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To transport an article in a wagon, or otherwise, would seem necessarily to mean to carry or convey it in that or in some other vehicle, by whatever name it might be distinguished. If these words are construed to mean, a removal of the article from one place to another, otherwise than in a vehicle, it might well admit of a doubt, whether a removal in a vehicle, other than one of those which are enumerated, would be a case within the law. But so far from this matter being left a doubt by the law, we find, that when the punishment by way of forfeiture is prescribed, the words "or otherwise" are very plainly construed to mean the thing by which the articles are transported; thus distinguishing between the thing which transports, and the thing which is transported.

It may be admitted, that the mischief is the same, whether the enemy be supplied with provisions in the one way or the other; but this affords no good reason for construing a penal law by equity, so as to extend it to cases not within the correct and ordinary meaning of the expressions of the law, particularly, when it is confirmed by the interpretation which the legislature *122] has given to the same expressions in the *same law. If it were impossible, to satisfy the words "or otherwise," except in the way contended for on the part of the United States, there would be some reason for giving that interpretation to them. But it has been shown, that this is not the case.

It was contended by the attorney-general, that these questions were in effect settled in the case of the *United States v. Barber*, 9 Cr. 243. But this is clearly a mistake. The only question in that case which was referred to this court, was, "whether fat cattle are provisions or munitions of war?" The decision of this court was in the affirmative. But whether the fat cattle were dead or alive, and if the latter was to be intended, whether they were driven or transported in some vehicle, did not appear, and of course, the law arising out of that state of facts was not, and could not be decided.

Upon the whole, it is the opinion of a majority of this court, that driving living fat oxen, &c., on foot, is not a transportation thereof, within the true intent and meaning of the above-recited act of congress.

Judgment for the defendant.

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Prize.—Rights of captors.

Where an enemy's vessel was captured by a private armed vessel of the United States, and subsequently dispossessed by the force or terror of another; the prize was, under the circumstances of the case, adjudged to the first captor, with costs and damages.

APPEAL from the Circuit Court for the district of Massachusetts. The British schooner *Mary*, whereof Charles Thomas, jr., a British subject, domiciled at St. Johns, New Brunswick, was late owner and master, sailed under convoy from St. Johns, New Brunswick, bound to Castine, then in the military occupation of the British, laden with a cargo, the growth, produce and manufacture of British possessions, shipped by British merchants domiciled in St. Johns, New Brunswick, to merchants resident in Castine.

The schooner *Mary* was captured by the private armed schooner *Cadet*,

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between Duck Island and Mount Desert, on the night of the 25th of December 1814, between the hours of 11 and 12; the convoy under which the Mary sailed was in sight of the Mary, at the time of her capture; but no other vessel was in sight at that time. The Cadet came up with the Mary so suddenly, that she had no opportunity to make resistance, or give notice to the convoy of her danger. After the capture of the Mary, the principal part *of her cargo was taken on board the Cadet, carried into the district of Massachusetts, and in the district court of said district, [*124 condemned to the Cadet as prize of war.

On the morning of the 26th of December, after sunrise, the Cadet and Mary being then in company, an armed brig, the Paul Jones, was discovered by them, under such suspicious circumstances, as to induce them to believe her to be a British cruiser, and in consequence, to part and steer different courses. The sails of the Paul Jones were of English canvas. She pursued the Mary, firing at her, until between 4 and 5 o'clock, p. m. of the 26th of December; the Mary had then arrived in a bay of the United States, to wit, Wheeler's bay, a bay frequented by American vessels. The Mary being within half a mile of the shore, and within the same distance of the Paul Jones, and being in such a situation as rendered it certain, that she must be intercepted by the Paul Jones, the prize-master and crew, considering it certain, from her appearance and actions, that the Paul Jones was an English cruiser, left the Mary for the shore, after having thrown over her anchor, and ordered the British master, and his son of twelve years of age, who were left on board, to pay away the cable. After the prize-crew left the Mary, the British master hoisted English colors, and steered the schooner towards the Paul Jones.

Ten minutes after the prize-crew left the Mary, she was boarded by a boat from the Paul Jones, when the English master informed them that the *Mary was an English vessel, prize to the Cadet, when the Paul Jones immediately stood off from the land, with the Mary in company, [*125 with English colors still flying. A boat, then out to the windward of the Mary, and within musket-shot, or a quarter of a mile distant from her (the crew then lying on their oars, the sea smooth, and the wind light), repeatedly hailed the Mary, both and after she was boarded by the Paul Jones, and received no answer.

The prize-master of the Mary, immediately on his getting on shore, dispatched a boat on board her, to ascertain the national character of the vessel by whom she was boarded, and claim her, if the boarding vessel should prove American; but before the boat could get off, the Paul Jones had sailed, with the Mary in company.

Libels against the Mary and cargo were filed in the district court for the district of Maine, by David Elwell, in behalf of himself, and the owners, officers and crew of the private armed schooner Cadet, and by John Thomson Hilton, in behalf of himself, and the owners, officers and crew of the private armed brigantine Paul Jones. The Mary and cargo were condemned in the district court for the district of Maine, to John Thomson Hilton, and the owners, officers and crew of the Paul Jones. An appeal was entered from said decree, by David Elwell, and the owners, officers and crew of the Cadet, in the circuit court of Massachusetts. In consequence of the affinity of the judges to the parties, the decree of the district court

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of Maine was, *by consent of parties, affirmed *pro forma*, and the cause brought, by appeal, to this court.

Jones, for the appellants.—This is a case of novel impression as to the circumstances, but long since settled in principle. The prize-crew of the *Cadet* were driven out of the *Mary* by the terror of the force of the *Paul Jones*. It is not the case of a prize abandoned and taken as *res nullius*, nor retaken by the original British crew, and re-captured by the *Paul Jones*. The prize was in a place of safety, *infra præsidia*; not constructively, as of a fleet, or a neutral port, but of a port of the captor's country. In order to constitute a dereliction of the property acquired in the thing captured, the abandonment must be voluntary, and with intent to relinquish the right acquired. The origin of this principle is to be found in the Roman code, which distinguishes between a voluntary and compulsory abandonment of possession; the first changing the right of property, whilst the latter has no *127] such effect. (a) It is applied to *the law of prize, by the different elementary writers. (b) It was practically enforced in the case of *The Lord Nelson*, Edw. 79, and by this court in the case of *The Mary Ford*, 3 Dall. 198. Striking the colors is to be deemed the real *deditio*, and the consummation of the capture. *The Rebeckah*, 1 Rob. 195. So also, the capture is held to be consummated, where the prize is completely under the dominion of the captor, has no ability to resist, and no prospect of escape. *The Edward and Mary*, 3 Rob. 246. Here was no re-capture by

(a) Just. Inst. lib. 2, tit. 1, § 46, 47. *Alia sane causa est earum rerum, quæ in tempestate levandæ navis causa ejiciuntur. Hæ enim dominorum permanent: quia palam est, eas non eo animo ejici, quod quis eas habere nolit, sed quo magis cum ipsa navi maris periculum effugiat. Qua de causa, si quis eas fluctibus expulsas, vel etiam in ipso mari nactus, lucrandi animo abstulerit, furtum committit.* So also, D'Habreu, in commenting on the 9th article of the French prize ordinance (which prescribes, that if a captured vessel, not having been re-captured, is abandoned by the enemy, or if, by storms or other accidents, it returns into the possession of French subjects, before having been carried into any enemy's port, it shall be restored to the former owner, if claimed within a year and a day, although the possession of the enemy may have continued more than twenty-four hours), makes the following observation: "*Quoique l'article de l'ordonnance ne paroisse pas faire la différence entre un vaisseau abandonné par les ennemis, et celui qui l'a été par l'effet d'une tempête ou de quelque autre accident imprévu; il est néanmoins certain qu'il y en a quelqu'une. Nous n'entreprendrons point ici de la faire sentir: outre que cela nous écarterait de notre objet, il n'est personne, tant soit peu versé dans la jurisprudence, qui ignore que l'abandon volontaire fait perdre la propriété, tout au contraire de celui qui est forcée.*" D'Habreu on Prizes, ch. 5, § 10, tom. 2, p. 95, of M. Bonnemant's Translation.

(b) Bynkershoek, Q. J. Pub. ch. 4, p. 35, of Du Ponceau's Translation; Id. ch. 5, p. 36; 2 Azuni, part 2, ch. 4, art. 5, § 1, 3, 7; 2 Wooddeson, 454; see also, *Goss v. Withers*, 2 Burr. 693. In that case, the true distinction on this subject is alluded to by Lord MANSFIELD, that by whatever length of time, or other circumstance, the property in prizes is vested, so as to bar the former owner, in case of re-capture or sale, "the instant the captor has got possession, no friend, no fellow-soldier, or ally, can take it from him; because it would be a violation of his property." And it is in this sense most to be understood what is repeated by so many writers from the civil law. *Quæ ex hostibus capiuntur, statim captentium fiunt.* An inchoate title immediately accrues, as against any cruiser of the same nation, or its allies in the war, which title cannot be divested but by a voluntary abandonment on the part of the first captor. 2 Wooddes. 455.

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the enemy *crew, because no resistance nor escape; and the British master could clearly not have maintained a claim for salvage, in the courts of his own country, had the Paul Jones turned out to be a British privateer.

Webster, contra.—This is a case of voluntary relinquishment of the prize; and even if it was produced by terror of a supposed enemy, that will not make it involuntary. The case of *The Lord Nelson* does not determine the present case; but Sir WILLIAM SCOTT there puts the very case now before the court, and decides it by asking, “Suppose, therefore, that after this voluntary abandonment, the ship had been met with by some French cruiser, and that by means of jury-masts, they had succeeded in carrying her into a French port; can there be any doubt, that she would have been prize to the second captor?” In the case of *The Ann*, which was a question of jurisdiction in a revenue cause, the seizure being abandoned before adjudication, this court illustrate their opinion, by analogy to the prize law, holding, that capture gives no authority to proceed to adjudication, if abandoned before judicial proceedings are commenced. 9 Cranch 289. So also, in the case of *The Astrea*, it was determined, that an interest acquired by possession is divested by the loss of possession, from the very nature of a title acquired in war. 1 Wheat. 125. The case of *The Adventure* is likewise in point. (Ibid. note.) There was no fraud on the part of Paul Jones. She had a right to chase under any colors; *but she neither chased nor fired under enemy’s colors; whilst the prize showed no colors, and therefore, invited pursuit; and was found in the possession of her original British master, and therefore, authorized detention. She was not *infra præsidia*, whilst lying in Wheeler’s Bay; but even supposing she had been, if she was afterwards abandoned by her original captor, the Paul Jones had a right to take possession. The prize-master did not think it worth while to risk being taken prisoner, and therefore, abandoned his prize. [*129]

Jones, in reply.—The case supposed by Sir WILLIAM SCOTT, in delivering his judgment in *The Lord Nelson*, is of a voluntary abandonment, and not one produced by the application of force or terror. In the case of *The Ann*, this court, though incidentally describing the general doctrine, adhere to their accustomed accuracy and precision of language. “A voluntary abandonment,” is the phrase used by the learned judge, who delivered the opinion of the court; and he proceeds to state, “It is not meant to assert, that a tortious ouster of possession, or fraudulent rescue, or relinquishment after seizure, will divest the jurisdiction.” The precedent of *The Astrea* does not apply. In that case, there was a capture and re-capture, and a second re-capture; but no question whether the abandonment by the first captors was voluntary or not. The case of *The Adventure* was not a question of derelict; but whether the belligerent may invest a neutral with his rights at sea, in fraud of the contingent right of re-capture by the *other belligerent. The question here is not whether fraud was used, but whether force was used. The prize-crew supposed they were [*130] surrendering to British captors: but the Mary was not in a situation to be captured by a cruiser of the United States; she was not derelict, but lying in a roadstead, which is a *præsidium*, though not guarded by forts and castles.

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February 14th, 1817. JOHNSON, Justice, delivered the opinion of the court.—We are of opinion, that the facts stated in this appeal, make a clear case of tortious dispossession on the part of the Paul Jones. The privateer Cadet had, with great gallantry, captured the Mary, and been in possession of her, part of a night and day. The prize was close in upon the American coast, and making for a port which was open before her. It was not until the superior sailing of the Paul Jones made it manifest, that the prize must be cut off from this port, and until she had been repeatedly fired upon, that the prize-crew abandoned her. There exists not a pretext in the case, that this abandonment was voluntary, or would have taken place, but for the hostile approach of the Paul Jones. Whether the *vis major* acted upon the force or the fears of the prize-crew is immaterial, since actual dispossession ensued.

But it is argued, that the Paul Jones showed American colors; the Mary ought not, therefore, to have feared her: the Mary showed no colors, she, therefore, invited pursuit; and finally, that the Paul Jones found her *131] in the actual possession of her *original master, and therefore, could not have done otherwise than detain her. We think otherwise. It was more probable, that an enemy would show false than true colors. The circumstance of the Mary standing in for a friendly shore, was less equivocal evidence of her character, than the exhibition of colors; and after boarding the Mary, and learning that she was a prize to the Cadet, it was the duty of the captor, to have repaired the injury he had done, and either by making signals, sending a boat on shore, or a message by the boat that did come off, to have recalled the prize-crew of the Cadet. But instead of this, she instantly mans the prize, bears away from the harbor, which was close under their lee, and, by carrying English colors, until out of sight, completes the conviction of the prize-crew that the re-capture was by an enemy.

We are of opinion, that the decision of the circuit and district courts should be reversed; that the prize should be adjudged to the Cadet; and the case remanded for the assessment of reasonable damages in favor of the Cadet. But, considering that the prize arrived in safety, and probably in a more secure harbor than that for which she was sailing, when seized by the Paul Jones (although it is certainly a case for damages), we are of opinion, the damages should be moderate.¹

Sentence reversed. (a)

(a) Mr. Justice STORY did not sit in this cause.

¹ For a further decision in this case, see 1 Mason 365.