The Adventure.

Prize of war.—Salvage.

The case of a vessel and cargo, belonging to a citizen of one belligerent nation, captured on the high seas, by a cruiser of the other belligerent, given to a neutral, and by him brought into a port, and libelled in a court of his own country, between which and the nation to which the vessel originally belonged, war breaks out, before final adjudication, is to be considered as a case of salvage.[1]

One moiety adjudged to the libellants, and the other moiety to remain subject to the future order of the court from which the appeal was brought up; and to be restored to the original owner, after the termination of the war, unless legislative provision should previously be made for the confiscation of enemy's property, found in the country at the declaration of war.

The act of bringing in the cargo, though consisting of articles, the importation of which was prohibited by law, was not considered, under the peculiar circumstances of this case, as subjecting the property to forfeiture.

The Adventure, 1 Brock. 235, reversed.

This was an appeal from the decree of the Circuit Court for the district of Virginia. The facts of the case, as stated by Johnson, J., in delivering the opinion of the court, were as follows:

The libellants were the master and crew of the American brig Three Friends. On the 14th November 1811, whilst on their voyage from Salem to the Brazils, *with a valuable cargo on board, they were captured *222] by the Nymphe and Medusa, French frigates, and by them the brig was plundered and burnt. On the 21st, the frigates captured the Adventure, a British ship, laden with British goods; and, after taken out part of the cargo, made a present of the residue to the libellants. The fact of the gift was established by a writing under the hand of the captain of the Medusa, commander of the squadron, in which he says "*je donne au capitaine*," &c., in the language of an unqualified donation. On the 23d November, they left the squadron, and arrived at Norfolk, on the 1st of February 1812, after a long and boisterous voyage, in a large ship, navigated by a very inadequate crew. On her arrival in the United States, she was libelled by the master and crew, as their property, acquired under the donation of the French captor; and the United States interposed a claim for the forfeiture incurred under the non-importation act. At the time of her arrival, peace existed between this country and Great Britain: but on the 18th of June following, and pending this suit, war was declared.

Pinkney, for the libellants, said, it was not his intention, at this time, to inquire, whether or not, this be a case for condemnation, under the non-intercourse act of March 1st, 1809; he did not mean to deny, that it is not. Waiving that question, therefore, for the present, he contended, that the property in controversy is either, a *droit* of admiralty, subject to salvage, or that it is to be considered as derelict. But no evidence has been produced in support of the latter supposition. It must, therefore, be considered as a case of the former description, and a case too, of the most meritorious character.

If this be conceded, the next question is, what rate of salvage shall be allowed? The English rule on this subject is fixed only in the case of re-capture by government ships and privateers. The salvage allotted to

[1] The Astrea, 1 Wheat. 125.

the first, is at the rate of one-eighth of the beneficial interest in the whole re-captured property ; to the last, one-sixth. In all other cases, the judge of court is at liberty to order such salvage as he shall deem reasonable. Sometimes, *the whole property saved is allowed ; sometimes, the moiety only, and sometimes, less. The present case is one of extraordinary merit. [*223

In the court below, two points were made in behalf of the United States : 1. That this was a case of forfeiture, under the non-intercourse act of 1st of March 1809 : and if not, then, 2. That it was a case of salvage, and the rate to be allotted discretionary with the court.

JOHNSON, J., here suggested a doubt, whether it was not a case under the non-intercourse act ; and asked, whether the United States could rightfully seize the property in question, as a *droit* of admiralty, in port, or any other British property on the land ? He also observed, that there might be some difficulty with regard to the allotment of salvage, should this prove to be a case of that kind.

Harper, for the libellants.—On a capture of a vessel, the right of the captors is only inceptive : in order to complete that right, it is necessary to prosecute it to the condemnation of the vessel, in a court of competent jurisdiction. In the present case, the French captors transferred their right, whatever it was, to the American master and crew. Could they lawfully do this ? The decision of the question depends upon the doctrine relative to the transfer of a chose in action. We contend, that they could ; and that the transferees were consequently entitled, as captors, to prosecute the original capture.

But if the libellants are not entitled as captors, then it is a question, whether it be a case under the non-intercourse act, or a case of salvage. In order to bring it within the meaning of the non-intercourse act, it must be shown, that there was an intention to import for sale or use ; that there was a voluntary importation, and that the importation was from a foreign port or place. But here, there was no such intention, *here was no voluntary importation ; and no importation, as we conceive, from any foreign port or place, within the meaning of the act ; here was no intention to infract any law whatsoever ; it was a case of clear necessity ; the master and crew were obliged to bring in the ship, to save their own lives. [*224

But it may, perhaps, be said, that though it was necessary to bring in the ship, it was not necessary to bring in the cargo. What then was to be done with it. Was it to be thrown into the sea ? The British owner was not divested of his right. Such an act, therefore, would have been inconsistent with the neutral character which it was the duty of all Americans to preserve towards Great Britain, with whom we were then at peace. We conceive, that the course pursued by the libellants, was unexceptionable : they proceeded openly to the United States, and immediately on their arrival, delivered up the property, to be disposed of according to law. There is no appearance, throughout the whole transaction, of the smallest intention to violate any law whatever.

It must, therefore, be considered as a case of salvage ; and had the relations between Great Britain and the United States continued as they were at the time of the importation, the residue of the property in question, after

deducting the salvage, must have been restored to the British owner. But the declaration of war has altered the nature of the case: the ship and cargo have now become enemy property, and as such, are claimed by the American government, subject, however, to the right of the libellants.

What salvage is to be allotted to us, the court will decide. Our case is certainly one of great merit: we were, for more than two months, exposed to the perils and hardships of a long and boisterous voyage; and that, too, in a large ship, to the management of which, the small crew on board was by no means adequate. Less than half the amount of the property would not, we conceive, compensate us for the trouble and danger we have incurred.

*225] *Pinkney* observed, that he had not considered this as a case coming within the meaning of the non-intercourse act, and had, therefore, waived the discussion of that point: he still doubted whether there were sufficient grounds to support it. The law only prohibits importations from a foreign port or place. In cases of transshipment, it may perhaps be said, that the property transshipped is imported from a foreign place: but here was no transshipment, no change of vessel: here, the property is imported from the high seas, which can hardly be considered as coming within the description of a foreign port or place. He did not mean, he said, to enter into a formal argument. He would, however, observe, that in his opinion, the captors, in the present case, could not complete their right to the property in question, by means of a neutral master and crew, even if the British owner was divested of his right.

Rush, Attorney-General, conceived that the high seas might be considered as a foreign place; that the cargoes of whale-ships from the Pacific, such as oil, whalebone, blubber, &c., which originate from the sea, might be considered as within the meaning of the non-intercourse act. He suggested, that the word place, in the act, was probably used in contradistinction to port.

Marshall, Ch. J.—In the circuit court, the high seas were considered as common to all nations, and, of course, foreign to none.

Pinkney said, this was a case of very considerable difficulty. How is the property to be disposed of? It cannot be decreed to the United States, for it is not a case under the non-intercourse act, nor was the seizure *jure belli:* a prize court had no jurisdiction: for the seizure was in time of peace, for a supposed violation of the non-intercourse law, and after the property was landed: it cannot be decreed wholly to the libellants, because it must be considered as a case of salvage. Nor can it be restored to the original owner, because he is an alien enemy.

Monday, March 7th, 1814. (Absent, Todd, J.; Story, J., did not sit in this cause, some distant relative of his having an interest in it.)

*226] *Johnson, J., after stating the facts of the case, as before mentioned, delivered the opinion of the court, as follows:—The very peculiar circumstances of this case require the application of a variety of principles; and the court has not been aided in its inquiries, by that elaborate discussion which such novel cases generally elicit. But they are

relieved by the reflection, that the principles to which they must resort in forming their judgment are well established, and lead satisfactorily to a conclusion. The most natural mode of acquiring a definite idea of the rights of the libellants in the subject-matter, will be, to follow it through the successive changes of circumstances by which the nature and extent of the rights of the parties were affected. The capture, the donation, the arrival in the United States, and the state of war.

As between the belligerents, the capture, undoubtedly, produces a complete divesture of property. Nothing remains to the original proprietor but a mere *scintilla juris*, the *spes recuperandi*. The modern and enlightened practice of nations has subjected all such captures to the scrutiny of judicial tribunals, as the only practical means of furnishing documentary evidence to accompany ships that have been captured, for the purpose of proving that the seizure was the act of sovereign authority, and not mere individual outrage. In the case of a purchase made by a neutral, Great Britain demands the production of such documentary evidence, issuing from a court of competent authority, or will dispossess the purchaser of a ship, originally British. *The Fladoyen*, 1 Rob. 114, 135. Upon the donation, therefore, whatever right might, in the abstract, have existed in the captor, the donee could acquire no more than what was consistent with his neutral character to take. He could be in no better situation than a prize-master navigating the prize, in pursuance of orders from his commander. The vessel remained liable to British capture, on the whole voyage. And on her arrival in a neutral territory, the donee sunk into a mere bailee for the British claimant, with those rights over the *thing in possession, which the civil law gave for care and labor bestowed upon it. [*227

The question then occurs, is this a case of salvage? On the negative of the proposition, it is contended, that it is a case of forfeiture, and therefore, not a case of salvage, as against the United States; that it was an unneutral act, to assist the enemy in bringing the vessel *infra præsidia*, or into any situation where the rights of re-capture would cease, and therefore, not a case of salvage as against the British claimant. But the court entertain an opinion unfavorable to both these objections.

This could never have been a case within the view of the legislature, when passing the non-importation act. The ship was the plank on which the shipwrecked mariner reached the shore; and although it may be urged, that bringing in the cargo was not necessarily connected with their own return to their country, yet, upon reflection, it will be found, that this also can be excused, upon very fair principles. It was their duty to adhere strictly to their neutral character; but to have cast into the sea the cargo, the property of a belligerent, would have been to do him an injury, by taking away that chance of recovery subject to which they took it into ther possession. Besides, bringing it into the United States, did not necessarily pre-suppose a violation of the non-importation laws. If it came within the description of property cast casually on our shores, as we are of opinion it did, legal provision exists for disposing of it in such a manner as would comport with the policy of our laws. At last, they could but deliver it up to the hands of the government, to be re-shipped by the British claimant, or otherwise appropriated under the sanction of judicial process. And such was the course that they pursued. Far from attempting any violation of the laws of the

country, upon their arrival here, they deliver it up to the custody of the laws, and leave it to be disposed of under judicial sanction. The case has no one feature of an illegal importation, and cannot possibly have imputed to it the violation of law.

*228] *As to the question arising on the interest of the British claimant, it would, at this time, be a sufficient answer, that they who have no rights in this court, cannot urge a violation of their rights, against the claim of the libellants. But there is still a much more satisfactory answer: to have attempted to carry the vessel "*infra præsidia*" of the enemy, would, unless it could have been excused on the ground of necessity, have been an unneutral act. But when every exertion is made to bring it to a place of safety, in which the original right of the captured would revive, and might be asserted, instead of aiding his enemy, it is doing an act exclusively resulting to the benefit of the English claimant.

It being determined to be a case of salvage, the next question is, as to the amount to be allowed. On this subject, there is no precise rule; nor is it, in its nature, reducible to rule. For it must, in every case, depend upon peculiar circumstances, such as peril incurred, labor sustained, value decreed, &c.; all of which must be estimated and weighed by the court that awards the salvage. So far as our inquiries extend, when a proportion of the thing saved has been awarded, a half has been the *maximum*, and an eighth the *minimum;* below that, it is usual to adjudge a compensation *in numero*. In some cases, indeed, more than a half may have been awarded; but they will be found to be cases of very extraordinary merit, or on articles of very small amount. In the present case, the account sales of the cargo was near $16,000; and we are of opinion, that the one-half of that sum will be an adequate compensation.

The next question arises on the application of the residue. On this point, the court is led to a conclusion, by the following considerations: At the arrival of the vessel in the United States, the original British owner would, unquestionably, have been entitled to the balance. The state of war, however, at present, prevents his interposing a claim in the courts of this country. But as this property was found within the United States, at the declaration of war, it must stand on the same footing with other British property similarly situated. Although property of that description is liable to be dis-

*229] posed of by the legislative *power of the country, yet, until some act is passed upon the subject, it is still under the protection of the law, and may be claimed, after the termination of war, if not previously confiscated. We will, therefore, make such order respecting it, as will preserve it, subject to the will of the court, to be disposed of as future circumstances shall render proper.

As to the mode of distributing the amount of the salvage, the court have concluded to adopt an arbitrary distribution; because there exists no positive rule on that subject. They would have adopted the rules of the prize act relative to cases of salvage, had the circumstances of the case admitted of its application.

This court orders and decrees, that the decree of the circuit court of Virginia, in this case, be reversed; that the costs and charges be paid out of the proceeds of the sale; that the one-half of the balance be adjudged to the libellants, to be divided into thirteen and a half parts, three of which

shall be paid to the master, two to the supercargo, two to the chief mate, one and a half to the second mate, and one to each of the seamen. And that the balance be deposited in the bank of Virginia, to remain subject to the future order of the circuit court.

Judgment reversed.

John Green *v.* John Liter and others.

Real actions.— Writ of right.

The circuit courts of the United States have jurisdiction in writs of right, where the property demanded exceeds $500 in value ;[1] and if, upon the trial, the demandant recover less, he is not to be allowed his costs ; but, at the discretion of the court, may be adjudged to pay costs.[2]

At common law, a writ of right will not lie, except against the tenant of the freehold demanded. If there be several tenants, claiming several parcels of land, by distinct titles, they cannot lawfully be joined in one writ ; and if they are, they may plead in abatement of the writ.[3]

If the demandant demands against any tenant more land than he holds, he may plead non-tenure as to the parcel not holden ; but the writ will abate only as to the parcel whereof non-tenure is pleaded, and admitted or proved.[4]

Under the act of Kentucky, to amend process in chancery and common law, the party may recover, although he prove only part of the claim in his declaration ; but it does not enable him to join parties in an action, who could not be joined at the common law.

The act of Virginia, of 1786, reforming the method of proceeding in writs of right, did not vary the rights, or legal predicament, of the parties, as they existed at the common law. It did not, therefore, change the nature and effect of the pleadings ; and notwithstanding that act, the tenant may still have the benefit of the ordinary pleas in abatement. The clause of the act which provides, that the tenant, at the trial, may, on the general issue, give in evidence any matter which might have been specially pleaded, is confined to matters in bar.

Under the act of Virginia, of 1786, the tenant may, at his election, plead any special matter in bar, in a writ of right, or give it in evidence on the *mise* joined. The act is not compulsive, but cumulative.

The act of Virginia, of 1786, did not change the nature of the inquiry, as to the titles of the parties to a writ of right.

In order to support a writ of right, it is not necessary to prove an actual entry under title, nor actual taking of esplees : a constructive seisin in deed is sufficient.

Under the land law of Virginia, the whole legal estate and seisin of the commonwealth pass to the patentee, upon the issuing of his patent, in as full and beneficial a manner (subject only to the rights of the commonwealth) as the commonwealth itself held them.

A conveyance of wild and vacant lands, give a constructive seisin thereof, in deed, to the grantee and attaches to him all the legal remedies incident to the estate : *à fortiori*, this principle applies to a patent.[5]

In Kentucky, a patent is the completion of the legal title ; and it is the legal title only that can come in controversy in a writ of right.

A better subsisting adverse title in a third person, is no defence in a writ of right.[6]

If tenants claiming different parcels of land, by distinct titles, omit to plead that matter in abatement, and join the *mise*, it is an admission, that they are joint-tenants of the whole ; and the verdict, if for the demandant, for any parcel of the land, may be general, that he hath more mere right to hold the same than the tenants ; and if, of any parcel, for the tenants, that they have more mere right to hold the same than the demandant.[7]

If a man enter into lands, having title, his seisin is not bounded by his actual occupancy, but is held to be co-extensive with his title : but if a man enter, without title, his seisin is confined to his possession by metes and bounds.[8]

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[1] See Homer *v.* Brown, 16 How. 354.

[2] S. P. Kneass *v.* Schuylkill Bank, 4 W. C. C. 106.

[3] Liter *v.* Green, 2 Wheat. 306.

[4] See Fiedler *v.* Carpenter, 2 W. & M. 211.

[5] Peyton *v.* Stith, 5 Pet. 486 ; United States *v.* Arredondo, 6 Id. 691.

[6] Green *v.* Watkins, 7 Wheat. 27. And see Ingles *v.* Sailor's Sung Harbor, 3 Pet. 133.

[7] See Liter *v.* Green, 2 Wheat. 306.

[8] Peyton *v.* Stith, 5 Pet. 485 ; Clark *v.* Courtney, 7 Id. 320 ; Ellicott *v.* Pearl, 10 Id. 412 ;