explains what is uncertain in the sentence. The special verdict shows that the vessel was seized on her approaching the port of Cadiz, without previous knowledge of the blockade; that she never was turned away, and "permitted to go to any other port or place;" that she was "detained" for several days, and then sent in for adjudication, without being ever put into the possession of her master and crew, so as to enable her either "again to *attempt* to enter" the port of Cadiz, or to sail for some other port; that while thus detained, the commander of the blockading squadron drew the master of the John into a conversation, which must be termed insidious, since its object was to trepan him into expressions which might be construed into evidence of an intention to sail for Cadiz, should he be liberated; *202] *that availing himself of some equivocal, unguarded, and, perhaps, indiscreet answers on the part of the master, the vessel was sent in for adjudication; and on those expressions, was condemned.

This court is of opinion, that these facts do not amount to an *attempt* again to enter the port of Cadiz, and therefore, do not amount, under the treaty between the United States and Great Britain, to a breach of the blockade of Cadiz. The sentence of the court of vice-admiralty in Gibraltar, therefore, is not considered as falsifying the warranty, that the brig John was American property, or as disabling the assured from recovering against the underwriters in this action, and the testimony in the case shows that the blockade was not broken.

The judgment of the circuit court is to be reversed, with costs, and it is to be certified to that court, that judgment is to be entered on the special verdict for the plaintiff.

Judgment reversed.

Marshall *v.* Delaware Insurance Company.

Marine insurance.—Abandonment.—Loss by capture.

The right of the insured to abandon and recover for a total loss, depends upon the state of the fact, at the time of the offer to abandon, and not upon the state of the information received.[1]

The technical total loss arising from capture, ceases with a final decree of restitution, although that decree may not have been executed, at the time of the offer to abandon.

Marshall *v.* Delaware Ins. Co., 2 W. C. C. 54, affirmed.

Error to the Circuit Court for the district of Pennsylvania, in an action for a total loss, on a policy of insurance on the Brig Rolla, her cargo and freight.

The material facts stated, were, that the Brig Rolla, a neutral vessel, while prosecuting the voyage insured, was captured by a belligerent cruiser, and libelled as prize of war. On the 9th of July 1806, a final sentence in favor of the vessel and cargo was passed, and on the 19th of the same month, about one o'clock P. M., restitution was made. On the 17th of July, *203] the assured, in *New York, received information of the capture, and immediately gave orders to his agent in Philadelphia, to abandon to

[1] Alexander *v.* Baltimore Ins. Co., *post*, p. 370; Olivera *v.* Union Ins. Co., 3 Wheat. 183; Humphreys *v.* Union Ins. Co., 3 Mason 429. And see Ritchie *v.* United States Ins. Co., 5 S. & R. 501; Dorr *v.* New England Marine Ins. Co., 4 Mass. 221.

the underwriters. In pursuance of these orders, the offer to abandon was made on the morning of the 19th.

The judgment of the court below was for the defendants.

Hopkinson, for the plaintiff.—The question in this case is, whether the plaintiff is entitled to recover for a total, or only for a partial loss? The proceeds of the cargo have been received by the plaintiff, who sold the same for account of the underwriters, if they will receive them. If the abandonment was made, before the restoration in fact, of the cargo, to the master on the 19th of July, the plaintiff has a right to recover for a total loss, according to the decision in *Rhinelander's Case*, at last term (*ante*, p. 41).

The plaintiff having shown a total loss, by the capture, it is incumbent on the defendants to show, that the property was restored before the abandonment. On the 17th, the plaintiff received information of the capture; on the 18th, he wrote and put into the post-office at New York, the letter to his agent in Philadelphia, directing the abandonment to be made; on the 19th, it was received in Philadelphia, and the abandonment offered. The abandonment must relate to the 18th, when the plaintiff wrote his letter and made his election to abandon. Abandonment is an *ex parte* act, and if the plaintiff has a right to abandon, at the time when he elects and offers to abandon, the defendants are liable from that time. No consent is necessary on the part of the defendants. The plaintiff was bound from the date of his letter; and the defendants must be equally bound.

But although the property may have been in fact restored before the abandonment, if that restoration was unknown to the plaintiff, it is yet an undecided question, whether the abandonment is not valid. *The opinion of Lord MANSFIELD, in *Hamilton* v. *Mendes*, unlike the opinions of that great man, is confused and contradictory, sometimes making the question of right to abandon depend upon the state of the information, and sometimes, on the fact itself. It is not reasonable, that the insured should be bound to abandon, upon receipt of the first intelligence, and yet the underwriter be permitted to take advantage of subsequent events. There would be no mutuality in this principle. It would be ruinous to merchants, thus to be kept out of their money. Besides, the contract is for indemnity, and there can be no fairer mode of ascertaining the indemnity, than to give the underwriters the thing itself, subject to the chance of recovery, and let them pay the price. If the thing is restored, and goes to a good market, the underwriters derive the benefit; if a loss happens, it is what they are bound by their contract to sustain. But as to the state of the fact itself, we contend, that there was no actual restoration of the property before the offer to abandon. If there was, it is for them to show it. The *onus probandi* is on them. If it is necessary to the justice of the case, the court will divide the day, and ascertain which event did first actually happen. *Combe* v. *Pitt*, 3 Burr. 1434. [*204

Dallas and *Rawle*, contrà, contended, that the peril being at an end, at the time of the offer to abandon, the plaintiff cannot recover for a total loss, unless the consequences of the capture created a total loss either in fact or in law.

The peril by capture was at an end on the 9th of July, when the final

decree of restitution was pronounced in the court of dernier resort. The right to restitution was consummate, and the authority to restore absolute. What remained was mere matter of form. The vessel and cargo were in the hands of the public officer, who held the same, after the decree, in trust for the owner. There was no longer any hostile or adverse possession. The property was in no danger of condemnation, or even of further detention.

*205] *The state of the fact, and not of the information, is the test of the right to abandon. If intelligence were the test, any idle vague rumor might compel the underwriters to pay a total loss, when the property was, in fact, in perfect safety, the whole time. The contract is, that the property shall not perish by the peril, not that it shall not encounter the peril. A storm may injure it, but if the injury does not exceed half the value, and the voyage be not broken up, it is not a total loss. The underwriters are only bound to pay the partial loss. It is a contract of indemnity only; the liability of the defendants, therefore, must depend on the state of the fact, and not of the intelligence. Park 77, 155, 160, 144, 145, 146, 148, 152, 156, 167; *McMasters* v. *Shoolbred*, 1 Esp. 237; *Rhinelander* v. *Ins. Co. of Pennsylvania* (*ante*, p. 42); *Dutilh* v. *Gatliff*, 4 Dall. 446; 1 Caines' Cas. 21, 22; 1 Johns. 205.

It is not contended, that the consequences of the capture created a total loss, either in fact or in law. The expenses, pillage and damage did not amount to more than one-fourth of the insured value, and these the underwriters are willing to pay. The vessel arrived at her destined port: she performed the voyage insured.

Ingersoll, in reply.—It is said, that the restitution is to be considered as referring back to the time of the decree; but that point was otherwise decided in the case of *Dutilh* v. *Gatliff*, in the supreme court of Pennsylvania. It was there decided, that although at the time of the offer to abandon, there was a decree of restitution, yet as that decree was not known to the party who offered to abandon, and as, in fact, the property was then in possession of the captors, the insured had a right to recover for a total loss.

February 23d, 1808. MARSHALL, Ch. J., after stating the facts of the *206] case, as above, delivered the opinion of the court as follows:—*The question submitted to the consideration of the court is this: is the assured entitled to recover for a partial or for a total loss?

In support of the claim for a total loss, two points have been made: 1st. That the state of information at the time of the abandonment, not the state of the fact, must decide the right of the assured to abandon. If this be otherwise, then, it is contended, 2d. That the right to abandon is coextensive with the detention, which continued until restitution was made in fact, and that restitution in fact, though made on the same day, was posterior in point of time to the abandonment.

1. Does the right to abandon depend on the fact, or on the information of the parties? The right to abandon is founded on an actual or legal total loss. It appears to the court, to consist with the nature of the contract, which is truly stated to be a contract of indemnity, that the real state of loss, at the time the abandonment is made, is the proper and safe criterion of the rights of the parties. Might they depend absolutely on the state of in-

formation, a seizure which scarcely interrupted the voyage might be, and frequently would be, converted into a total loss, and the contests respecting the real state of information might be endless. Intelligence of capture and of restitution might be received at the same time, and the insured might suppress the one and act upon the other.

This point came under the consideration of the court in the case of *Rhinelander* v. *Insurance Company of Pennsylvania*, in which case, it was said, that " where a belligerent has taken full possession of a vessel as prize, and continues that possession, to the time of the abandonment, there exists, in point of law, a total loss." The court, in delivering this opinion, understood itself to require, that the continuance of the possession *up to the time of the abandonment, or a technical total loss incurred, notwithstanding the restoration, was necessary to justify a recovery as for a total loss. [*207

In considering the second point, the court proceed to inquire, whether the technical total loss on which the right to abandon depended, was terminated by the decree of restitution, or continued until that decree was carried into execution, and restitution was made in fact?

The real object of the policy is not to effect a change in property, but to indemnify the insured. Whenever, therefore, only a partial loss is sustained by one of the perils insured against, the original owner of the property retains it, prosecutes his voyage, and recovers for his partial loss. But the voyage may be really broken up, without the destruction of the vessel and cargo. A detention by a foreign prince, either by embargo or capture, may be of such long duration as to defeat the voyage. This is a peril insured against, and of its continuance, no certain estimate can be made. In the case of capture, it is, for the time, a total loss, and no person can confidently say that the loss will not finally be total. So, of an embargo: its duration cannot be measured, and it may destroy the object of the voyage. These detentions, therefore, are, for the time, total losses, and they furnish reasonable ground for the apprehension, that their continuance may be of such duration as to break up the voyage, or ruin the assured, by keeping his property out of his possession. Such a case, therefore, upon the true principles of the contract, has been considered as justifying an abandonment, and a recovery for a total loss.

But when a final decree of restitution, from which it is admitted that no appeal lies, has been awarded, the peril is over. On no reasonable calculation, can it be supposed, that such a delay of restitution will ensue, as from that time to break up the voyage. There is no reason to presume a subsequent detention on the part of *the foreign prince. There is no motive for such detention. The master of the captured vessel may perhaps not be ready to receive possession, and the delay may proceed from him. At any rate, without some evidence that the peril was not actually determined, the court cannot consider it as continuing, after the sentence was pronounced. A technical total loss originates in the danger of a real total loss. The court cannot suppose such a danger to have existed, after a final sentence of acquittal, unless some order of court relative to a reconsideration could be shown, or it should appear, that some other delays were interposed by the court which had pronounced the sentence, or by the sovereign of the captor. [*208

Had the facts on which this question depends been known at New York and Philadelphia, as they occurred, could it have been said, that there existed a technical total loss? After a decree of restitution, could it be said, that while means were taking to carry that decree into execution, while the mandate for restitution was passing from the court to the vessel, the assured had a right to elect to consider his vessel as lost, and to abandon to the underwriters? To this court, it seems, that the right to make such an election, at such a time, would be inconsistent with the spirit of the contract, and that the technical total loss was terminated by the decree of restitution, unless something subsequent to that decree could be shown, to prove the continuance of the danger, or of an adversary detention.

Nothing in this opinion is intended to extend to the case where a cargo may be lost, without the loss of a vessel.

There is no error in the judgment of the circuit court of Pennsylvania, and it is to be affirmed, with costs.

Judgment affirmed.

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*209] *McIlvaine *v.* Coxe's Lessee.

Alienage.

On the 4th of October 1776, the state of New Jersey was completely a sovereign and independent state, and had a right to compel the inhabitants of the state to become citizens thereof.

A person born in the colony of New Jersey, before the year 1775, and residing there until the year 1777, but who then joined the British army, and ever after adhered to the British, claiming to be a British subject, and demanding and receiving compensation from that government, for his loyalty and his sufferings as a refugee, has a right to take lands by descent, in the state of New Jersey.[1]

This cause was now argued again by *Du Ponceau* and *Ingersoll*, for the plaintiff in error, and by *Rawle* and *E. Tilghman*, for the defendant.

The report of the former argument (2 Cr. 280), having been so full, it is deemed unnecessary to state more of the argument, at this term, than will be sufficient to show the points to which additional authorities were adduced.

For the *plaintiff* in error, it was contended, 1. That Daniel Coxe was born an alien to the state of New Jersey; and when the revolution commenced, had a right to choose his side, in a reasonable time, and could not be made a citizen of the new state against his will. Upon this point, were cited *Coignet* v. *Pettit*, 2 Dall. 234; 2 Rutherforth 30; 1 Bl. Com. 212; *Ware* v. *Hylton*, 3 Dall. 225; Plowden on Alienage, 3, 4, 7, 15, 19, 24, 119; Laws of the U. S. vol. 7, p. 147; vol. 3, p. 165; vol. 6, p. 80.

2. That even if he could, contrary to his natural allegiance, be compelled by force to become a citizen of the new state, his consequent allegiance to such new state could be temporary only, and could not exist longer than the pressure of the force existed. He had a right to escape from that force, and to throw off that allegiance, if he could. Natural allegiance, *i. e.*, the allegiance due from birth, is the only kind, which, by the rule of the common law, cannot be shaken off. Voluntary allegiance, by naturalization, and,

[1] But see Inglis *v.* Sailors' Snug Harbor, 3 Pet. 99, whereby this case is practically overruled.