that the said libel should be dismissed, and that the said brig and appurtenances should be delivered to the claimants thereof," these petitioners.

The petition then alleges various damages consequent upon and following the seizure, according to the specification in the petition amounting to the sum of $22,459 35.

It was contended for the petitioners that the United States were liable to them for these damages, by the law of nations or analogies drawn from it; and by the municipal law, upon its rule, that a principal was liable for the tortious acts of his agent while acting in the course of his employment or in the line of his duty.

Admitting that the decree of the district court established the fact

that the seizure was tortious, the question raised in the case is, whether the government is liable to its own citizens for the misfeasance or positive wrong of its officers.

For such a liability by *the law of nations* no authority was adduced and none are known. Treaties made with foreign nations were referred to; but treaties are contracts, and as such are confined to their parties and terms, and they can furnish neither rule nor analogy for the case at bar.

In the law of agency and master and servant, under the municipal law, the principal is liable for the misfeasance of his agent occurring in the course of his agency, but this rule is only the application of the maxim "*Qui facit per alium facit per se*," and the rule stops with its reason; therefore in that law the principal is never liable for the *wilful* misfeasance of his agent. In such case the unlawful intent, of which the unlawful act is but the consummation, is not the principal's, but the agent's only, and he therefore is alone responsible for it. Hence the familiar instances of collisions at sea and on land. If the servant of A drive his carriage against B's carriage carelessly, A is liable; but if the servant of A drive his carriage against B's carriage wilfully, A is not liable, but his servant is alone responsible. The rule as to misfeasances or positive torts is the same for public agencies as for those of private individuals.

But in the theory of the municipal law every unlawful act of *a public officer* is held to be, by a presumption of law, founded on public policy, and therefore absolute and conclusive—the result of an original unlawful intent on the part of the officer, apart from and outside of his official authority, and belonging to him personally and exclusively, and therefore the responsibility for the act is his exclusively. The rule is thus stated by Lord Coke in the Six Carpenters' case, 8 Rep.: "Where entry authority or license is given to any one *by the law*, and he does abuse it, he will be a trespasser *ab initio;*" and he then states the reason of the rule to be, "that, in the case of a general authority or license *of the law*, the law adjudges by the subsequent act *quo animo* or to what intent he entered; for *acta exteriora indicant interiora secreta.*" This has been always and uniformly the rule as to public agencies, and applied to this case it makes the seizure of the brig Casket, in legal theory, the unofficial act of Lieutenant Simonds, with which the United States had no connexion, and for which or its consequences or incidents they are not responsible.

This rigorous presumption of the ancient municipal law has been in many instances in modern law and under statutes of the United States so far mitigated, in consideration of facts, as to relieve the officer from responsibility on proof of probable cause; but that has no reference to the liability of his government, and therefore need not be considered here.

The case of Mitchell *vs.* Harmony (13 How., 115) and Story on Agency (s. 307) were cited as authorities for the claim of the petitioners.

But the case of Mitchell *vs.* Harmony only decides as to the personal liability of the public officer, and that he could not justify an illegal act by the order of a superior officer which was manifestly ille-

gal. No question of the liability of the government was raised in the case.

The section cited from Story on Agency, and the whole chapter from which it is cited, refers only to the liability of principals in *contracts* made by their agents, and to declarations and representations and acts not tortious in contracts, and even as to these it declares the government not liable unless it authorized the specific declaration, representation, or act effecting the injury. The section has no reference to misfeasances or torts; and that text book, in section 319, in the 12th chapter, which treats of torts, is direct and full to the point that the government is not liable for the misfeasances or tortious acts of its officers.

This case is the same in principle as that of Cassius M. Clay *vs.* The United States, heretofore decided by this court; and for the reasons given in that case and for those stated above we are of opinion that the United States are not liable in any degree for the seizure of the Casket by Lieutenant Simonds, or for any of the alleged consequences of that act, and that the petitioners are not entitled to the relief they pray for.