The Mary Ford.

The counsel for the *defendant* in error insisted, that although the want of a statement of facts was a technical defect in the record before the court, which they were willing to supply as much as lay in their power, from their notes of the evidence which had been taken before the circuit court; yet the court could not, without great injustice, reverse the decree on that account. They were bound, by the 24th section of the judiciary law, on the reversal of a decree of the court, to pass such a decree as the circuit court should have passed. How could they do it in this instance? Were they, for an omission of the court, which they could not help any more than the defendants, to put it out of their power to obtain justice? and how could they say, that the circuit court should have rendered a different decree, since they were not possessed of the merits of the cause?

The Court were unanimously of opinion, that the error assigned, was not a sufficient ground for reversing the decree, and recommended to the parties to come to some agreement, which might bring the matters in controversy fairly before them.

After some conversation, an agreement took place between the counsel on both sides, that the cause should be continued to the next term; and that, in the meantime, new evidence *might be taken on both sides, and the whole matter of fact, as well as the law, brought before the supreme court of the United States, as upon an appeal. (*a*) [*188

The Mary Ford.

McDonough *v.* Dannery and The Ship Mary Ford.

Prize.—Jurisdiction.—Salvage.

The courts of a neutral nation have no right to decide upon the lawfulness or unlawfulness of a capture taken by one belligerent from another.[1]

When a court takes cognisance of any original matter, it naturally draws to its jurisdiction every incidental or necessary question; therefore, a court of admiralty having jurisdiction of a libel for salvage, of a vessel captured by one belligerent from another, and abandoned at sea, by the captors, may also adjudicate upon the conflicting claims of the captors and former owners to the surplus.

The rights vested in a belligerent, by capture, cannot be destroyed, by a neutral taking possession of the captured vessel, after being abandoned at sea by the captors.[2]

Where a vessel was found abandoned at sea, by another, bound on a foreign voyage, with a valuable cargo, and without supernumerary hands, and carried into port, with great risk and exertion on the part of the salvors, one-third part of the gross value was allowed for salvage.

This was a writ of error to remove the proceedings and decree from the Circuit Court, for the district of Massachusetts; and the record being returned, exhibited the following facts:

On the 4th of November 1794, the owners and crew of the ship George,

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(*a*) See same case, *post*, p. 231.

[1] Stoughton *v.* Taylor, 2 Paine 653; Castello *v.* Boutielle, Bee 29; The William, 1 Pet. Adm. 12; The Fanny, 2 The Friendship, Id. 40; Id. 309.

[2] S. P. Booth *v.* L'Esperanza, Bee 92.

filed a libel in the district court of Massachusetts, in which they set forth, that the said ship George was an American vessel, owned and navigated by American citizens, loaded with a very valuable cargo, principally on freight, and bound from Virginia for Rotterdam; and that on the second day of October last, on the high seas, in latitude 44° N. and longitude 40° W., they fell in with the ship Mary Ford, which they found utterly deserted and abandoned, without any person on board, and in a most perilous state: That the captain and crew of the said ship George, took possession of the Mary Ford, and with the intention of saving the said ship and her cargo, the mate and three of the said crew entered on board the Mary Ford, and at great peril of their lives, and suffering great hardship, with the assistance of two men from a fishing vessel, whom they hired, brought her into the port of Boston; whereupon, they prayed that the said ship and cargo might be adjudged to them.

On the 5th of November 1794, Thomas McDonough, Esq., consul of his Britannic Majesty, for the states of Massachusetts, Rhode Island, Connecticut and New Hampshire, filed a claim in the district court of Massachusetts, and suggested, that the ship Mary Ford and her cargo, at the time she was taken possession of by the crew of the ship George, was, and now is, owned by certain merchants, subjects of his said Britannic majesty, and prayed that the same might be delivered to him, in behalf of said owners, on the *189] payment of a reasonable salvage, *or, if sold, that the proceeds thereof might be delivered to him, behalf of said owners, deducting therefrom such salvage with costs and charges.

On the 2d of December 1794, J. B. Thomas Dannery, citizen and consul of the French republic, resident at Boston, in behalf of said republic, and citizens thereof immediately concerned, likewise filed a claim for the said ship Mary Ford and her cargo; and suggested, that the said ship and her cargo, on the 28th day of September last, were the property of some of the subjects of the king of Great Britain; and afterwards, on the same day, between two and three o'clock in the afternoon, on the high seas, were attacked, subdued and taken by a squadron of ships, to wit, the Filaburtier, Charant, Postilion, Semiellante, Jean Bart and Ranger, all in the public service of and belonging to the French republic, commanded by Commodore Vil Maudarine; and that the French republic, and all the citizens thereof, were then, and still are, at open war with the king of Great Britain and all his subjects; and that some of the seamen of said squadron, entered on board the said ship Mary Ford, took complete and entire possession of her, and took and brought away the British captain and seamen of said ship, and still hold them prisoners of war; and that they took and brought away the papers belonging to her; by all which, and the laws of nations, the said ship Mary Ford and her cargo became the property of the French republic and the captors, by the rights of war. The said last-mentioned claimant further suggested, that afterwards, on the 29th day of the same September, about three o'clock in the afternoon, the said ship and her cargo, by order of the commodore of said squadron, from an apprehension of weakening his force, were left at sea, from necessity. The said consul prayed a restoration of the said ship and cargo to be adjudged to him, to the use of the French republic, on his paying reasonable salvage, with costs and charges, or that the said ship and cargo might be decreed to be sold to the use of the French

republic and her citizens concerned, after paying such salvage, costs and charges.

The facts which appeared in evidence in this case were, that the Mary Ford and her cargo were, before the 28th day of September, the property of certain British subjects; that she was bound on a voyage from the West Indies to London; that, on that day, she was attacked on the high seas, by the squadron mentioned in the claim of the consul of the French Republic, or one of the ships belonging to the same, to which she struck; that an officer and some of the crew of one or more of the ships of said squadron entered on board, took out her master and all her crew, and the greatest part of the ship's papers, and that she *sailed some time, probably more [*190
than twenty-four hours, with said French crew on board her, in company with said squadron, and was then left by order of the commander of said squadron, who directed her to be burnt; that some attempts were made unsuccessfully to effect this purpose; that several British vessels had been captured and manned by said squadron, and many of the people of the squadron were sick, and incapable from that cause to do duty; that from an apprehension of weakening his force, the said commander had given the said orders; that the said ship George met with the said Mary Ford at the time and place mentioned in the libel, and brought her and her cargo into the harbor of Boston, under the circumstances set forth in the libel. The ship Mary Ford and her cargo had been sold by order of the court, and with the consent of all parties.

After argument, Lowel, Judge of the District, delivered the opinion of the court, first recapitulating the facts above stated.

"By the Court.—The libellants have prayed, that the whole of the ship and cargo should be decreed to their use. There have been times in the history of nations, in which vessels and goods, left by necessity on the high seas, have been decreed the property of the finders; and where wrecks on the shore have been withheld from the original proprietors by the sovereigns of the country, or some great man on whose lands they have happened to be cast; but in very early times, they have, in both cases, been considered as the property of the original owner. Several of the Roman emperors made their edicts and decrees for the preservation of such property, and the restoration of it; and for a long time, the law of nations has been settled on principles consonant to justice and humanity, in favor of the unfortunate proprietors; and the persons who have found and saved the property, have been compensated by such part thereof, or such pecuniary satisfaction, as the laws of particular states have specially provided, or, in want of such provision (as the writers on the law of nations agree), by such reward as in the opinion of those who, by the municipal laws of the country, are to judge, is equitable and right. In our country, no special rule being established, this court is to determine what, in such case, is equitable and right. The rule in estimation, which ought, in my opinion, to be adopted, would be to give, if possible to ascertain it, such compensation or reward as would be sufficient inducement to engage reasonable persons, to encounter the peril and expense of the undertaking; what this may be, must, in almost every case, depend on the estimation which the judge, who is to decide, may make of the expense, the labor, the peril, and the *actual suffering of those, [*191

by whose exertions the property is saved. And as several of the most important of these are really mental, to which no measure of weight or capacity can be actually applied, it is probable, different persons would vary considerably in their estimation of them. It may, therefore, be a thing to be wished, that every nation would make, at least, some general rules for determining such cases; but as there are none established in this country, I am bound to exercise my own judgment, in determining what is a just and equitable compensation.[1]

"Admiralty courts, having the thing saved under their control, may either adjudge a portion of such thing to the persons who have saved it, or a sum of money to be paid by the proprietor, or from the produce of the thing sold. And in either case, the same principle ought to operate, and such parts of the thing saved, or sum of money, be decreed to those who save it, as may fully compensate them, and will encourage others to like efforts. In this case, the Mary Ford, when found, was at the mercy of the seas, her sails and rigging partly taken away or lost; very little or no provisions on board her; the George was bound on a foreign voyage, with a valuable cargo, and it does not appear that she had any supernumerary hands; those who undertook to carry her into port, found her greatly disabled and difficult to manage; the risk of their lives must have been considerable, and their exertions great. I think, few cases will happen, when the compensation ought to be higher.

"Under all circumstances, therefore, I am of opinion, that one-third part of the gross proceeds of the value, ought to be paid to the owners and crew of the ship George, for salvage of the said ship Mary Ford and her cargo, and in full compensation of their services, peril and expenses, in the following proportions, which have been since settled by three merchants, named by them, and appointed by the court, viz.: to the owners of the George, $9580.28, being two-third parts of the sum decreed for the owners of the George and her crew, after deducting $370.42 for the owners, for expenses incurred and paid by them, on the joint account of the owners and the crew—and the remaining one-third, viz., $4790.14, to the master and crew of the George, in the following proportions, viz.: to the master, $1156.20; Lemuel Foster, $825.90; John Classin, $495.54; five seamen, $330.36, each; one other, $289.07; the cook, $247.77; *and the boy, $123.86.

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"The next question is, to whom shall the residue be decreed? To settle this question, passages have been read from many books written on the law of nations, and others in which the municipal regulations and decisions of several nations have been reported or commented on; and which have been supposed to be applicable to this case. The gentlemen who have been of counsel for the parties, have ingeniously supported their respective

[1] When not fixed by statute, the amount of salvage necessarily rests on an enlarged discretion, according to the circumstances of each case. Post *v.* Jones, 19 How. 150; Tyson *v.* Prior, 1 Gall. 133; The Emulous, 1 Sumn. 207; The Cora, 2 W. C. C. 80; s. c. 2 Pet. Adm. 361; Two Hundred and Ten Barrels of Oil, 1 Spr. 91. It must be reasonable, in reference to the peril relieved against, and the danger incurred. Talbot *v.* Seaman, 1 Cr. 1; The Huntress, 2 Wall. Jr. C. C. 59; The William Penn, 1 Am. L. Reg. 584; The Bowen, 5 Ben. 296; The Georgiana, 1 Low. 91; The Lovett Peacock, Id. 143. As a general rule, the rate of salvage, in the case of a vessel found deserted at sea, is a moiety of her value; and this, except in very special cases, is the extreme limit. The John E. Clayton, 4 Bl. C. C. 372.

claims; I have, I trust, carefully perused their authorities and attended to their arguments; very few of their authorities appear to me to apply; their arguments have been pertinent. I lay out of the case, the whole doctrine of *postliminy*, as applied to recaptures, which I consider as depending on the municipal regulations of states, which every sovereign has a right to make, so far, at least, as their own citizens only are concerned, in such manner as may appear to them best. Under this head, though blended by some writers with the law of nations, are to be placed the regulations made, variously however, by the European nations, and the late congress of the United States, by which the property is divested from the former owners, by capture, after twenty-four hours possession by the enemy; and all other arbitrary rules, made to settle questions of like nature; also all questions about total and partial losses on policies of insurance.

"I embrace as sound doctrine, the principle, that neutral nations ought not to decide respecting the lawfulness or unlawfulness of capture, if it appears that the captor, and the nation from whom the property is taken, are at war with each other, and the captors, or their vendees, are in possession of the property, save where the territorial rights of the neutral, or the rights of their citizens, are involved in the question; and that neutrals are always to take the existing state of things as right; so that if either of the powers at war, or those to whom they have transferred it, are in possession of a thing taken from their enemy in war, neutral powers are to suppose them lawfully possessed, and ought not to inquire how long, or under what circumstances, they have possessed them. To interfere and decide in such cases, must necessarily imply a partiality, contrary to the idea of neutrality; for they must either give greater firmness to the capture, by deciding it to be lawful, or weaken and render it less secure, by determining it to be unlawful. Neither are neutral powers to give aid to either party, by conducting their prizes for them, when they are too weak to protect and conduct them.

"These principles, I think, will serve as a guide to a decision in this case. Neither of the belligerent powers was in possession *of this property when found; the British claimants say, it has been theirs; this is [*193 admitted by the French claimants; and we have evidence of this fact by the construction of the ship which is in our sight, by the cargo on board, and divers ship's papers which were found with her. The French claimants say, we took her in open war, we firmly possessed her, and she ought to be restored to us. The reply in behalf of the British claimants is, you did not complete your capture; you did not firmly possess her; you were too weak, consistent with other views you held more important, to retain her. Is it necessary that we should decide these questions between them? Shall we try the legality of the capture, and decide the firmness of the possession? Will it not be, to aid, to make the capture and possession firm and legal, which is said to be incomplete? The French claimants say, we were under apprehension of weakening our force, and so left her from necessity. The vessel had been British, of this, there is no question; did she, by capture and firm possession, according to the law of nations, become French? Of this, there is at least a doubt.

On considering the whole matter, I do adjudge, order and decree, that one third-part of the money, arising from the sales of the ship Mary Ford and her cargo, be paid to the persons who saved them, in the proportions

before mentioned. And that the duties and all other costs and charges be first deducted from the other two-third parts, and the residue remain in court for the use of the British owners of said ship and cargo, or such other persons, who may derive right thereto from them, when the same shall be ascertained in court.

From the decree of the district judge, so far only as it respects the British owners, the French consul appealed, and the appeal being argued before the circuit court, the following decree was there pronounced: (Judge LOWELL declining, however, to give any opinion).

"CUSHING, Justice.—The court having fully heard the parties on the appeal in this case, by their counsel, it appears, that the said ship Mary Ford and her cargo, being the property of some British subjects, were, on or about the 28th day of September, A. D. 1794, captured on the high seas, by a French squadron of ships, under the command of Commodore Vil Maudarine, and were taken into actual and quiet possession of said fleet, and so held for above twenty-four hours, and were then left on the high seas, without any hands aboard, after some unsuccessful attempts, by his order, to burn her, which was in consequence of many of the people of his squadron being sick, and incapable of doing duty, and from an apprehension of weakening his force in parting with any of his people, to keep on board and to conduct the said ship Mary Ford.

*194] * "That the said ship George, met with the said ship Mary Ford, and brought her and her cargo into the harbor of Boston, as set forth in the libel; not with intent to aid either party, in the war subsisting between the French republic and the British nation, but to save the property from absolute loss, or in expectation of proper compensation for the trouble. On which case, the operation of the law of nations appears to the court to be, that by the said capture, the property became immediately the captor's. The questions about firm possesssion, appearing to relate chiefly, if not only, to cases of *postliminy* or recapture, or to that of a neutral vendee; things which it is apprehended have no place in this cause; and about which the municipal laws and regulations of different countries are very different.

"The property then, in this case, becoming the captor's, immediately, by conquest and the right of war, must so continue, until divested by recapture, or by some legal means or act to that effect. And it is not conceived, that the abandoning the ship, from the occasion stated in the evidence, could amount to a recapture, so far as to invest the property in the original owners, or prevent the captors from reclaiming the possession, when opportunity offered, at any time previous to a recapture. It is therefore, considered and decreed by the court, that the decree made in the district court, so far only as it decrees, that the said residue of the said two-third parts of the money arising from the sales of the said ship Mary Ford and her cargo, remain in court for the use of the British owners of the same ship and cargo, or such other persons who may derive right thereto from them, when the same should be ascertained in court, be and hereby is reversed. And it is now further adjudged and decreed by this court, that the same residue of the said two-third parts of said money, remain in court for the use of the French republic, and those concerned in said capture."

From this decree of the circuit court, the British consul appealed; but the appeal being disallowed, the proceedings were removed into the supreme court by writ of error; and the plaintiff assigned for error the decree in favor of the French claimants, and also the disallowance of his appeal; the defendant pleaded *in nullo est erratum*, and thereupon, issue was joined.

The cause was argued, on the 4th and 5th of February 1796, by *E. Tilghman*, for the plaintiff in error, and by *Ingersoll* and *Du Ponceau*, for the defendant in error.

For the *plaintiff* in error, two points were made: 1st. That the courts of the United States had no jurisdiction in this case: and 2d. That the property of the British owners of *the Mary Ford, was not so divested as to give a perfect right to the captors. [*195

1st Point. The court cannot determine on the validity of the capture between the belligerent powers. In cases where there have been illegal outfits, within the jurisdiction of the United States; or where their territorial neutrality and sovereignty have been invaded; or where their municipal laws have been violated; the judicial power of the Union will interpose. But the present is barely a question of prize; unconnected with any incidental or collateral circumstances, which justify a neutral nation in taking cognisance of the cause. Lee on Capt. 77.

2d Point. The property in a prize is not so divested by capture, as to give the captor a full right, until the vessel is brought into a place of safety. The Mary Ford was not in a place of safety; there was ground to entertain a reasonable hope of recapture; and there must be a condemnation, in a court of competent jurisdiction, before the property is conclusively transferred from the original owner to the captor. Until that is done, any length of possession will not, of itself, furnish a title to the prize. Grot. 582, lib. 3, c. 6, § 3; Puff. 845, lib. 8, c. 6, § 20; 2 Heinec. lib. 2, c. 9, § 202, p. 197; Marten, L. N., lib. 8, c. 3, § 11, p. 197; Vatt. lib. 3, § 196, p. 571; Lee on Capt. 72. It is true, however, that a right of possession, and an inchoate right of property, were acquired by the capture; but the right of possession being abandoned, it reverted to the original proprietor.

For the *defendant* in error, it was answered: 1st. That the court has jurisdiction: 2d. That the court must restore the ship to the possession of the captor, whether the capture was legal or illegal; for they must consider every capture made in a war, in form, as valid.

1st Point. It is remarkable, that the person who claims the exercise of the authority of the court, should except to its jurisdiction; but even by him it is conceded, that the court may exercise a jurisdiction on the subject-matter. This court has jurisdiction, if any court of the United States can take cognisance of the controversy; and if this court cannot hold plea of the dispute, it will not be pretended, that any other court may. It is, then, an universal rule, without exception, that whoever pleads to the jurisdiction of a court, must show another competent jurisdiction. Doct. Plac. 234. The only book read in support of the exception (Lee on Capt. 77), repels the appellant's claim; for it is the principle, and not the mode, of adjudication, which forms the subject of the chapter referred to. Lee on Capt. 72. The original proprietor claims; the vendee says, that he purchased from the captor; and the inference is, *that the judges cannot decide upon the legality [*196

of the prize, but must consider each belligerent party the proprietor of what he has taken. The general principle is best exemplified in the justificatory memorial on the *Silesia* loan: the court of the captor is the proper court to decide the question of prize, or no prize; 1 Magens, p. 487, 490, 496, 505; but still the reason of the law must show its extent. Not only the reason of the rule restricts its operations to the cases, where the question can be decided by the appropriate court of the captors; but the theoretical writers, as well as uniform practice, demonstrate the existence of such a restriction. If, likewise, the capture be made within neutral limits, an exception to the general rule arises. 2 Wood. 443, Act of Congress of June 1794. The regulations established by the executive department, and the adjudications of this court, concur in the position. Another exception arises, where neutral property of another nation, or of our own citizens, has been captured at sea, and is brought within our ports. *Glass* v. *The Betsey* (*ante*, p. 6); 2 Wood. 439; Bynk. Q. J., lib. 1, c. 17. But if the sovereign will protect his citizen from injury, he must also compel him to do justice. Now, therefore, as no subject of a neutral state can take from the captors the prizes which they have made, without violating their right of possession (2 Wood. 455; 2 Burr. 693); it follows, that when such a case happens within our jurisdiction, the courts of the United States must decide between our citizens and the foreign captors; nor can the relief to the captors be refused, by the interposition of a claim on the part of the captured, as original proprietors. The order in which the claims of captor and captured have been filed, cannot vary the jurisdiction of the court; for, if the captured property is brought into port by our citizens, forcibly or charitably, the jurisdiction must be the same, and the question of prize will be equally involved.

2d Point. But taking cognisance of the present case does not lead to a decision of the question of prize or no prize; for the court must consider the capture to be lawful. No neutral power can doubt the validity of a capture made in a public war. Vatt. lib. 3, c. 14, § 208; 1 Wood. 125; Vatt. lib. 3, c. 3, § 40, § 190, § 209, § 212, § 229; Grot. lib. 3, c. 6, § 2; Burlem. c. 7, § 12, 14; 2 Wood. 441. An inchoate right, therefore, a right to the possession, a special property, is enough for the captor. Of his possession, however slight, a neutral power cannot deprive him: if his enemy were still in pursuit; if he would have been recaptured the next moment; the neutral power cannot interfere with the possession, nor, interfering, must restore it. 2 Burr. 696; 2 Inst. of Just. tit. 1, § 17; Dig. lib. 41, tit. 1, law 5, § 7; *197] 2 Ruth. 594, lib. 2, c. 9; *Collect. Jurid. 134, 135. In the present instance, the interference was charitable, yet, if the vessel had been detained, after payment or tender of a reasonable salvage, the detainer would be deemed a trespasser; and the rule and remedy must be the same, as if he had been a trespasser *ab initio*. If the captors had abandoned their property, let all the legal consequences follow; but that is a question which the captors have a right to controvert with those who saved the property: the British claimants can certainly advance no title, by finding it. The distinction between perfect rights and inchoate rights, can only occur between a recaptor and the original owner, or between a vendee and the original owner: the authorities that have been cited on the opposite side, are all of that description; Marten 291; Emerig. 494; Grot. 582; Puff. 845; 2 Heinec. 197, 199; and the subject is so explained by the latest English writers.

2 Wood. 455–6. The distinction, indeed, arises entirely out of the *jus postliminium;* and the very definition of that right shows its inapplicability to the present case. "The right of *postliminium* (says Vatt. lib. 3, c. 14, § 204) is, that in virtue of which persons and things taken by the enemy, are restored to their former state, when coming again under the power of the nation to which they belonged: but it can have no operation with regard to foreign or neutral nations." 2 Wood. 443; Vatt. lib. 3, c. 14, § 208.

Then, wherever a court takes cognisance of any original matter, it naturally draws to its jurisdiction, every incidental or necessary, question. 3 Bl. Com. 106, 107, 108. Though, where the admiralty, or, as we contend, any foreign court, had not original jurisdiction, it shall not, by the incidental occurrence of a question properly cognisable there, defeat the jurisdiction of the common law, or as we contend, the neutral court. It has been said, that in cases of prize between two other nations, the court of prize has jurisdiction; 3 Bl. Com. 108; where 2 Show. 232; Comb. 474, are cited; but the citation is incorrect; for the authority merely recognises the general principle, that where the admiralty has jurisdiction of the original matter, it may, incidentally, try a question, not otherwise triable there; Comb. 462; and the case in Show. 232, is the celebrated case of *Hughes* v. *Cornelius*, which merely says, that a foreign sentence is conclusive; s. c. Raym. 473. *Quod inconveniens est, non licitum est*, is a good maxim applied to new undecided points. Doug. 388. Where the question of prize comes in collaterally, even a common-law court may decide it, not operating as a sentence to bind the property of the goods (2 Wood. 453, 454; 10 Mod. 77; 2 Str. 1250; 2 Burr. 683, 1198, 1734); for it is essential to the court that it may examine the question so far as is necessary for their purpose, though, generally considered, the question may be reserved *for exclusive jurisdictions. [*198
Doug. 588, *per* BULLER, J.; Harg. L. T. 452; 1 Lev. pl. 2; Roll. Abr. 584; 21 Vin. Abr. 43. But after all, the question of abandonment, is the only proper subject of controversy; and if a right of possession ever attached, the abandonment of the prize can have no other effect, than if the captors had set fire to one of their own ships and abandoned her. The abandonment, if not done by choice, but from necessity, leaves the right unimpaired; and the vessel being brought into port by a friend, ought to be restored, on paying a reasonable salvage; Lee on Capt. 256, 257; Molloy 82; for it will not interfere with the jurisdiction of any foreign court, as to the question of prize, that our courts should, in this case, assert a jurisdiction to make restitution to the captor.

BY THE COURT.—We are unanimously of opinion, that the district court had jurisdiction upon the subject of salvage; and that, consequently, they must have a power of determining, to whom the residue of the property ought to be delivered.

In determining the question of property, we think, that immediately on the capture, the captors acquired such a right, as no neutral nation could justly impugn or destroy; and consequently, we cannot say, that the abandonment of the Mary Ford, under the circumstances of this case, revived and restored the interest of the original British proprietors.

Some doubts have been entertained by the court, whether, on the princi-

ples of an abandonment by the French possessors, the whole property ought not to have been decreed to the American libellants, or, at least, a greater portion of it, by way of salvage; but as they have not appealed from the decision of the inferior court, we cannot now take notice of their interest in the cause. Upon the whole, let the decree be affirmed.

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*199] *WARE, administrator of JONES, Plaintiff in error, *v.* HYLTON *et al.*

Confiscation of debts of alien enemies.

The treaty of peace concluded between the United States and Great Britain, in 1783, enabled British creditors to recover debts previously owing to them by American citizens, notwithstanding a payment into a state treasury, under a state law of sequestration.[1]

An individual citizen of one state cannot set up the violation of a public treaty, by the other contracting party, to avoid an obligation arising under such treaty; the power to declare a treaty void, for such cause, rests solely with the government, which may, or may not, exercise its option in the premises. IREDELL, J., in the court below.

ERROR from the Circuit Court for the district of Virginia. The action was brought by William Jones (but as he died, *pendente lite*, his administator was duly substituted as plaintiff in the cause), surviving partner of Farrel & Jones, subjects of the king of Great Britain, against Daniel Hylton & Co., and Francis Eppes, citizens of Virginia, on a bond, for the penal sum of 2976*l.* 11*s.* 6*d.* sterling, dated the 7th July 1774.

The defendants pleaded: 1st, Payment; and also, by leave of the court, the following additional pleas in bar of the action.

2d. That the plaintiff ought not to have and maintain his action aforesaid, against them, for $3111. 1-9, equal to 933*l.* 14*s.*, part of the debt in the declaration mentioned, because they say that, on the fourth day of July, in the year 1776, they, the said defendants, became citizens of the state of Virginia, and have ever since remained citizens thereof and residents therein; and that the plaintiff, on the said fourth day of July, in the year 1776, and the said Joseph Farrel, were, and from the time of their nativity ever had been, and always since have been, and the plaintiff still is, a British subject, owing, yielding and paying allegiance to the king of Great Britain; which said king of Great Britain, and all his subjects, as well the plaintiff as others, were, on the said fourth day of July, in the year 1776, and so continued until the 3d of September, in the year 1783, enemies of, and at open war with, the state of Virginia, and the United States of America; and that being so enemies, and at open war as aforesaid, the legislature of the state of Virginia did, at their session begun and held in the city of Williamsburgh, on Monday, the 20th day of October, in the year 1777, pass an act, entitled "an act for se-

*200] questering British property, enabling those indebted *to British subjects to pay off such debts, and directing the proceedings in suits where such subjects are parties," whereby it was enacted, "that it may and shall be law-

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[1] Hamilton *v.* Eaton, Mart. (N. C.) 1; s. c. 1 Hughes 249; Jones *v.* Walker, 2 Paine 688. The plea of alien enemy only goes in abatement of the suit; Bell *v.* Chapman, 10 Johns. 183; if put in, after issue joined, as it may be, *puis darrein continuance* (Smith *v.* McConnel, 11 Id. 424), the plaintiff may reply a subsequent restoration of peace (Russel *v.* Skipwith, 1 S. & R. 310), whereby the disability is removed Hamersly *v.* Lambert, 2 Johns. Ch. 508.