The Schooner Adeline and Cargo. (*a*)

Salvage on re-capture.—Test-affidavit.—Prize.—Further proof.

American property, re-captured, may be restored on payment of salvage, although the libel pray condemnation of it as prize of war, and do not claim salvage. Salvage is an incident to the question of prize.[1]

A test-affidavit ought to state, that the property, at the time of the shipment, and also at the time of capture, did belong, and will, if restored, belong to the claimant; but an irregularity in this respect, is not fatal.

A test-affidavit, by an agent, is not sufficient, if the principal be within the country, and within a reasonable distance from the court. But if test-affidavits, liable to such objections, have been acquiesced in by the parties in the courts below, the objection will not prevail in this court.

By the act of the 3d of March 1800, one-sixth part only is allowed to a privateer for salvage, upon the re-capture of the cargo on board a private armed vessel of the United States, although one-half be allowed for the re-capture of the vessel.

The property of persons domiciled in France (whether they be Americans, Frenchmen or foreigners), is good prize, if re-captured, after being twenty-four hours in possession of the enemy, that being the rule adopted in the French tribunals.

Further proof will be allowed by this court, where the national character and proprietary interest of goods re-captured do not distinctly appear.

Property unclaimed will be decreed as good prize.

This was an appeal from the sentence of the Circuit Court for the district of New York.

The American letter of marque schooner Adeline sailed from Bordeaux, for the United States, with a cargo, owned in part by citizens of the United States, and *in part by French subjects. On the 24th of [*245 March 1814, she was captured, in the bay of Biscay, by a British squadron, who put a prize-crew on board and ordered her for Gibraltar. After being six days in the possession of the British she was re-captured, near Gibraltar, by the American privateer Expedition, who put a crew on board, and ordered her for the United States, where she arrived, and was libelled, with her cargo, by the re-captors, in the district court at New York, as prize of war.

The vessel was claimed by citizens of the United States, residing therein, as was also part of her cargo; another part of the cargo was claimed by French subjects, resident in the United States; another part by French subjects, resident in France; another part by citizens of the United States, resident in France; another part by French subjects, whose residence was not stated; and another part by citizens of the United States whose residence was not stated; and another part by "alien friends," without stating of what nation, or where resident. Some of the claims stated the property, at the time of capture, to belong to the persons therein mentioned, and did not state to whom it belonged at the time of shipment.

The district court condemned, as good prize, all the property owned by Frenchmen, and other persons resident in France, and all the property of those persons whose residence was not stated; and restored all the property belonging to persons resident in the United States, upon payment of one-sixth for salvage. The vessel was restored, by consent of parties, on payment of one-half for salvage. The sentence was affirmed, *pro formâ*, by consent, in

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(*a*) March 3d, 1815. Absent, Todd, Justice.

[1] See The Star, 3 Wheat. 78; The Lilla, 2 Spr. 177; The Ann Green, 1 Gallis. 275; Marshall *v.* Delaware Ins. Co., 2 W. C. C. 54.

the circuit court. The re-captors appealed as to the rate of salvage, which they contended ought to have been one-half, and those claimants whose property was condemned, also appealed.

The case was submitted to the court, by *J. Woodward* and *Emmet*, for the re-captors, and by *Irving* and *D. B. Ogden*, for the claimants, upon their written notes for argument.

*246] *J. Woodward*, for the re-captors, made the following points: 1. That such claims as date the property from the time of capture, instead of the time of shipment, are insufficient and invalid. 2. That the re-captors are entitled to the whole of the French property, by the rule of reciprocity. 3. That the captors are entitled to a rate of salvage of one-half upon the American property, or such other and higher rate than the rate decreed in the courts below, as this court may adjudge. 4. That the re-captors are entitled, by the same rule of reciprocity, to the whole of the property of such Americans as were at the time of capture domiciled in France, or resident there for commercial purposes. 5. That the re-captors are likewise entitled to all property, the national character of which is not defined by the evidence. 6. That the property of those Frenchmen who are described as having a mere temporary residence in the United States, cannot be considered as American. 7. That the property of persons described as alien friends, without mentioning to what nation they belong, or where they reside, must also be taken to be French, or decreed to the captors for uncertainty. 8. That the persons described in the claims as citizens of the United States, without stating their residence, at the time of shipment, or at any other time, must, under the circumstances of the case, be considered as residing in France.

There are claims which date the property from the time of capture; this, we say, is insufficient. The claims should state the property from the time of shipment at least. This is necessary to prevent transfer *in transitu*, and to give effect to, and preserve the simplicity and dispatch of the *preparatorio* investigation.

*247] *An important question in this case is, what is to become of the American part of the cargo of an armed American vessel, re-captured by an American private armed vessel? The re-captors, in the first place, contend, that the part of the cargo above mentioned is *casus omissus* as to the act of congress of the 3d of March 1800. If the court should decide, that there is a *casus omissus*, then the fate of this part of the cargo will depend upon the common law. The re-captors contend, that the common law is, that if property so situated has remained twenty-four hours in possession of the enemy of the captured party, they are entitled to the whole of the property as prize of war. To this they cite Grotius *de jure belli ac pacis*, lib. 3, ch. 16. Vattel, lib. 3, ch. 13, § 196. This right upon re-capture is here clearly laid down to privateers, to be divested only by the laws of each state, and treaties. Our treaty with France is silent, except as to restoration on capture by pirates; this being *ex delicto*, there is no change of property by the original capture. See also Professor Marten's Summary of the Law of Nations, book 8, ch. 3, § 10. "In order to encourage privateering, those concerned in it are allowed to hold all the merchant vessels and merchandise they take

from the enemy or his subjects, without any reserve whatsoever with respect to the redemption of them by the proprietor."

The only remaining question on this point would be, what kind of possession consummates the right of the privateer. Twenty-four hours' possession has been considered "firm" possession, and sufficient to consummate this right by an almost common usage, and recognised by almost all the treaties of maritime powers. 1 Rob. 151 (Am. ed.); 2 Azuni 306, 308, 312, in a note, 275, 276 and 282.

If the above considerations are inapplicable, and the salvage of this part of the cargo is governed by the acts of congress, then by those acts, the re-captors are entitled to one-half. *The unqualified right of the privateer to the property captured, or re-captured, is, after firm possession, clear at common law, and the doctrine of taking away that right by salvage is derogatory to that law. If this be so, the act of congress is derogatory to the common law, and must be liberally construed in favor of privateers. The reward has always been out of the whole subject-matter; the cargo, as well as vessel and armament; and it is with confidence contended, that a separation of the cargo, so as to subject it to one-sixth salvage, while the vessel and armament affords one-half, is, if it exist at all, anomalous to the act of the 3d of March 1800, and at war with the usage and treaties of all maritime states. The reason of increasing the salvage upon an armed vessel is the merit of battle, and it is evident, that the cargo is as well won by battle as the armament and vessel. [*248

But if the whole of the act of congress be to be taken together, and the 2d section be permitted to reflect a light upon the 1st section, it will appear, that congress could have had no other meaning, than that the salvage should be increased upon the cargo, as well as the vessel and armament. In the second section, where they give a salvage upon their own property, thus captured by a private armed vessel, they give one-half of the goods on board as well as of the vessel and armament. But should not the cargo be considered as a mere incident to the vessel, and follow its fate and character?

As to the French property, we are entitled to the whole as prize of war, by the foregoing rule of twenty-four hours' possession, which is the rule in France. Reciprocity is the rule in this case. See the act of 1800, § 3. The twenty-four hour rule is established in France by ordinance of 15th June 1779, with respect to all re-captures by privateers. France, in her treaty with Holland, 1st May 1781, secures the twenty-four hour right to privateers. The court will find those acts of France referred to in 2 Azuni 276, 282. **Miller* v. *The Ship Resolution*, 2 Dall. 2. This is a strong case, establishing the twenty-four hour right. It refers to an ordinance of congress declaring this rule as to us, and refers to the French ordinance to the same point. It admits the twenty-four hour rule, but excludes its application to that case, that being the case of a neutral capture which conveyed no right. See also the case of *The Mary Ford* (*McDonough* v. *Dannery*), 3 Dall. 188. [*249

On the right of the re-captors, on the 4th point of the case, they will not enlarge by argument, as they consider it well established; nor on that of the 5th point, than merely to observe, that it appears to be just, *ex necessitate*, and comes under the description of confusion in the civil law; nor as to the 6th point, than to observe, that there is no standard by which a char-

acter can be reflected upon these claimants but the voyage itself; which makes them either American or French. The description of the claim negatives the idea of their being American; they must, of course, be French. The 7th point must meet the same constrnction for the same reason.

As to the principle contended for in the 8th point of the case, it may be remarked, for elucidation, that some of the claimants, described as in this point, turn out, by the evidence, to be resident in France for commercial purposes.

Is the owner of the vessel entitled to freight, exclusive of salvage? The re-captors say, the vessel is not entitled to freight, because she would have been condemned had she been brought into England. But if entitled to freight, the captors have saved that freight, and are, therefore, entitled to one-half as salvage. Freight may remain, after all the rights of the captors are deducted, to be adjusted between the vessel and the freighters. This question can only apply to the American part of the cargo; for as to the French, the rule is to vest the property absolutely, in cases of re-capture, after twenty-four hours' possession, the *postliminii* right and all its incidents are destroyed.

*250] *Irving*, in behalf of the owners of the vessel, and of such parts of the cargo as were claimed by persons resident in the United States. —The schooner Adeline is a registered American vessel, owned by Isaac Levis and William Weaver, native citizens of the United States, and residents of Philadelphia, and was commissioned as an American letter of marque. She commenced her voyage from Bordeaux, to a port in the United States, in the month of March 1814, having on board a cargo owned principally by citizens of the United States and others residing in our territory. In the course of this voyage, she was first captured by two British vessels of war, and was afterwards, and before her condemnation as prize, re-captured by an American private armed vessel. Upon her first capture, most of her papers were taken from on board, by the captors, and those which were left, have been delivered up to the district court at New York, and transcripts of the same are contained in the record before this court.

In these cases, most of the claims and test-affidavits specify the property respectively claimed, at the time of shipment in the Adeline, and at the time of capture, to have been owned by citizens and residents in the United States. Many of the claims and test-affidavits testify that the goods thus claimed vested in the claimants, before and at the time of capture and re-capture; and generally, all the claims are supported by the respective bills of lading. In truth, there is not a paper attached to this record which falsifies any claim, or casts any suspicion upon them. An objection has been taken to some of those claims, because they do not state that the property vested in the claimants, at the time of shipment, and that, for aught that appears to this court, the property might have been transferred *in transitu*.

Admitting this to be the fact, how can such transfer prejudice those claimants? The vessel was an American vessel, coming from a French port,

*251] to a port of the United States. The rule, that the character of property must be determined *by its shipment, that the same cannot be transferred in its transit, but as regards belligerent rights, must be con-

sidered as remaining the same as at the time of shipment, applies only to enemy property. *The Danckebaar Africaan*, 1 Rob. 90 (Am. ed.) ; *The Vrow Margaretha*, Ibid. 285.

But the claims objected to will be found, on examination, to agree with those which are in common use in the admiralty courts of England, even in cases where the property is captured as prize of war. *The Fortuna*, 2 Rob., appendix, 313. It is sufficient to assert property in the claimants, and to negative the allegation of title in the enemy at the time of capture. Those claims and test-affidavits are testimony in a prize cause, and will be deemed satisfactory, unless there is some evidence in the ship's papers or preparatory examinations, to invalidate them. See the Duke of Newcastle's letter in the appendix to Chitty ; *The Haabet*, 6 Rob. 55.

But to proceed to the merits of this case. Upon examining the libel of the captors, the first inquiry will be, whether this property could be captured as prize, for it has been so libelled? The commission to our private armed vessels, under the act declaring war, authorizes the re-taking of property captured, which was originally American. The property thus re-taken can only present a case of salvage, because the title of the original proprietors never has been divested ; and that equally whether the property was originally American or neutral.

The interest of the captured property does not vest in the captor until after final adjudication. *The Elsebe*, 5 Rob. 167 (Am. ed.) ; Act 26 June 1812, § 4 (2 U. S. Stat. 759). And the fifth section of the prize act provides, "that all vessels, goods and effects the property of any citizen of the United States, or of persons within and under the protection of the United States, or of persons permanently resident within and under the protection of any foreign prince, government or state in amity with the United States, which have been captured by the enemy, and which have been re-captured by vessels commissioned as aforesaid, shall be restored to the rightful owners, upon *payment by them respectively of a just and reasonable salvage, to be determined by the mutual agreement of the parties concerned, or by the decree of any court having competent jurisdiction, according to the nature of each case, agreeably to the provisions heretofore established by law." [*252

The present case, then, before the court, determines itself to be a case of salvage, if there was a right to re-capture, and if the service rendered was meritorious. The right is not questioned, for the re-capture was from the enemy ; nor is the service questioned, for the property would have been otherwise lost.

It becomes however a matter of inquiry, whether the re-captors, under their present libel, can have a decree for salvage. The papers taken from on board the vessel and the examinations *in præparatorio* proved that the re-captured vessel was an American vessel, and that her cargo was in part American and in part French. It was evident, therefore, that the re-capture could only present a case of salvage ; and as such the vessel and cargo should have been libelled. But the libellants have proceeded against the property as prize of war, and have asserted title to it as such, in all their allegations. Must they not make out their allegations, and, if they fail, can they, as a last resort, seek for salvage, when such has not been prayed for in their libel, nor in any manner spread upon the record before this court?

But if the court should be of opinion, that a decree for salvage can be made upon the libel, claims and disclosures in this record, then the only question will be, the amount of this salvage. The re-captors contend for a moiety, and we, that they should have but a sixth. Which is right must depend upon a just construction of the act, in cases of re-capture, passed 3d March 1800 (2 U. S. Stat. 16). The first branch of the first section of this act provides, that "a re-captured vessel, other than a vessel of war or private armed vessel, shall be restored, on payment of one-eighth (if taken by a public armed vessel) of the value of the re-captured vessel and cargo; and if re-taken by a private armed vessel, of one-sixth." *The second
*253] branch of that section provides, "that if the re-captured vessel shall appear to have been set forth and armed as a vessel of war, before such capture, or afterwards, and before the re-taking, the salvage shall be one moiety of the true value of such vessel of war or privateer."

The act contemplates two descriptions of cases as to vessels, viz., armed and unarmed; the former are to pay a moiety, the latter a sixth. The law having settled the amount, the court, when it ascertains what the law is, will adhere to the provision. Now, the construction must depend on the evident meaning and intent of the legislature, as clearly to be gathered from a view of the whole provision; and it may be adopted as a fundamental rule, that where there is an express provision, there shall not be a provision by implication; *expressio unius est exclusio alterius.*

The first clause provides for the case of unarmed vessels and goods. It commences by stating "that when any vessel, unarmed, or when any goods" (not on board such vessel, but wholly in the disjunctive)—when any goods (reaching any and every case of goods)—when any such are captured by a private armed vessel, one-sixth shall be allowed. It proceeds throughout the whole clause in the disjunctive, saying that such vessel or goods shall be restored on payment of one-sixth as salvage.

The second clause is studiously confined to vessels, "and if such vessel" (passing by goods altogether and leaving the general provision for goods unimpaired)—and if such vessel is armed, then one moiety of the true value of such vessel is to be allowed; repeating and carefully confining the provision to the vessel, and that, too, with a peculiar particularity. Congress, in express words distinguish—they place private unarmed vessels and all goods re-captured on the same footing. The fifth section of the prize act (2 U. S. Stat. 760), declares, that the above provisions are to regulate cases of salvage.

*254] But it is contended, that the intent of a statute is to be *considered, that the design of the legislature is to be consulted. I grant it, wherever there is any ambiguity in a statute. In such case, it is the privilege and duty of the court to give a just construction. But this only holds in cases where there is great obscurity, not in cases where the provisions of the statute are clear and explicit. To hold that a court can intermeddle with such provisions, is to clothe the court with legislative as well as judicial powers—to authorize it to make laws instead of only expounding them. It is laid down in Parker 233, that "where the words of a statute are express, plain and clear, they ought to be construed according to the genuine and natural signification and import, unless by such exposition a construction or inconsistency would arise in the statute, by reason of some subsequent clause

from whence it might be inferred that the intent of parliament was otherwise."

But is is said, that from the provision contained in the second section of the statute, we may gather, that it was the intent of the legislature, to give a moiety of the goods on board a private armed vessel to the re-captor, as well as a moiety of the vessel. When we come to examine this section, which is thus pressed into the service of the first, we shall find that it relates entirely to the property of the United States which may be re-captured. It has no reference to the first section, it speaks of property of a different description, differently owned. In the last clause, it provides, that if a vessel of war of the United States is re-captured by a private armed vessel, a moiety of any goods on board shall be allowed. The government, deeply interested in the preservation of our public vessels; the national character, deeply interested in the rescuing from the enemy our vessels of war and in not permitting them to exist as mementoes of their triumph; the national prosperity, deeply interested in preserving to us the means of our own strength, and in preventing the same from being added to that of the enemy; these are sufficient inducements for our government to make an extraordinary provision. The service is not rendered to an individual, it is rendered to the nation; it is more meritorious; feelings of patriotism more than of interest may have impelled to the performance of the *duty; the [*255
danger was greater, the object more important; the recompense should therefore be increased.

But the first and second sections of this statute are wholly independent. The first relates to the re-capture of private property, either by our public or private armed vessels. The second relates to the re-capture of public property, either by our public or private armed vessels. Each section is perfect in itself, and each independent of the other; neither requires the interposition of any court to explain them. "Wherever any words of a statute are obscure or doubtful, the intention of the legislature is to be resorted to, in order to find the meaning of the words." *Wimbish* v. *Tailbois*, Plowd. 57. Where words of a statute are plain and positive, it is not the province of the court to search after new constructions. Justice BULLER remarks, in the case of *Bradley* v. *Clark*, 3 T. R. 201, "that, with regard to the construction of statutes according to the intention of the legislature, we must remember, that there is an essential difference between the expounding of modern and ancient acts of parliament. In early times, the legislature used to pass laws in general and in few terms; they were left to the courts of law to be construed, so as to reach all the cases within the mischief to be remedied. But in modern times, great care has been taken to mention the particular cases in the contemplation of the legislature, and therefore, the courts are not permitted to take the same liberty in construing them, as they did in expounding the ancient statutes."

But the provisions in this statute respecting salvage were not unadvised provisions, hurried over without deliberation. Congress, in consequence of the partial war with France, had been called on to legislate repeatedly upon the subject. The first provision was by statute 28th June 1798, [*256
§ 2 (1 U. S. Stat. 574). This is general, *for vessel and cargo, armed or unarmed, one-eighth; all are placed on the same footing. The second provision was by statute of March 2d, 1799 (1 U. S. Stat. 716). That gives

(if detained 24 hours) one-eighth ; if 48 hours, one-fifth ; if 96 hours, one-half ; without any distinction between vessel and goods, or armed and unarmed. The next year, induced by the inconvenience or inequality of the former laws, they made a deliberate provision. The subject was fresh ; every clause was weighed. Those provisions had been a matter of investigation for three successive sessions of congress, and had been successively amended. Can it be said, then, that congress had not a view of the whole ground, that they were hurried in the passing of this law? The very law they were considering was an amendment, and would naturally cause inquiry and reflection. On mature deliberation, therefore, they, in the year 1800, enact the present law. They discriminate between private unarmed vessels and goods, allowing one-sixth for salvage, and for the vessel alone, if armed, a moiety. The re-captured property of the United States is placed in a distinct section, wholly unconnected with the other.

If we attend to the language of the last clause of the first section, giving to the re-captors the moiety of a private armed vessel, we shall ascertain the reason why a greater salvage was given for the vessel than the goods. The section states, " and if the vessel so re-taken shall appear to have been set forth and armed as a vessel of war." If the enemy are thus possessed of the means of injuring our trade and of capturing other vessels, then, as the wresting those weapons from their hands prevents the perpetration of further mischief, for this meritorious service, we will give to you one-half of those instruments of annoyance and destruction. The same reasoning will not apply to the goods ; the public reap not the same benefit from their re-capture.

But it has been heretofore argued in this cause, that a greater rate of
*257] salvage should be allowed than one-sixth, *and that a construction to that effect should be given to the statute, because the service was very meritorious ; the property had almost reached an enemy port, and but for the management and intrepidity of the re-captors, would have been wholly lost. And is not that the case in every capture by a belligerent ? Did not congress know, when they passed this law, the difficulty of getting prizes home ? Were they not then, in fact, more destitute of a navy than at present ? In pursuance of this argument of extraordinary merit upon the present occasion, it has been urged, that the re-captured vessel was armed ; and that life was hazarded equally in re-capturing the goods as in re-capturing the vessel. In the present instance, it is idle to talk of danger ; the Adeline, from her armament, was incapable of making resistance, and whether she did or not is problematic, as from the preparatory examinations, there appears to be an uncertainty whether any resistance was attempted. It is, however, certain, that the resistance, if any, was a mere parade, and that, having fired one or two guns, the vessel instantly surrendered. Not a soul was hurt on either side, and the privateer did not deem the resistance sufficiently important to return.

But admitting that the service, by any chance, might have been very meritorious ; that great gallantry might have been displayed and many lives lost ; yet, under this statute, I know not how any court can interfere with its settled provisions. In the case of *The Apollo*, 3 Rob. 250, which vessel was cut out from under the guns of a French fortress, where much daring spirit was evidenced on the part of the re-captors, and much danger hazarded,

and where extraordinary salvage was applied for, Sir WILLIAM SCOTT says, "all re-captures within the act are put upon the same footing of merit and reward; therefore, all that is said on the particular gallantry of the service is foreign to any singularly favorable application of this act, which has provided but one measure for all cases, without reference to circumstances."

With respect to the property of alien friends, resident in the United States, and re-captured in this vessel, I *only remark, that the provisions in the prize act apply equally to them as to our own citizens, residing within our territory. [*258

A claim has also been interposed by the owners of the schooner Adeline, for freight and primage of that part of the cargo which is not owned by them. That such should be allowed, I would respectfully contend, there can be no question, as the voyage has been performed, and the cargo delivered at its port of destination. But the re-captors assert, that they are entitled to a salvage of this freight. On the part of the owners, this is opposed; first, because salvage of the freight is not given by the statute, and second, because it is in fact allowed in the value of the goods.

The act has prescribed the terms on which the vessel and goods are to be restored. The court cannot add to those terms. The re-captors have no means of procuring this salvage, except by withholding the goods; but the act declares, that the goods shall be given up, upon payment of one-sixth of their value, without making any provision for salvage of freight. Against whom could the decree for a salvage of the freight lie? Not against the goods, for they are delivered up; not against the owners of the goods, for they are not before the court.

But salvage of freight is, in fact, paid in the increased value of the goods. The presumption is, that the merchandise is enhanced that value by the importation. Now, the salvage is not on the invoice value, but on the true value of the goods. This value is ascertained by sale or appraisement, at the place where the property is brought; no deduction is made, except imports and duties. Besides, the re-captors should not claim an additional recompense for perfecting that without which they could not participate in the cargo. The bringing this property safely in, entitles them to the one-sixth of its value, and that alone is specified in the statute as their reward.

The district court, from whose decision the re-captors have appealed, decreed, on the 9th of August 1814, that the re-captors should have as salvage one-sixth part of all the goods on board this vessel owned by American *citizens, and alien friends residing in the United States, and also a moiety of the vessel, her tackle, apparel, &c. In this decree, the claimants of that description acquiesced. The re-captors have, by successive appeals, brought this case before this court. The funds arising from a sale of this property, which sale took place before the decision of the district court, have been lying unproductive in the last-mentioned court ever since. If this court should affirm the decree of the circuit court in the above mentioned cases, then those claimants pray that costs and damages may be awarded them. [*259

D. B. Ogden, for all the claimants.—This vessel and cargo were re-captured by the Expedition, from the English, who had captured her, on a voy-

age from Bordeaux to New York. The Adeline is American property, and her cargo part of it American, part French. The Adeline and cargo are libelled as enemy's property, and the libel prays that they may be condemned as such. The claims deny the fact of its being enemy's property, and aver, that in some cases it is American property, in others, that it is the property of alien friends.

Before I consider the questions raised by the captors, I must first beg leave to call the attention of the court to some observations upon the nature of this cause, as it appears from the libel, claims and evidence. The libel charges the property as being enemy's, and prays for its condemnation as such. The claim denies the fact of enemy's property, and avers, that it is American or the property of alien friends. It is evident, that the only point in issue, the only question arising between these parties upon the claim and libel, is whether this property be or be not enemy's, and as such liable to condemnation?

*260] In all cases of prize, there must be a regular judicial *proceeding, and so in all other cases, in a court of admiralty, as well as in any other court. (See the answer to the Prussian memorial, in the appendix to Chitty's Law of Nations 314, also to be found in *Collectanea Juridica.*) All regular judicial proceedings consist of the proofs and allegations of the parties. The allegations of the parties are first made, and then the proofs are produced to support them. I understand the rule to be universal, in all courts in which there are regular judicial proceedings, that as a party cannot recover upon allegations without proof, so neither can he recover upon proofs without proper allegations. The judgment of the court must be according to the proofs and allegations.

What are the allegations of the parties in this case? The libel is in the nature of a declaration in a common-law court, or of a bill of complaint in a court of equity. It must state sufficient facts for condemnation, with sufficient certainty, and conclude with a proper and sufficient prayer. It must apprise the person claiming the property libelled, of the grounds upon which a condemnation will be asked; otherwise, it would be more than useless to require a libel at all. Now, this libel alleges or charges that this is enemy's property, and asks for a condemnation of it as such. Unless the evidence in the cause proves it to be enemy's property, I apprehend, the court never will, under this libel, condemn it.

The documents on board the captured vessel, and all the examinations *in præparatorio*, so far from proving the property to be enemy's property, prove directly the reverse; and indeed, it is not pretended by the counsel for the captors, that there is the least ground to suspect the property or any part of it to be hostile. Can the captors have a decree for salvage in this case? I think not, because they do not ask for it, in their libel; because the question here is, not whether the captors are entitled to salvage or not,

*231] but whether this is enemy's *property or not? I do not believe a single case can be produced in the books, where salvage has been decreed, unless it was specially asked for by the libel. A libel, like a declaration, may contain several grounds of a decree, or, to speak in common-law language, several counts. And there must be a count for salvage, or it cannot be decreed. In Hall's Admiralty Practice, 144, will be found a precedent of a libel, where salvage is claimed, drawn by one of the most

learned and experienced lawyers, particularly as a civilian, in the United States; which, although no authority, will certainly be considered as entitled to some weight, as showing the opinion of an enlightened lawyer upon the subject.

It is no answer to this argument, to say, that where property has been libelled as prize, property of friends is frequently condemned upon the ground of residence in an enemy's country or trading with an enemy, because such property is considered, *quoad hoc*, as enemy's property, and therefore, comes within the allegation of enemy's property in the libel. If I am right in the argument upon this subject, then I think it follows, of course, that if this is not enemy's property, it cannot be condemned to the captors, but must be wholly restored to the claimants, without any salvage whatever. It is no hardship to the captors, to acquit the property; they knew the facts, when they filed their libel; they made their election in what way to proceed against it; and, like all other parties in a court of justice, they must be bound by that election.

This, being property re-captured from the enemy, must be considered, *primâ facie*, not as enemy's property. It cannot be presumed, that they would capture their own property. Now, property re-captured from an enemy never can be proceeded against as prize of war; it is not considered as enemy's property, until, in some countries, it has been carried *infra præsidia;* in others, has been twenty-four hours in possession of the enemy; in England, and *under our prize act, until it has been condemned in a competent court. [*262

If the captors have any claim to any part of this property, it must be because re-captured from the enemy. But no such claim is set up in the libel; the right of property remains in the claimants; it has never been changed, and must, therefore, be restored to them.

But it is said, that some of these claims are insufficient, because they do not say, that the property belonged to the claimants at the time of ship ment, but merely at the time of capture. I answer, if the property belongs to the claimants now, it is all which the court will require in this case. I have already endeavored to show that the captors have no claim to the property; it follows, then, that the court will restore it to the proper owners, at the time of the decree. Suppose, however, that I am wrong in the principles which I have endeavored to establish, and that the captors can have a decree in their favor in this case; let me inquire whether the claims above alluded to are not sufficient? All that is necessary for the claim is to deny the material allegations in the libel. The allegation here is, that the property is enemy's property, and as such liable to be condemned. This allegation is expressly denied by the claim. Nothing more is ever required in a claim.

Where there are any circumstances which raise a presumption that the property is enemy's, such as coming from an enemy's port, found on board an enemy's vessel, &c., then it becomes necessary for the claimant to explain away those circumstances, to prove the friendly nature of the property, to show it to have been friendly at the time of its shipment, &c., which is done in what is called "the test-affidavit," not in the claim. But in cases where the property, from the circumstances of the case, must necessarily be presumed to belong to our own citizens or our friends (as in the case of a re-cap-

ture), then no test-affidavit can be necessary; then no explanation is asked, because none is required.

*263] *If these claims are insufficient, does it follow, that this property must be condemned? The claims being insufficient, the court will either suffer the claimants to amend them, or they will consider them as no claims, and dispose of the property accordingly. If an amendment is allowed, there can be no difficulty in removing this objection. If the claims are considered as no claims, is the property to be condemned as a matter of course? If the captors, in case of capture, send in a vessel, after taking out the master, supercargo and every other person who would probably claim, and leave on board only one or two of the crew, whose examinations may be taken in *præparatorio*, and who are wholly ignorant as to the property on board—if a vessel and cargo thus sent in, is libelled as prize, it is to be condemned, of course, as prize, because no claim is put in or filed for it? If all the papers and documents, and evidence in *præparatorio* prove the property not liable to condemnation, is it to be condemned, because no claim is filed for it by the owner? This doctrine would follow from the arguments upon the other side, but it is too monstrous to be supported by any court.

I take the law upon this subject to be this, viz: The proceedings in a court of admiralty are *in rem;* the subject-matter is, in substance, in possession of the court, and they never will decree it to the captors or to any other person, unless they can show a right to it. They never will give the captors my property, because I do not claim it, not being possibly in a situation to know that it has been captured or libelled. If there be no claim filed, the court will examine the papers and examinations *in præparatorio*, and if, from

*264] *the face of them, there appears good ground of condemnation, they will condemn, otherwise not.

It is not like the case of a judgment by default, in a court of common law, where the plaintiff takes judgment for his debt; because, at common law, the process has been personally served upon the defendant, he is actually in court, or has been proceeded against to outlawry. No surprise can be complained of by him. Not so in a court of admiralty, where the proceeding is *in rem;* and when the owner may never know that his property is in jeopardy. The court, being possessed of it, are bound to give it up to no body but him who has a good right to it. If, from the libel and the proofs before the court, it appears that the captors are entitled to the property, the court will decree it to them; otherwise not. And for this, among other reasons, it is an invariable rule, that a claim must always be put in under oath, so that if the court order property to be restored to the claimant, they may at least have some evidence of his right to it. For these reasons, if there was no claims put in to this property at all, yet, as from the proofs in the case taken *in præparatorio*, it is clearly not enemy's property, I contend, that the court could not condemn it as prize of war.

This case, being that of a re-capture, is a case in which the questions are, whether the property shall be restored to the original owners, and upon what terms? As there is no pretence that the property belongs to an enemy, there is no reason that the claim should negate a transfer *in transitu;* which transfer is void only when its effect would be to neutralize belligerent property.

If the libel in this case be such as the court can proceed upon to award

salvage to the captors, I shall now briefly examine upon what terms the property in question must be restored to its former owners. This property consists, 1. Of the vessel, claimed as American property and proved to be so. *2. Of property of American citizens, stated to be resident in [*265 the United States. 3. Of property of American citizens, whose place of residence is not stated. 4. Of property of alien friends, resident in the United States. 5. Of property of subjects of France, residing in France.

I. As to the vessel. By the act of congress of 26th June 1812, entitled "an act concerning letters of marque, prizes and prize goods," § 5 (2 U. S. Stat. 759), it is enacted, "that all vessels, goods and effects, the property of any citizen of the United States, or of persons resident within and under the protection of the United States, or of persons permanently resident within and under the protection of any foreign prince, government or state in amity with the United States, which shall have been captured by the enemy, and which shall be re-captured by vessels commissioned as aforesaid, shall be restored to the lawful owners, upon payment by them, respectively, of a just and reasonable salvage, to be determined by the mutual agreement of the parties concerned, or by the decree of any court having competent jurisdiction, according to the nature of each case, agreeably to the provisions heretofore established by law."

Now, the provisions heretofore established by law are to be found in an act of congress passed on the 3d March 1800. (2 U. S. Stat. 16.) This act, after providing for the restoration of vessels and goods, after re-capture, upon the rates of salvage therein mentioned, proceeds in these words, "and if the vessel so re-taken shall appear to have been set forth and armed as a vessel of war, before such capture, or afterwards, and before the re-taking thereof as aforesaid, the former owner or owners, on the restoration *thereof, shall be adjudged to pay, for and in lieu of salvage, one [*266 moiety of the true value of such vessel of war or privateer." Under this act, I presume, the court cannot hesitate in affirming the judgment of the circuit court, with costs and expenses of prosecuting this appeal.

II. As to the property of American citizens, resident in the United States. The act of March 1800 (2 U. S. Stat. 16), is positive in its provisions upon this subject: the property must be restored upon one-sixth salvage. The decree of the circuit court upon this property, I contend, ought also to be affirmed with costs.

III. As to the property of American citizens, whose place of residence is not stated. This, in my view of the subject, is the only point in the cause upon which the mind can at all hesitate, and when this is fully considered, I trust, all doubt upon it will vanish. It is contended on the part of the captors, that as no place of residence is mentioned, these American citizens must be considered as resident in France, and that the rule as to the restoration of the property of French subjects must therefore apply to them. To this I answer—

1. I do not think the presumption a fair one, that because no place of residence is mentioned, they are, therefore, to be considered as residing in France. As they are citizens of the United States, it would seem to me, that they ought fairly to be presumed as residing in the United States, until some evidence is produced to the contrary. If, however, the court think it

important, that the claimants should prove their place of residence, they will, I presume, give us an opportunity of doing so.

*267] *2. That the place of residence is wholly immaterial; because, being American citizens, and there being nothing unlawful in their residing in France, or any other country, with which we are at peace, they have not forfeited any of their rights as citizens of the United States. And the doctrine that residence abroad gives a national character, applies only to the case of the subjects of two nations which are at war with each other; or to neutrals residing in one of the two belligerent nations; but cannot be applied to such a case as this. I forbear, however, to enlarge upon this point as unnecessary; because, the question, as to the terms upon which this class of claimants are to have their property restored, depends upon the construction of the act of congress, which I shall now consider.

By the act of March 1800, before referred to, it is declared, that when any goods which shall hereafter be taken as prize, "by any vessel, acting under authority from the government of the United States, shall appear to have before belonged to any person or persons resident within or under the protection of the United States, and to have been taken by an enemy of the United States," &c. This question depends upon the construction of the above clause of the section. In order that the property should be restored, upon the payment of one-sixth salvage, it must belong "to some person or persons resident within, or under the protection of the United States." If it belongs to any person resident within the United States, it is to be so restored; or if it belongs to any person who is under the protection of the United States, whether he resides therein or not, it is to be restored upon the same terms. All foreigners who are permitted to reside in the United States, are under their protection, but no person who resides out of the

*268] United States is under the protection of the United States, but their own citizens. *In 2 Cranch 120, this court held, "that an American citizen residing abroad is entitled to the protection of his government."

Again, every foreigner who resides in the United States, must necessarily be under their protection; the words, therefore, "or under the protection of the United States," would be nugatory, if intended to be applied to such foreigners, and no effect can be given to those words, unless they are applied to citizens, residing out of the United States, but who are still under their protection. But if the words of the act of March 1800, are of doubtful import, their true construction is, I think, put out of all doubt, by the act of 26th June 1812, before referred to. These two acts of congress, being *in pari materia*, must be considered as one act, and construed accordingly. The 5th section of the act of June 1812, declares, "that all vessels, goods and effects, the property of any citizen of the United States, or of persons resident within and under the protection of the United States," shall be restored "agreeably to the provisions heretofore established by law." Now, there was no other provisions established by law, than those contained in the act of March 1800. It is evident, that congress must have intended, by the act of March 1800, to provide for restitution of the property of any citizen of the United States, whether he resided within the United States or not. This is the only construction by which the provisions of these two acts can be reconciled.

That this was the construction intended by congress, when these laws

were passed, will be still more evident, when we examine with a little more care, the different phraseology of them. The act of March 1800, says nothing about citizens of the United States, but speaks of property belonging to persons resident within or under the protection of the United States, thereby meaning, as I contend, all persons who reside within the United States, and all citizens *under the protection of the United States, let them [*269 reside where they may. The act of June 1812, provides for the cases of property "of any citizens of the United States," and of "persons resident within and under the protection of the United States." A foreigner, residing in and under the protection of the United States, is entitled to have his property restored under this act. This clause of the sentence does not apply to citizens at all, because their property is already provided for by the words "any citizen of the United States." By the act of March 1800, the property of all persons resident within, or of persons under the protection of the United States, is to be restored; without which latter words, no provision was made for citizens out of the country, these words were for that reason unquestionably inserted.

For these reasons, I contend, that it is immaterial where the American citizen reside, they are entitled to have their property restored, upon paying one-sixth as salvage.

IV. As to property of alien friends, resident in the United States. No observations are necessary to prove that under the acts of congress referred to, they are entitled to restoration upon paying one-sixth salvage. As to them, the decree, I presume, will be affirmed, with costs and expenses.

V. As to the property of subjects of France, residing in that country. By the 3d section of the act of March 1800 (2 U. S. Stat. 17), this property is to be restored upon the same salvage on which, by the laws of France, the property of American citizens would have been restored to them under similar *circumstances. And if no law or usage of France is known [*270 upon the subject, the same salvage is to be allowed as if it were the property of a person resident in the United States (viz., one-sixth). Now, I confess, I have not been able to find what was the rule in France upon that subject. Whether the ordinance of 1779, made upon this subject, and which is referred to in the argument on the other side, was in force at the time of this re-capture or not, or whether that ordinance, like almost everything else in that country, was destroyed, during the dreadful revolution which she has just passed through, I know not. I confess my ignorance, and I have endeavored in vain to obtain information about it. If no such French rule is known to the court, then I claim this property, belonging to French subjects, residing in France, upon the same salvage which by the act of congress, it ought to be restored to them, if they resided in the United States.

Emmet, for the re-captors, in reply.—Most of the cargo has been claimed; but no claim whatsoever has been put in for the property expressed in the bill of lading, No. 23 (26 bundles of steel to be delivered to C. W. Huty, of Philadelphia), nor to that expressed in No. 35 (a harp and case of strings to be delivered to T. Delort, who has come in and claimed other property), nor to that expressed in No. 39 (one case of pencils, on account and risk of Mr. Fongarolly, of New York). This circumstance would not have been

noticed here, but that it is called for by part of Mr. Ogden's argument, who (partially admitting that a bad claim is tantamount to none at all) contends, that the want of one is no ground for condemnation. In England, by the prize acts, regulations are made in case of non-claims for a limited time. In our courts, for want of any such regulations, defaults, as I understand, are usually taken, but the property not put out of the power of the court for a reasonable time. It is unnecessary to discuss the propriety of that arrangement, in the present case; for certainly, after the lapse of a year, where the
*271] parties, who ought to claim, *are in the immediate vicinity of the court, and have come forward with no claim at all, or one not disclosing what is necessary to ascertain the innocent character of the property, or the foundation or terms upon which restoration should be had; where they have refused the sanction of an oath to verify documents that, without it, may well be questionable; there can be no ground for awarding restitution to them. Their silence, or evasive mode of claiming, must be regarded as intentional; and indicating that they cannot make out a fair case for restoation.

Mr. Ogden contends for restitution, without salvage, on another ground; that this libel being for condemnation as enemy's property and prize of war, salvage cannot be awarded under it; therefore, says he, it must be restored, without salvage. That conclusion is clearly illogical, for if it were true, that salvage could not be awarded, under these proceedings, the only consequence would be, that the property should be retained, and the re-captors turned round to libel for salvage. The position itself, from which the conclusion is drawn, is also erroneous; for in all cases of military salvage, the proceedings are as against a prize, and the payment of salvage is a condition necessarily imposed, by the decree of restitution, on the claimant. It is not properly the thing sought for by the libellant and contested by the claimant. I do not mean to say, that it may not have been done from greater caution, and perhaps, want of practical experience, in the United States; or that, if done, it ought not to be supported, but it is neither usual nor necessary.

Mr. Ogden refers to a precedent of that kind in Hall's Admiralty Practice; I have not the book by me, and cannot refer to the authority, but if it be a libel for mere military salvage, the introduction of it in that book shows that the author's ideas were not very well arranged upon the subject which occupied him; for his book is only a translation of Clerke's *Praxis Curiæ Admiralitatis*, which treats exclusively of the instance court, and has no relation to the prize court of admiralty. It is sufficient, however, for me to say, that no precedent of a libel for military salvage is to be found in Maryatt's Formulary, or any English book of authority, and that, obviously, all the cases in Robinson's reports, where such salvage is decreed, are brought
*272] up under the prize jurisdiction, *and were proceeded against as prize of war.

Let me ask, by what right was the Adeline taken by the Expedition and held? Unquestionably, *jure belli*. By what right, or by what course of proceedings, were the re-captured crew examined *in præparatorio*, or the papers on board her opened and inspected by the prize commissioners? Because she was subject to be dealt with according to prize law. By a former prize act of England (33 Geo. III., c. 66, § 42), it was enacted, that

re-captured ships set forth by the enemy as vessels of war, should wholly belong to the captors, and not be restored to the original owners. How was such a vessel to be proceeded against, but by libelling her as prize, and condemning her as enemy's property? So, in the present case, part of the re-captured property is French, which we contend (and for the present, I shall take for granted), ought to be condemned to the captors and not restored at all. How are we to proceed for that condemnation, but by libelling as prize of war? Why, under the rule of reciprocity, is it not to be restored? Because, by the French law, belligerent property, of which an enemy has had twenty-four hours' possession, is considered to have changed owners, to be the absolute property of that enemy, and when re-captured, it is treated as the absolute property of that enemy, and condemned as such by libel for prize of war. The rule of reciprocity (1 Rob. 53, Am. ed., in the case of *The Santa Cruz*) induces us to consider French property (placed in such circumstances as would, under the laws of that country, be held to make a complete change of ownership of American belligerent property), as also acquired by the enemy; and to adjudicate upon it as actual enemy's property: of course, to libel and condemn it as prize of war. *Non constat*, till the claims are put in and sworn to, but that property, apparently American, is actually French; and it is necessary to proceed for prize, in order to get those claims and ascertain that fact.

A remarkable instance of that occurs, even in the present case. The bill of lading (No. 15) of 280 cases of claret, states them to be shipped by order and for account and risk of David Dunham (presenting a *primâ facie* case of American property), but when Mr. Dunham comes to claim on oath, he states them to be the property of Messrs. Johnson & Dowling, subjects of the French empire. How was the knowledge of that fact to be obtained, but by forcing a claim on oath? and if we *had proceeded by libelling only for salvage of the property, as American, how should we have learned [*273 that it was really subject to total condemnation as enemy's property, under the reciprocal application of the French law? The proceedings in this way are also the most simple. The libellant claims the benefit of his *primâ facie* right arising from capture out of enemy hands *jure belli*. If there be any title to be opposed to this, it must be shown and sworn to, and the court will then decree, according to the extent of that title, either total restitution or restitution on terms of salvage.

In ordinary civil salvage, which falls within the jurisdiction of the instance court (3 Rob. 178, Am. ed., note on the case of *The Hope*), the salvors never acquire a right of seizing the property, and their first step (if they proceed against it) is a warrant of arrest; they then libel for salvage, because they have no superior or *primâ facie* title to the thing itself; and the contestation is about the amount.

But a careful examination of Robinson's reports, Am. ed. (*The Aquila*, 1 Rob. 32; *The Santa Cruz*, Ibid. 42; *The Two Friends*, Ibid. 228; *The Apollo*, 3 Ibid. 249; *The Franklin*, 4 Ibid. 120; *The Carlotta*, 5 Ibid. 54; *The Sansom*, 6 Ibid. 410), will show, that is not the course of proceeding, where the property has been re-captured in war; and the only reason why it is not more clear, is, that the matter, being long established, and of course, is not noticed in the very brief statements which that reporter prefixes to the arguments of counsel and judgment of the court. Enough, however, is

given to establish my position. *The Aquila* (1 Rob. 32, 35), was a case of derelict, and, properly speaking, would have belonged to the instance court. It appears, however, from the judgment, that "some suspicions occurred that it was in fact the property of an enemy; and under these circumstances, it became expedient to proceed against it as prize, for the purpose of meeting the pretensions of the ostensible neutral owner, and of bring the examination of his claim, where alone it could be properly discussed, into the prize court, These measures were highly necessary, and therefore, no objection can justly be made against the mode of proceeding."

In the case of *The Two Friends*, 1 Rob. 228, 231, 238, a protest was made against the jurisdiction of the court over an American ship. The counsel on both sides allow that re-capture is a matter of prize jurisdiction; and in the judgment, *Sir WILLIAM SCOTT says, "but whatever may
*274] be the law as to wreck and derelict, I conceive it does not apply to these goods, which I consider to be goods of prize; for I know no other definition of prize goods, than that they are goods taken on the high seas, *jure belli*, out of the hands of the enemy; and there is no axiom more clear than that such goods, when they come on shore, may be followed by the process of this court."

In the case of *The Franklin*, 4 Rob. 140, the property was libelled as enemy's property and prize of war, and further proof was ordered of the property and destination. It was made and deemed satisfactory; but the captors insisted, that restoration should only be made on terms of salvage. This was resisted by the claimants, with arguments which, perhaps, have given rise to the present point by the claimants, although it was not a case of re-capture or seizure *jure belli* from an enemy. Sir WILLIAM SCOTT held, it was a case in which no military salvage was due; but directed (as the price of restoration in this prize cause), a civil salvage of 500*l.* to be paid.

In the case of *The Jonge Lambert*, 5 Rob. 54, reported in a note to *The Carlotta*, a Dutch ship and cargo captured by a French privateer and re-captured, was libelled as enemy's property and prize of war. She was condemned in the court below. The sentence was reversed on appeal, but as it was neutral property re-captured, the Lords of Appeal referred it to their surrogates, to decide whether any what salvage was due, with provisions for executing their decree. The surrogates decided that no salvage was due; but it is clear, that if it had been a case for salvage, the restitution, on this reversal of the sentence of condemnation, would have only been on payment of it.

It is unnecessary to discuss the arguments drawn from our different and totally inapplicable modes of proceeding under our municipal code. And I shall only add, that if the objection taken to this mode of proceeding should be sustained, as the error, though fallen into after much consideration, arose from want of sufficient light and information in our books, it is hoped that the opportunity will be afforded to the salvors of instituting such proceedings as may be thought adapted to their case.

There is a matter about which the counsel for the claimants have fallen into a mistake: they state the libellants *to have appealed from that
*275] part of the decree which restores the ship, on payment of a moiety of the value for the salvage. There is no such decree on the record. The restoration of the vessel, on paying a moiety for salvage, was agreed to by

all parties, and therefore, has in fact never been decreed at all, and never has been disputed. If the vessel were understood to be included in the words of the decree, "American property," we should, indeed, have ample grounds of appeal; for the salvage ordered would be only one-sixth. That, however, is not the case, and nothing is brought before this court, but the questions relating to the re-captured goods. The same answer applies to the mistake, that we have appealed from the decree of the court refusing us salvage on the freight. There is no such decree, and we never asked it, as our libel shows, though the case of *The Dorothy Foster*, 6 Rob. (Eng. ed.) 88, shows, we are entitled to it. No question of freight was ever presented in this case, but by the claim of Alexander Cranston (for the ship-owners) of freight for the goods not claimed by him for them; meaning to make our salvage on the goods pay a proportion of it, and so diminish its amount. That was not adjudged, and of course, we have not appealed; though if it had been decreed, we certainly should; for it could be supported by no principle, and would be directly contrary to the act of congress.

These questions being out of the way, nothing more remains, but to consider what is to be the fate of the re-captured goods which have been claimed, with the incidental consideration of costs and expenses. Part of this property has been claimed, and sworn to, only as belonging to the alleged owners, before and at the time of capture, without saying anything as to its ownership at the time of shipment. On this insufficient mode of claiming, and its consequences, I shall add nothing to Mr. Woodward's argument, except a reply to Mr. Ogden's observation, that there is no reason why such transfers *in transitu* between belligerent friends should be prevented. This very case shows otherwise; for if the property continued French, it would be subject to condemnation as enemy's property and prize of war; which belligerent right would be defeated by such a transfer.

I shall endeavor to simplify the discussion, by first *considering the great general division of French property, and of American property re-captured; and will endeavor to class the doubtful cases under one or other of those heads. [*276

As to the French property, it clearly must be judged upon according to the rule of reciprocity. In France, American belligerent property which had been twenty-four hours in the possession of the enemy captors, would be treated and considered as their property, and not restored on salvage. The law of twenty-four hours' possession has, in truth, been always the rule adopted by France and Spain, and most, if not all, the powers on the continent; for although they may desire a decree of condemnation, they desire it only as the most portable and compendious proof of the facts (including twenty-four hours' possession), from which the title has accrued. They do not regard the decree as creating a title to the property, which doctrine is in truth only confined to England and this country; and was not held, even by this country, during the revolutionary war. France has also made an ordinance on that subject, which is to be found in 2 Azuni 276, and of which this court must well be held to have judicial knowledge; for the prize court, to which it has succeeded, has recognised it in the case of *Miller* v. *The Resolution*, 2 Dall. 2. That this was the law of France, down to and long after the revolution, has not been doubted; and indeed cannot; for Azuni's work was published after 1803 (*Vide* 2 Azuni 218); but it is thought pos-

sible, that it may have been subsequently altered; and from the pretended ignorance on that subject, a claim for restoration on American salvage is made. The claim is singular; for it is predicated, not on the rights of the parties, but on the supposed ignorance of the court. It is not sanctioned by the words of the act of March 3d, 1800, § 3 (2 U. S. Stat. 17), which provides that "where no such law or usage shall be known," the same salvage shall be allowed as is provided by the first section of that act. That means, where no such law or usage shall be made known or promulgated or acted upon. It refers to cases in which, on inquiry, a state shall not be found to have adopted any precise law or usage on the subject; but it founds no right to a suitor, on supposed judicial ignorance. The ordinance of 1779 is, however, a known law, and it must be considered as valid, until those who
*277] insinuate *its abrogation give some proof of their assertion. The *onus* is with them, and the means of proof, coming from their own country, are certainly within their power. 1 Rob. (Am. ed.) pp. 56, 57, The presumption as well as the fact, therefore, is, that there has been no variation or abrogation of the ordinance of 1779.

The property of American citizens resident in France must, as I conceive, be considered as French, and subject to the same rule. This effect of domicil or national character is produced in every case, where that character is judged of merely by the law of nations. Birth, by the municipal laws of many countries, is considered as fixing an indelible national character; but that doctrine seems entirely dependent on municipal law, and is not to be found in the writers on the law of nations. Birth, with them, affords a *primâ facie* presumption of residence, and serves to establish it, where other facts are equivocal or silent; and in that sense Sir W. Scott must be understood, when he says, in the case of *La Virginie*, 5 Rob. 98, 99, "that the native character easily reverts, and that it requires fewer circumstances to constitute domicil, in the case of a native subject, than to impress the national character on one who is originally of another country." But birth ceases to afford evidence of the national character, under the law of nations, when opposed to a clear residence, *animo manendi*, in another country; for, says Sir William Scott, in *The Indian Chief*, 3 Rob. (Am. ed.) 23, "no position is more established than this, that if a person goes into another country, and engages in trade, and resides there, he is by the law of nations to be considered as a merchant of that country." In some of these cases (the particulars of which I shall hereafter point out), it may perhaps be contended, that, although the owner of the property appears to be resident in France, the permanency of his residence, or the *animus manendi*, does not appear; but to that I again answer in the words of Sir William Scott, in the case of *The Bernon*, 1 Rob. (Am. ed.) 87, 88, "wherever it appears that the purchaser was in France, he must explain the circumstances of his residence there: the presumption arising from his residence is, that he is there *animo manendi*, and it lies on him to explain it. For every purpose,
*278] therefore, either of commerce or of war, to be decided upon *solely by the law of nations, these American citizens resident in France must be regarded as Frenchmen.

But it is contended, that with respect to salvage, they are protected by the words used in the act of congress of March 3d, 1800, § 1 (2 U. S. Stat. 16), "any person or persons resident within or under the protection of the

United States;" which last expression, it is said, necessarily includes American citizens everywhere. If this were the intention of the legislature, it is very singular, that it did not simply say "any citizen of the United States, or any person or persons resident therein." It seems to me, however, that the word "resident" which is expressed in the first, is understood in the second member of the sentence; and that it should be read, "any person or persons resident within, or resident under the protection of the United States." An inhabitant of one of the territories comes within the last, but not the first description; so does a consul or other public minister who has not, by habitual commerce and residence, acquired another national character. Other instances of residence under the protection of the United States might be produced; but an American who has changed his national character, and become, for every purpose of war and commerce, a member of another community, can no longer be regarded as under the protection of the United States. I am at a loss to see how America could afford protection to him. If she were neutral, and the country of his residence belligerent, would his commerce from that country be under her protection? The laws relating to re-capture and salvage were made with a view to America's being belligerent, and must be construed in relation to that state of things. In that state, does she or can she afford any protection to a merchant, residing abroad, whose protection and character must exclusively depend on the hostility or neutrality of the country to which he belongs as a permanent member? The interpretation put upon this phrase by Mr. Ogden would make the first and third sections of the act of March 3d, 1800, at variance with each other, and the same person subject to two inconsistent measures: for, unquestionably, such an American, permanently resident in a foreign friendly country, comes under the description of a "person permanently resident within the territory and under the protection of a foreign prince," &c.

*The fifth section of the act of June 1812, cannot explain the antecedent law of March 1800; for it is, obviously, inadvertently [*279 worded, and not intended for any purpose of explaining, altering or affecting that law. If the mistaken substitution of the word *and* for *or*, could have any effect, it would be only to show that no person residing out of the United States in a consular or public capacity could be deemed under their protection. The truth, however, is, that the last act contemplates nothing more than to place re-captures by private armed ships, on the same footing with those made by public vessels of war; and it accomplishes that by a very loose phraseology.

If I am well founded in the foregoing arguments, it will follow, that the decrees of the courts below respecting French property and that of all the residents in France, whether native Americans or not, should be affirmed; and if costs and expenses are to be at all given in this case, with both.

I shall now consider the question as to clear American goods re-captured. The Adeline was a private vessel of war, having a letter of marque; and when in the possession of the English, she fought with and made resistance to the privateer Expedition. There can, therefore, be no question but that the salvage of the vessel itself must be one-half. The claimants, however, contend, that such a rate of salvage only extends to the vessel; but that goods re-captured, on board of even an armed and commissioned vessel, must be restored on paying one-sixth—that being the rate specified in the act of

March 3d, 1800: and in support of this opinion, several rules for the construction of statutes have been cited. It is my duty, and I trust, I shall do it successfully, to maintain the opposite doctrine. In order to do so, I shall observe, that salvage has, in every country and in every code of laws, been considered as a matter of general average: the service is an act done for the common benefit, and to be recompensed by common and proportionate contributions. Vessel and cargo always contribute expressly; freight, in some cases, expressly; in others, really, but less obviously, where the salvors receive their proportion of the cargo, or its value, without paying freight.

*280] If the act of 3d March 1800, meant to *break in upon this established principle of proportionate contribution for a common benefit, it is without precedent in any other code; and an unreasonable departure from an universal usage founded on justice and common utility. Such a supposition should not be indulged in; and it is indeed fully contradicted by the second section of the same law; for there, regulating the salvage on the re-capture of a public armed vessel, it enacts, that for the re-capture of a public armed vessel or any goods therein, one moiety of the true value thereof shall be paid. No satisfactory reason has been or can be assigned, why the United States should be obliged to pay differently, and in a greater proportion, for the benefit of re-capture, than private individuals deriving equal advantage from the act.

This second section of the act naturally presents the question, how it happened that the legislature omitted to mention expressly in the first section, goods on board such armed vessel? I think, I can answer it. The first section is copied from the English statutes on the same subject, varying the proportion of salvage, and with one addition, the operation and force of which, perhaps was not sufficiently adverted to at the time. Statutes of 13 Geo. II., c. 4; 17 Geo. II., c. 3; 29 Geo. II., c. 34; 16 Geo. III., c. 5, and 33 Geo. III., c. 66. They give one-eighth for salvage of vessel and goods, but enact, that if the re-captured vessel shall have been set forth as a vessel of war, during its possession by the enemy, the salvage for the vessel shall be one-half. Here, the principle of proportionate contribution for a common benefit was not departed from; for to set the vessel out for war, it must have been conducted into port, and of course, the cargo which it carried at the time of capture discharged, and the connection between them broken; the goods which such a vessel might have on board, when re-captured, would be enemy's property, and condemned as prize of war. The British acts, therefore, made no mention of such goods, they not being a fit subject for restoration on salvage.

Congress, in preparing their system, although they adhered to the phraseology of the English code, thought that the same service was rendered by capturing an armed vessel, whether it was originally fitted for war by Americans or their enemies, and therefore, awarded an equal compensation in both cases; but, perhaps, they did not advert to the fact, that, in the new

*281] case which they were introducing, re-captured *goods would have to be restored, and they, therefore, adopted the language of the British laws, without inserting a provision to meet a situation of things that could not exist under them. Or else, considering the character of average contribution as necessarily fixed on salvage, by universal usage and equal justice, they thought it unnecessary to do more than settle the rate of contribution;

and the state of the vessel being the circumstance that was to affect that rate, they spoke of it alone; but conceived and intended that a proportionate contribution from everything connected with it in danger and benefit conferred, would follow as an incident.

If the first supposition be true, the awarding of salvage for the re-captured goods on board an armed vessel is a *casus omissus;* and the least we can be warranted in saying is, that it is in the discretion of the court to settle that rate. If it be, I trust it will be settled by analogy to the rule made in the act itself, and so as to preserve the harmony of the whole system. If the second supposition be correct, then the word "vessel" must be considered with a liberal interpretation, as also including all on board of it. And in support of such an interpretation, calculated to preserve received and established usage against a literal meaning, I may refer to the opinion of the court as delivered in the case of *Talbot* v. *Seaman*, 1 Cranch 1. There, the court had occasion to consider the meaning of the expression "any nation in amity with the United States" used in the act of March 2d, 1799, relating also to re-captures from the enemy: the counsel for the captors contended, that the words of this law gave salvage on the re-capture of neutral property; founding themselves, like our adversaries, on the literal extent of the expression. On which the court observes (1 Cranch 43), "The words of the act would certainly admit of this construction. Against it, it has been urged, and we think with great force, that the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law."

The impossibility of having access to authorities, prevents my citing many instances of statutes similarly construed, which I have no doubt could be easily furnished. The following however happen to be within my power: *Zouch* v. *Stowell*, Plowd. 366, "a thing which is within the intention of the makers *of the statute, is as much within the statute, as if it were within the letter." In *Eyston* v. *Studd*, Plowd. 467, that equitable construction which enlarges the letter of a statute is thus defined, "*Æquitas est verborum legis directio efficatius cum una res solummodo legis cavetur verbis ut omnis alia in æquali genere eisdem caveatur verbis.*" And there the remedy given by the 9 Edw. III., c. 3, against executors, it is said, has been always extended by an equitable construction to administrators; because they are within the equity of the statute. *Platt* v. *Sheriff of London*, Plowd. 36, the words of the 13 Edw. I. are "*circumspecte agatis de negotiis tangentibus Episcopum Norwicensem;*" yet this statute, although only the bishop of Norwich be named, has been always extended, by an equitable construction, to other bishops. [*282

Some of the claims in this cause are for property owned by aliens resident in the United States. Where that residence is not clearly made out to be permanent, the claimants must take the consequence of the insufficiency of their claims and proofs. They are all Frenchmen, and if they have not shown a sufficient domicil to obtain for them the American national character, they must be considered as Frenchmen and abide the reciprocity resulting from their law. Where they are clearly permanent residents within the United States, they will be entitled to the benefit of that character, if my reasoning as to Americans domiciled in France be correct; if it be not, they

must suffer under the rule the court will then lay down, and be regarded as Frenchmen.

It only remains for me now to say a few words of costs and expenses which are asked for by the claimants. This case is brought before this court by their voluntary act and a clear consent, without which it could not have been presented on appeal. The district judge declared the principles he would adopt for his decision; but, strictly speaking, he made no decree on the case of any individual claimants. Those principles were considered in some respects erroneous by the counsel for the captors, and in others, by those for the claimants. It was, therefore, considered better to bring all the principles in review before the supreme court, as the expense would be little, if at all, increased by so doing; and if any claimant had been unwilling to
*283] become a party *to this arrangement, he might have withheld his consent; and his case could not have been brought up on appeal, until a decree had been made on his individual claim. I submit, that it is, therefore, now too late, for him to talk of costs and expenses; and in truth, impossible to ascertain what proportion of costs or expenses he can sustain.

March 10th, 1815. (Absent, Todd, J.) STORY, J., delivered the opinion of the court, as follows:—The American letter of marque schooner Adeline, with a valuable cargo on board, was captured on her voyage from Bordeaux to New York, on or about the 14th of March 1814, by a British squadron; and on or about the 19th of the same month, was re-captured by the American privateer Expedition, James Clayton, commander, and brought into New York for adjudication. Prize proceedings were immediately instituted against the vessel and cargo as enemy property; and various claims were interposed in behalf of American and French merchants. Upon the hearing of the cause, the district court decreed a restoration of all the property of American citizens, and other persons resident in the United States, upon the payment of one-sixth of the value as salvage, and condemned all the property of French subjects, and of American citizens domiciled in France, and of all others whose residence remained unexplained, as good and lawful prize to the captors. From the former part of the decree, the captors appealed, and from the latter part, the claimants appealed to the circuit court; and from an affirmance *pro formâ* of the decree in that court, the parties have appealed to this court. It does not appear in the record, that any decree was pronounced in respect to the vessel; and it is, therefore, probable, as intimated by counsel, that she has been restored, on a compromise between the parties interested.

Before we proceed to the consideration of the principal questions which have been argued, it will be proper to notice several objections to the regularity of the allegations, proceedings and proofs in the cause.

*284] It is, in the first place, asserted, on behalf of the claimants, *that if this should turn out not to be a case of enemy property, but of salvage merely (as most certainly as to some of the claims it must be held to be), the re-captors can take nothing by the present libel, because it proceeds upon the mere footing of the property being prize of war. And it is likened to the case of a declaration at common law, where the party can only recover *secundum allegata et probata;* and if no count hit the precise case, the party must be nonsuited.

If, indeed, there were anything in this objection, it cannot, in any beneficial manner, avail the claimants. The most that could result would be, that the cause would be remanded to the circuit court, with directions to allow an amendment of the libel. Where merits clearly appear on the record, it is the settled practice, in admiralty proceedings, not to dismiss the libel, but to allow the party to assert his rights in a new allegation. This practice, so consonant with equity and sound principle, has been deliberately adopted by this court on former occasions. After all, therefore, the claimants would, in the language of an eminent civilian, but change postures on an uneasy bed.

But we are all of opinion, that there is nothing in this objection. No proceedings can be more unlike than those in the courts of common law and in the admiralty. In prize causes, in an especial manner, the allegations, the proofs and the proceedings are, in general, modelled upon the civil law, with such additions and alterations as the practice of nations and the rights of belligerents and neutrals unavoidably impose. The court of prize is emphatically a court of the law of nations; and it takes neither its character nor its rules from the mere municipal regulations of any country.

In cases of mere civil salvage, it may be fit and proper, that the libel should distinctly allege and claim salvage, though we do not mean to assert that, even in such cases, it is indispensable. In cases of military salvage, also, the party may, if he please, adopt a similiar proceeding. But it is by no means necessary, and, in most cases, would be highly inexpedient. Recaptures are emphatically cases of prize; for the definition of prize goods is, that they are goods taken on the high seas, **jure belli*, out of the hands of the enemy. When so taken, the captors have an undoubted [*285 right to proceed against them as belligerent property, in a court of prize: for in no other way, and in no other court, can the questions presented on a capture *jure belli* be properly or effectually examined. The very circumstance that it is found in the possession of the enemy, affords *primâ facie* evidence that it is his property. It may have previously possessed a neutral or friendly character; but if the property has been changed by a sentence of condemnation, or by such possession as nations recognise as firm and effectual, the neutral or friendly owner is for ever ousted of his right.

It depends altogether upon future proceedings; upon the examinations taken in preparatory, and the documents on board; upon the verity of the claims, and the diligence and good faith of the claimants; and upon the principles of international law, comity and reciprocity, whether a restoration can be decreed or not. How can these questions be decided, unless the customary proceedings of prize are instituted and enforced? How can it be known, whether all the documents on board be not colorable and false, or whether the conduct of the claimants be not unneutral or fraudulent, unless the truth is drawn from the parties entrusted with the property for the voyage, by the trying force of the standing interrogatories and the test-affidavits? The very case before us presents a strong illustration of the propriety of these proceedings. There is a large shipment on board, which, on the bill of lading, purports to be the property of an American claimant; yet the claimant himself expressly swears, that it is the sole property of the French shipper. What the consequences are of that fact will be presently seen.

The court, then, has a legitimate jurisdiction over the property as prize; and, having it, will exert its authority over all the incidents. It will decree a restoration of the whole, or of a part; it will decree it absolutely, or burdened with salvage, as the circumstances of the case may require: and whether the salvage be held a portion of the thing itself, or a mere lien upon it, or a condition annexed to its restitution, it is an incident to the principal
*286] question of prize, and within *the scope of the regular prize allegation. If, therefore, the case stood upon principle alone, we should not doubt as to the sufficiency of the libel for this purpose; but it has, also, the clear support of the practice of the admiralty. *The Aquila*, 1 Rob. 37; *The Franklin*, 4 Ibid. 147; *The Jonge Lambert*, 5 Ibid. 54, note.

Another objection urged on behalf of the captors, is to the sufficiency of the claims and test-affidavits. It is asserted, and truly, that the goods are not alleged, in the claim or affidavits, to have belonged to the claimants at the time of shipment; it is only alleged, that they so belonged at the time of capture. Regularly, the test-affidavit should state that the property, at the time of shipment, and also at the time of capture, did belong, and will, if restored, belong to the claimant; but an irregularity of this nature has never been supposed to be fatal. It might, in case of doubt or suspicion, or in a case calling for the application of the doctrine as to the legal effect of changes of property *in transitu*, have justified an order for further proof: or, in cases of gross negligence or pregnant fraud, have drawn upon the party more severe consequences. But in ordinary cases, it is not deemed to work any serious consequences: in this instance, it probably passed unnoticed in the courts below, where, if the blot had been hit, it might have been instantaneously removed by an amendment.

Another irregularity undoubtedly was, that the test-affidavits were put in, on behalf of many of the claimants, by their agents, although the principals were resident in the United States, and within the reasonable reach of the court. Where the principal is without the country, or resides at a great distance from the court, the admission of a claim and test-affidavit by his agent, is the common course of the admiralty. But where the principal is within a reasonable distance, something more than a formal affidavit by his agent is expected. At least, the suppletory oath of the principal, as to the facts, should be tendered; for otherwise, its absence might produce unfavorable suspicions. If, indeed, the principal might always withdraw himself from the view of the court, and shelter his pretensions behind the affidavit of an innocent or ignorant agent, there would be no end to the impositions practised upon the court. The court expects, in proper cases,
*287] something more than the mere formal test-affidavit *of an agent, who may swear truly, and yet, from his want of knowledge, be the dupe of cunning and fraud. It is not meant to assert that any such imputations belong to the present case. This irregularity, like the former, probably passed in silence; and it would be highly injurious, if an objection of this sort should now prevail, when all parties have hitherto acquiesced in its immateriality.

We are now led to the principal question in this cause, viz., what rate of salvage is to be allowed to the re-captors? This depends upon the true construction of the salvage act of congress of 3d of March 1800, ch. 14. That act provides, that, upon the re-capture of any vessel (other than a vessel of

war or privateer), or of any goods belonging to any persons resident within or under the protection of the United States, the same, if re-captured by a private vessel of the United States, shall be restored on payment of one-sixth part of the value of the vessel or goods; and if the vessel, so re-captured, shall appear to have been set forth and armed as a vessel of war, before such capture, or afterwards, then upon a salvage of one-half of the true value of such vessel of war. It is argued, in behalf of the re-captors, that the Adeline being an armed vessel, they are entitled to a moiety of the value of the cargo as well as of the vessel; either upon an equitable construction of the statute, or upon general principles, as a case not within the purview of the statute.

We are all, however, of a different opinion. The statute is expressed in clear and unambiguous terms. It does not give the salvage of one-sixth part of the value upon goods, the cargo of an unarmed vessel; but it gives it upon any goods re-captured, without any reference to the vehicle or vessel in which they are found. We cannot interpose a limitation or qualification upon the terms which the legislature has not itself imposed; and if there be ground for higher salvage, in cases of armed vessels, either upon public policy or principle, such considerations must be addressed with effect to another tribunal. This decision affirms the decree of the circuit court as to the claims of all the parties domiciled in the United States.

*As to the claims of the parties domiciled in France, whether natives or Americans, or other foreigners, their rights depend altogether upon the law of France as to re-captures; for by the act of congress, as well as by the general law, in cases of re-capture, the rule of reciprocity is to be applied.[1] If France would restore in a like case, then are we bound to restore; if otherwise, then the whole property must be condemned to the re-captors. It appears, that by the law of France in cases of re-capture, after the property has been twenty-four hours in possession of the enemy, the whole property is adjudged good prize to the re-captors, whether it belonged to her subjects, to her allies, or to neutrals. We are bound, therefore, in this case, to apply the same rule; and as the property in this case was re-captured, after it had been in possession of the enemy more than twenty-four hours, it must, so far as it belonged to persons domiciled in France, be condemned to the captors; and the decree of the circuit court as to them must be affirmed. [*288

As to the claims of the other persons whose national character and proprietary interest do not distinctly appear, considering all the circumstances, we shall direct further proof to be made on both points. As, indeed, the master has not been able to swear directly to the proprietary interest of the cargo, but simply says, that the goods were, as he presumes and believes, the property of the shippers or the consignees, perhaps, in strictness, further proof might have been required in the court below as to the whole cargo. It was not, however, moved for there by the captors; and as we are satisfied in relation to the claims which we shall restore, it would be useless now to make such a general order.

Upon these principles, the property embraced by the claims by and in behalf of Alexis Gardere, of William Weaver and Isaac Levis, jointly, and

[1] The Star, 3 Wheat. 78.

of William Weaver alone, of Andrew Byerly, of George I. Brown and William Hollins, of Peter A. Karthous, of William Bayard, Harman Leroy, James McEvers and Isaac Iselm, of William Hood, of Theophilus De Cost, of John Dubany, of Messrs. John B. Fonssatt & Co., of Edward Smith, James Wood and Samuel W. Jones, of Victor Ardaillon, of Lewis Chastant, of Lewis Labat, of Benjamin Rich, of Nath'l Richards, Nayah Taylor and
*289] Gustavus Upson, of *Ferdinand Hurxthal; must be restored on payment of the salvage of one-sixth part of the value. The property embraced in the claims on behalf of Peter Boue, jun., of R. Henry, of P. Doussault, of William Johnston and James Downing, of G. Brousse, must be condemned to the captors. The remaining claims must stand for farther proof. And as to the property unclaimed, it must be condemned as good and lawful prize to the captors.

The decree of the circuit court is to be reformed so as to be in conformity with this decision.

The Brig Ann, McClain, Master. (*a*)

Jurisdiction in case of seizure.

If a seizure, by a collector, for a violation of the revenue laws of the United States be voluntarily abandoned, and the property restored, before the libel or information be filed and allowed, the district court has no jurisdiction of the cause.[1]

Appeal from the sentence of the Circuit Court for the district of Connecticut, which reversed that of the district court, and restored the property to the claimant.

Story, J., delivered the opinion of the court, as follows:—This is an information against twelve casks of merchandise, part of the cargo of the brig Ann, alleged to have been imported, or put on board with an intent to be imported, contrary to the non-importation act of 1st March 1809, ch. 91, § 5.

It appears from the evidence, that the Ann sailed from Liverpool for New York, in July 1812, haqing on board a cargo of British merchandise. She was seized by a revenue-cutter of the United States, on her passage towards New York, while in Long Island sound, about midway between Long Island and Falkland Island, and carried into the port of New Haven, about the 7th of October 1812, and immediately taken possession of by
*290] *the collector of that port, as forfeited to the United States. On the morning of the 12th of October, the collector gave written orders for the release of the brig and cargo from the seizure, in pursuance of directions from the secretary of the treasury, returned the ship's papers to the master, and gave permission for the brig to proceed without delay to New York. Late in the afternoon of the some day, the present information was allowed by the district judge, and on the ensuing day, the brig and cargo were duly taken into possession by the marshal, under the usual monition from the court. On the trial in the district court, the property now in

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(*a*) March 10th, 1815. Absent, Todd, Justice.

[1] The Abby, 1 Mason 360. But a valid seizure confers jurisdiction, notwithstanding an improper removal of the *res* from the marshal's custody. The Rio Grande, 23 Wall. 458.