it orders should be effected by the captors, but by those who, in point of law and fact, were in possession, either of the George and her cargo, or of the money for which they were sold. As the officer of the court of New Jersey, not the captors, held this possession, the decree operates upon him, not upon them.

On that part of the libel in this case which may be considered as supplemental, and as asking relief in addition to that which was given by the decree of the 23d of December 1780, the court deems it necessary to make but a very few observations. The whole argument in favor of this part of the claim is founded on the idea that the captors were wrongdoers, and are responsible for all the loss which has been produced by their tortious act. The sentence of reversal and restoration is considered by the plaintiffs as conclusive evidence that they were wrongdoers. But the court can by no means assent to this principle. A belligerent cruiser who, with probable cause, *29] seizes a neutral and takes her into port for adjudication, *and proceeds regularly, is not a wrongdoer. The act is not tortious. The order of restoration proves that the property was neutral, not that it was taken without probable cause. Indeed, the decree of the court of appeals is in this respect in favor of the captors, since it does not award damages for the capture and detention, nor give costs in the suit below. If we pass by the decree, and examine the testimony on which it was founded, we cannot hesitate to admit, that there was justifiable cause to seize and libel the vessel.

Upon the whole case, then, the court is unanimously of opinion, that the decree of the circuit court ought to be affirmed.

Sentence affirmed.

Rhinelander *v.* Insurance Company of Pennsylvania.

Marine insurance.—Loss by capture.—Abandonment.

A capture of a neutral as prize, by a belligerent, is a total loss, and entitles the insured to abandon.

The state of the loss, at the time of the offer to abandon, fixes the rights of the parties.[1]

This was a case certified from the Circuit Court for the district of Pennsylvania, in which the opinions of the judges of that court were opposed to each other upon the question, whether the plaintiff was entitled to recover, upon a case stated, the material facts of which were as follows:

The defendants insured $12,500, on the freight of the plaintiff's American ship The Manhattan, which had been chartered by Minturn & Champlin, for a voyage from New York to Batavia, and back to New York. The freight was valued in the policy at $50,000. The charter-party contained a covenant, that if any dispute should arise between the plaintiff and Minturn & Champlin, respecting the freight, the cargo should not be detained by the *30] plaintiff, provided they *should give good security to abide by the award of arbitrators, who were to be appointed to settle such dispute. On her homeward voyage, on the 10th of February 1805, the ship was taken

[1] See Marshall *v.* Delaware Ins. Co., *post*, p. 202; Alexander *v.* Baltimore Ins. Co., *post*, p. 373; Olivera *v.* Union Ins. Co., 3 Wheat. 183; Bradlie *v.* Maryland Ins. Co., 12 Pet. 378; Humphreys *v.* Union Ins. Co., 3 Mason 429; Queen *v.* Union Ins. Co., 2 W. C. C. 331.

and detained, on the high seas, by a British armed vessel, and the second mate and twenty-one of the seamen taken out, and two British officers and fifteen seamen put on board, with orders to take her into a British port. The second mate was put on board another vessel, and arrived in New York on the 26th of February, when he gave the above information to the plaintiff, who, on the 28th of February, communicated it, by his letter of abandonment of that date, to the defendants.

The Manhattan, with her cargo, was carried into Bermuda, on the 12th of February, and libelled as prize of war. On the 20th of April 1805, both vessel and cargo were acquitted. From this sentence, so far as it respected the cargo only, an appeal was prayed, which did not appear to have been decided ; but on the 8th of May, the cargo was delivered to its owners, on their giving security, and on the 8th of July, the vessel and cargo arrived in New York ; but before their arrival, the defendants having refused to give counter-security, so as to relieve the owners of the cargo from the effect of the security which they had given upon getting possession of their goods, the plaintiff, on the 6th of June 1805, after the vessel was liberated, brought the present suit. Upon the arrival of the vessel and cargo, Minturn & Champlin gave security to abide the award of the arbitrators concerning the freight, according to the covenant in the charter-party, and obtained possession of the cargo.

Hopkinson, for the plaintiff, contended : 1. That there had been a total loss of the property insured, occasioned by a peril within the terms of the policy. 2. That the abandonment was made in due time.

*Whenever a vessel is captured by a belligerent as prize, whether the belligerent be a friend or an enemy, the loss is total, so long as the detention exists ; and vests a complete right of abandonment. It is not the state of the information received, but the actual state of the fact, which justifies the abandonment, and gives the right to recover as for a total loss. The vessel was actually libelled as prize, at the time of the abandonment, although no information of such libel had been received by the plaintiff ; and therefore, the case is clearly within the doctrine established by the supreme court of Pennsylvania, in the case of *Dutilh* v. *Gatliff*, decided a few days ago ;(*a*) that if the vessel be libelled by the *captors as prize, it is such a capture as gives the insured a complete right to [*31 [*32

(*a*) Decided January 17th, 1807. (4 Dall. 446.)

Case stated. On the 24th of September 1799, the defendant, Samuel Gatliff, underwrote $750, upon a policy of insurance on the schooner Little Will, belonging to John Dutilh and Thomas Lillibridge, for whom the plaintiff was agent, on a voyage at and from Philadelphia to Havana. On the 25th of September 1799, the Little Will sailed on her voyage from Philadelphia for Havana, and on the 8th day of October following, she was captured by three British privateers, and carried into the port of Nassau, New Providence, where she arrived on the 13th of the same month. Upon her arrival in Nassau, the said schooner was libelled in the admiralty court, and on the 9th day of November following, was regularly acquitted; and in the whole, she remained 37 days at Nassau, during 35 of which, she was in custody of the captors ; but the fact of her acquittal was not known to the plaintiff, until after the abandonment hereafter mentioned; although it was known to John Dutilh, one of the owners and supercargo, who was with her at Nassau. On the 13th day of November, the plaintiff wrote the letter of abandonment, inclosing the papers therein referred to, which was received by the

abandon; and to recover as for a total loss. Although the Manhattan and
*33] cargo *were acquitted by the vice-admiralty court before the return of the writ in the present case, yet the acquittal, as to the cargo, was
*34] suspended by the appeal; and the *property was not, in fact, put in to the possession of the freighters, until they had given security to its

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defendant the same day. On the 20th of November, the said schooner sailed from Nassau for Havana, where she arrived on the 21st of the same month, and sold her cargo, except three boxes plundered at New Providence Afterwards, the said schooner sailed from Havana for Philadelphia, where she arrived on the 26th or 27th of February, in the year 1800, with a cargo of sugars, on which freight became due, and was received by Stephen Dutilh, for the benefit of those who were entitled to it; each party refusing to accept her, she was sold for wharfage, and the whole proceeds of sale applied to the payment thereof. The schooner Little Will was American property, as warranted.

The question for the court is, whether the plaintiff is entitled to recover as for a total loss?

Tilghman, Ch. J.—On the case thus stated, the question submitted to the court is, whether the plaintiff is entitled to recover for a total loss? In resolving this question, I shall divide it into two points. 1. Did there ever exist a total loss? 2. Supposing that there once existed a total loss, has any circumstance occurred, which excludes the plaintiff from recovering for more than a partial loss?

1. The case before us includes one of the risks expressly mentioned in the policy, a taking at sea. But it has been objected, that this taking was not by an enemy, and that when a belligerent takes a neutral, it is to be presumed, that the taking is only for the purpose of searching for the property of his enemy, or goods contraband of war, and that in the end, justice will be done to the neutral. To a certain extent, there is weight in this distinction; but it must not be carried too far. At the time when the capture in question was made, the United States acknowledged the right of the British to detain their vessels for the purpose of a reasonable search. The bare taking of the vessel, therefore, could by no means constitute a loss; and if, under suspicious circumstances, she should be carried into port, to afford an opportunity for a complete investigation, perhaps, even that ought not, of itself, to be considered as a total loss. On this, however, I give no opinion. But when the captor, having carried the vessel into port, and completed the examination of the cargo and papers, instead of discharging her, proceeds to libel her as a prize, I think, the loss is complete. The property is no longer subject to the command of the owner, and it is unreasonable, that he should wait the event of judicial proceedings, which may continue for years. The case of an embargo is less strong, because there the confiscation of the property is not intended, and a temporary interruption of the voyage is all that, in general, is to be apprehended. Yet the assured is not obliged to wait the result, but may abandon, immediately on receipt of intelligence of the embargo. Not many judicial decisions have been produced on the point in question. Where principles are strong, it is sufficient, that there have been no decisions to the contrary. It appears, however, that in the state of New York, the precise point has been determined. In the case of Mumford *v.* Church, decided in the supreme court of New York, July term 1799, (1 Johns. Cas. 147), the assured recovered for a total loss where there was a capture, carrying into port, and libelling by a British captor, though, after the abandonment, the property was restored. It is necessary, that some general rule should be established; some line drawn, by which the assured may know at what time he has a right to abandon. In most cases, the voyage is extremely injured by proceedings in the court of admiralty, and the event is doubtful. For it cannot be denied, that, of late, such strange occurrences have taken place, in war and politics, as have very much affected the principles and practice of foreign courts of admiralty. Whatever may be said of the law of nature and nations, and the immutable principles of justice, we see very plainly, that the courts obey the will of the sovereign power of their country; and this will fluctuates with the circumstances of the times.

full value, to return it to the captors in case the sentence of acquittal *should be reversed. As to them, therefore, the property was not restored. It never arrived in safety. Its trial was still pending, and [*35 if it should finally be condemned, the freighters would never be liable to the plaintiff for the freight. As to the plaintiff, therefore, it still continues a

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I am, therefore, of opinion, that both by the words and spirit of a policy of insurance, the assured may abandon, when he receives intelligence of the libelling of his vessel.

2. This brings me to the consideration of the second point. Has any circumstance occurred, "which limits the plaintiff to a recovery for only a partial loss?"

It is contended, that such an event has occurred; that the vessel was acquitted, by decree of the court of admiralty; that after acquittal, she proceeded on her voyage, and that one of the owners was on the spot, and knew of the acquittal. I do not think there is much weight in the circumstance of one of the owners being on the spot, because the general agent of all the owners was in Philadelphia. This general agent effected the insurance, and conducted all the business with the underwriters, and the owner who was in New Providence gave him intelligence of what occurred, from time to time, and by no means intended, from anything that appears, to restrain him from making an abandonment. It is true, that the vessel proceeded on her voyage, after she was restored; but it is not stated, nor can the court presume, that any of the owners acted in a manner inconsistent with the abandonment made by their agent. It was proper, at all events, to pursue the voyage for the benefit of whoever might be interested in it. This is the usual practice, and a practice authorized by the policy, and very much for the advantage of the underwriters.

The only difficulty in the case before the court arises from this circumstance; that before the action was brought, the vessel was restored, and even at the time of the abandonment, there was a decree of acquittal, although restitution does not appear to have been actually made until some days after. The counsel for the defendant have relied much on the opinion of Lord MANSFIELD in the case of Hamilton *v.* Mendes, to establish this principle, that a policy of insurance, being in its nature a contract of indemnity, the plaintiff can recover no more than the amount of his actual loss, at the commencement of the action. There is no doubt of the soundness of the principle: I mean, that a policy is a contract of indemnity. The only question is, at what period the rights of the parties are to be tested by this principle; whether at the time of abandonment, or of the commencement of the action? I have considered attentively the case of Hamilton *v.* Mendes. It must be obvious to every one, that the decision in that case was perfectly right. It was simply this; that a man shall not be permitted to abandon and recover for a total loss, when he knew, at the time of his offer to abandon, that his property, which had been lost, was restored, and the voyage very little injured. But in reading the opinion of Lord MANSFIELD, we find a want of accuracy, with which that great man was seldom chargeable. Sometimes, it appears as if he thought the period for fixing the rights of the insurers and the assured, was the commencement of the suit; sometimes, the time of abandonment, and sometimes, he even seems to have extended his ideas so far as the time of the verdict. But finally, he explicitly declares, that he decides nothing but the point before him. He seems to have felt a little sore, at the improper application of some general expressions used by him in the case of Goss *v.* Withers. Anxious to cut off all pretence for doing the same in Hamilton *v.* Mendes, he has taken too much pains to avoid the possibility of misrepresentation. Hence, his argument, considered in the whole, is not altogether clear and consistent. Upon the whole of this case of Hamilton *v.* Mendes, I think it most safe to confine its authority to the point actually decided, which was very different from that we are now considering. Some period must be fixed for determining the right of the parties. To limit it to the time of commencing the action, would be of little service to the insurers; for the law being once so established, an action would be brought, in every instance, on

total loss of the freight. He cannot, in any event, recover it from the freighters, until the appeal is decided, and if that decision should be against the latter, his only chance would be, in the hope of justice from the courts of the captors, who, upon condemnation of the cargo, sometimes order the freight to be paid to the owner of the ship, if he is a fair neutral, and has no interest in the cargo. Nothing but relieving the freighters from the security they had given for the cargo, could entitle the plaintiff to recover against them. The underwriters, therefore, were bound either to pay to the plaintiff the amount they had insured, or, by giving such counter-security as should indemnify the freighters, give the plaintiff a right of action against them. The latter part of the alternative the defendants have refused. The case of *Da Costa* v. *Newnham*, 2 T. R. 407, shows that the underwriters were bound to give such counter-security, or to pay the amount insured. The property never came free into the hands of the freighters. The right of action depends upon the facts existing at the time of abandonment. In the case of *Mumford* v. *Church*, decided by the supreme court of New York, at July term 1799 (1 Johns. Cas. 147), the assured recovered, notwithstanding a restoration, before abandanment. But the assured cannot retract his abandonment, and it is not just, that one party should be bound, and the other at liberty. If the plaintiff had a right to abandon, the defendants were bound to accept.

For the defendants, *Rawle* and *Lewis* contended: 1. That there never was a total loss; and consequently, the plaintiff never had a right to abandon. *2. That before the action was brought, the vessel was acquitted, and therefore, no right of action existed. 3. That before the return of the writ, the vessel and cargo had arrived in safety at the port of destination, and the freight was earned, and that the plaintiff might recover it from the freighters. 4. That the plaintiff had voluntarily suffered the cargo to be delivered, without payment of the freight, and had lost his lien

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the first default of payment. The time of abandonment seems the most natural and convenient period; because the assured must make his election to abandon or not, in a reasonable and short time after he hears of the loss, and the property being transferred by the abandonment, can never afterwards be claimed by the assured. Want of mutuality, is want of justice. There is no reason why the assured should be bound, but the insurer left free to take advantage of events subsequent to the abandonment.

It has been contended by the plaintiff's counsel, that the right to abandon would not have been affected, even if the property had been restored, at the time of the abandonment, because the restitution was unknown to the plaintiff. As to this, I give no opinion. It is unnecessary; because it is stated, that the vessel remained in the custody of the captors, at the time of the abandonment. The defendants' counsel have urged, that this was the fault of the master, or of one of the owners, who was then at New Providence, because, after a decree of acquittal, a writ of restitution might have been sued out. But it not being stated that there was any fault or negligence in the master or owner, I do not think, that the court can infer it; it being stated that the vessel remained in the custody of the captors, we must presume that the custody was legal. Whether for the purpose of giving the captors an opportunity of entering an appeal, or for what purpose it was, the restitution was delayed, we are at a loss to determine. But as restitution was not actually made, and as the plaintiff was ignorant even of the decree of acquittal, his right to abandon remained unimpaired. Upon the whole, I am of opinion, that the plaintiff is entitled to recover for a total loss.

on the goods, by his own folly, and therefore, had no right to recover from the underwriters.

They admitted, that the defendants were liable for a partial loss to the amount of the charges, expenses, &c., in consequence of the capture; but denied, that the plaintiff could claim for a total loss. The information received, at the time of the offer to abandon, was only of an arrest and detention; which, as the Manhattan was a neutral vessel, must be presumed to be only for the purpose of exercising the belligerent right of search; and such a detention has never been holden to give a right to abandon. But a capture by a friend differs from a capture by an enemy. Park 66. It is presumed, that the courts of our friend will do us justice, and restore our property without delay. Hence, no salvage was allowed for the re-capture of a neutral from the power of one of the belligerents, unless under very particular circumstances. If the capture of a neutral be not followed by condemnation, it is not a total loss, unless the voyage be wholly broken up. *Saloucci* v. *Johnson*, Park 79. The right of search (admitted by our treaty) gives a right to send the neutral into port for examination, and for that purpose the belligerent may put a force on board, and take out part of the original crew. The mere capture, ordering her into port, taking out part of the crew and putting other men on board, gave no right to abandon, and yet the abandonment is founded upon those facts only. The defendants were not obliged to accept the abandonment. It ought to have been accompanied by a cession. No subsequent event can make it valid. It was not accepted and therefore, *did not bind either party. The information ought to be such, at the time of abandonment, that the underwriter may know whether he ought to accept it or not. He should be able to decide, whether he ought to undertake the defence of the property. The assured cannot abandon, unless upon information of facts which show a total loss. Subsequent events cannot be coupled with a prior offer to abandon. Suppose, the assured should say, I heard of a gale of wind; I offer to abandon, although I have heard of no loss; could that avail him? In the case of *Suydam & Wyckoff* v. *The Marine Insurance Company*, 1 Johns. 181, the supreme court of the state of New York decided, that the assured cannot avail himself of a subsequent event, without a new abandonment. It is admitted, that the facts, and not the information, decide the right to abandon, but there must be information of sufficient facts, at the time of abandonment. A detention for examination does not necessarily destroy the voyage, nor even render it probable that the voyage will be broken up. Whenever the fact appears, that the voyage is destroyed, and the jury finds the fact to be so (for it is not a matter of law), it is a total loss. There is no printed report of the case of *Mumford* v. *Church*, and therefore, we cannot examine its principles.(a) [*37

But the restitution of the cargo, although on security, is a legal restitution. The freight never was in danger. If it has been, it was in consequence of facts which would have discharged the underwriters. If the

(a) LIVINGSTON, J.—That case was reversed, in principle, by the court of errors, in Church v. Bedient, 1 Caines Cas. 21. And the law now established by that case in New York is, that if, at the time of abandonment, the property has been actually restored, the abandonment is invalid.

voyage was lawful, freight would have been allowed, even upon enemies' goods, and although the voyage was not ended. Whether the cargo be condemned or not, the ship-owner is entitled to his freight. The only ground upon which a British court of admiralty will refuse to allow freight, is a ground which would also discharge the underwriters, viz., that the ship-owner was not a fair neutral. *The Copenhagen*, 1 Rob. 245 (Am. Ed.); *38] *The Rebecca*, 2 Ibid. 84; *The *Racehorse*, 3 Ibid. 88; *The Atlas*, Ibid. 245; 4 Rob. 279, 282; *The Vrow Henrica*, 4 Ibid. 279, 282; *Touteng* v. *Hubbard*, 3 Bos. & Pul. 291. It is only a delay in receiving the freight. If the plaintiff is to be considered as a fair neutral ship-owner, he must eventually recover the freight, either from the owners of the cargo or the captors; and if he is not such a fair neutral ship-owner, the warranty in the policy is falsified, and the defendants are not liable. Suppose, the delay had been caused by any of the other perils insured against, such as a violent storm driving the ship off from the coast, or a long course of contrary winds, &c., the inconvenience to the plaintiff would have been the same, and yet he would have no right to abandon. The defendants did not undertake that the voyage should be performed in any given time, nor to be liable for the wear and tear of the ship, tackle, &c., in consequence of such protracted voyage. The defendants have a right to avail themselves, in their defence, of the very evidence produced on the trial of the libel, and even of the sentence of condemnation, if it proceed upon grounds inconsistent with the warranty. The defendants were not bound to give the counter-security; because the plaintiff's vessel had been restored to him, without security; and it cannot be right, that the defendants, who are not underwriters upon the cargo, should give security to its whole amount, in order to enable the plaintiff to recover the freight from the freighters.

But the freight was earned, and the freighters were liable to the plaintiff, before the defendants were bound to plead. The vessel and cargo had arrived, and the defendants may now set up that fact as a defence. If a vessel, supposed to be lost, be abandoned to the underwriters, and a suit brought upon the policy, but before plea pleaded, the vessel arrive in safety; the underwriters may plead this fact, or give it in evidence, and it will be a good defence. In *Hamilton* v. *Mendes*, 2 Burr. 1214, Lord MANSFIELD says, "We give no opinion how it would be, in case the ship or goods be restored in safety," "between the commencement of the action and the verdict." And in *Sullivan* v. *Montague*, Doug. 112, he says, "*actio non* goes, *39] in every case, to *the time of pleading, not to the commencement of the action." The declaration is the beginning of the action. Co. Litt. 126 *a*. And even after plea pleaded, if any matter of defence arise, the defendant may, and indeed, if he would not for ever lose the benefit of it, he must, plead it as a plea *puis darrein continuance*. *Ewer* v. *Moile*, Yelv. 141.

But the plaintiff has never made a cession to the underwriters of his right to the freight, and of the means of obtaining it. He had, by a covenant in the charter-party, given up his lien upon the cargo; a fact unknown to the defendants, and which ought to have been disclosed. He had also, without the defendants' consent, left the question of freight to arbitrators, who have not yet decided.

Ingersoll, in reply.—The question whether the cargo shall be restored to its owners, is still pending in the court of admiralty, and if the plaintiff had, at any time, a right to recover the freight from the underwriters, that right still continues. On the first intelligence of the capture, the plaintiff offered to abandon; and according to the true state of the facts, he had then a complete right to abandon. Although the property was neutral, yet it was captured as prize. It was treated by the captors as enemy-property. It was, in fact, taken *jure belli*, and therefore, it can make no difference, in principle, whether the nation of the captors be at peace or at war with the nation of the captured vessel and cargo. It was seized as prize of war, and the question of neutrality is still to be decided. The delivery of possession, upon security, is no more a restitution of the cargo, than if the owners had purchased it under a decree of condemnation. It has not arrived safe; it is burdened with an incumbrance to its full value. The circumstances detailed by the second mate, in his first information to the plaintiff, clearly showed that the seizure was made of the property as prize of war. It is said, the abandonment was made too soon. In *Fuller* v. *Mc Call*, 2 Dall. 219, the plaintiff was holden to be too late, because he did not abandon upon receipt of the first intelligence, although the information came from a *stranger. But here, the information was given by an officer of the ship, [*40 an eye-witness, and the vessel was, in fact, libelled as prize of war. The insured is bound to abandon in a reasonable time after receiving the intelligence, so that the underwriter may take measures to save what he can, to indemnify himself; and no objection can be made, that the assured abandoned too soon, if subsequent information prove that he had then a right to abandon.

Whether this be strictly a capture or not, is immaterial, as one of the risks insured against is taking at sea; and as this taking was with the view of seizure as prize, on suspicion of its being enemy-property, it is within the principle of belligerent capture. The right of search gives no right to dispossess the owner of his vessel, either according to the law of nations, or to our treaty with Great Britain. But if such right did exist, an unreasonable detention gives a right to abandon; and whenever a vessel is libelled, if the insured means to claim for a total loss, he ought to abandon, in order to give the underwriters a right to defend the property in the court of admiralty. The assured, after an offer to abandon, is not bound to defend the property. The libel was filed eight days before the abandonment, but that fact was not necessary to give the right to abandon.

It has been said, that the books furnish no case in which the capture by a friend has been decided to be a total loss. But Marshall, in p. 422 and 435, considers the law as settled, that a capture by a friend, under pretence of enemy's goods, must be considered as a capture, because it is done as an act of hostility. The uncertainty of the duration of the detention, puts it upon the same principle as the case of an embargo. A capture is a total loss, although a condemnation never takes place. *Goss* v. *Withers*, 2 Burr. 694, 697.

An actual deed of cession was not necessary, because the offer to abandon was not absolutely accepted. The offer to cede the plaintiff's right was sufficient. The covenant in the charter-party to relinquish the lien on the

cargo for freight, upon other security being given, did not affect the interests of the underwriters. The security stood in the place of the cargo, and was abundantly sufficient.

*41] *Marshall, Ch. J., delivered the opinion of the court, as follows:— The Manhattan, a neutral ship, while prosecuting the voyage insured, was captured by a belligerent cruiser, the second mate and twenty-one of the hands were taken out, and two British officers and fifteen seamen put on board, and she was ordered into a British port. The mate soon afterwards arrived in the United States, in another vessel. On the 26th of February 1805, he gave information of these facts to the owner of the Manhattan, who, on the 28th of the same month, communicated it to the insurers, and offered to abandon to them. On the 2d of April, payment of the freight was demanded and refused. The Manhattan was carried into Bermuda, and libelled as prize of war. On the 20th of April, in the same year, both vessel and cargo were acquitted. From this sentence, so far as respected the cargo only, an appeal was prayed, which does not appear to have been decided. The cargo was delivered to the owners, on their giving security, and on the 8th of July, the vessel and cargo arrived at the port of destination. The underwriters having refused to give counter-security, this action was brought, on the 6th of June, after the vessel was liberated, and before her arrival at the port of destination. The policy is on the freight.

The question referred to this court is, whether the facts stated entitle the insured to recover against the underwriters for a total loss. In examining this question, the material points to be determined are: 1st. Had the insured a right to abandon when the offer was made? 2d. Have any circumstances since occurred which affect this right? These are important questions to the commercial interest of the United States, and ought to be settled with as much clearness as the case admits.

*42] *It is universally agreed, that to constitute a right to abandon, there must have existed a total loss, occasioned by one of the perils insured against; but this total loss may be real or legal. Where the loss is real, a controversy can only respect the fact; but the circumstances which constitute a legal, or technical loss, yet remain, in many cases, open for consideration. It has been decided, that a capture, by one belligerent from another, constitutes, in the technical sense of the word, a total loss, and gives an immediate right to the assured to abandon to the insurers, although the vessel may afterwards be recaptured and restored. It has also been decided, that an embargo or detention by a foreign friendly power, constitutes a total loss, and warrants an immediate abandonment. But the capture, or taking at sea of a neutral vessel by a belligerent, is a case on which the courts of England do not appear to have expressly decided, and which must depend on general principles, on analogy, and on a reasonable construction of the contract between the parties.

A capture by an enemy is a total loss, although the property be not changed, because the taking is with an intent to deprive the owner of it, and because the hope of recovery is too small, and too remote, to suspend the right of the assured, in expectation of that event. If a neutral ship be captured as enemy-property, the taking is, unquestionably, with a design to deprive the owner of it; and the hope of recovery is, in many cases, remote, since it

may often depend on an appellate court; and though not equally improbable as in the case of capture by an enemy, is not so certain, as is stated in argument by the counsel for the defendants. The distinction between a capture by an enemy and by a belligerent, not an enemy, has not been taken in the cases adjudged in England, so far as those cases have been laid before the court, and the best general writers seem to arrange them in the same class. 2 Marshall 422, 435. *It has been also determined, that a total loss existed in the case of an embargo, or the detention of a foreign prince. [*43

In one case cited at the bar (*Saloucci* v. *Johnson*), the court of king's bench determined, that an illegal arrest at sea, amounted to a detention by a foreign prince, and although that case has since been overruled in England, so far as it decided, that to resist a search did not justify a seizure, yet the principle that an arrest at sea was to be resolved into a detention by a foreign power, has not been denied. Marshall (p. 435), after noticing the contrary decisions respecting the right of a neutral to resist a search, adds, "yet the above case of *Saloucci* v. *Johnson* may, nevertheless, I conceive, be considered as an authority to prove, that if a neutral ship be unlawfully arrested and detained by a belligerent cruiser, for any pretended offence against the law of nations, this would be a detention of princes." That a detention of a foreign power by embargo, or otherwise, warrants an abandonment, is well settled. 2 Marshall 483.

The opinion given by the court of king's bench in the case of *Saloucci* v. *Johnson*, goes no further than to establish that an unlawful arrest at sea is to be considered as the detention of a foreign prince. Whether the arrest can only be considered as unlawful, when the cause alleged, if true, is not in itself sufficient to justify a seizure, or when, if true, it would be sufficient, but is in reality contrary to the fact, is not stated. In point of reason, however, it would seem, that when an arrest is made at sea, by a person acting under the authority of a prince, the detention is as much the detention of princes in the one case as in the other.

In the case of an embargo, the detention is lawful. The right of any power to lay an embargo has not been questioned. Yet it is universally admitted, that an embargo constitutes a detention, which amounts, at the time, to a total loss, and warrants an abandonment. *In what consists the difference between a detention occasioned by an embargo, and a detention occasioned by an arrest at sea, of a neutral, by a belligerent power? An embargo is not laid with a view to deprive the owner of his property, but the arrest is made with that view. In the first case, therefore, the property detained is not in hazard; in the last, it always is in hazard. So far the claim to abandon on an arrest is supported by stronger reason than the claim to abandon, when detained by an embargo. [*44

But it is argued, that the duration of an embargo has no definite limitation, while a neutral vessel may count on being instantly discharged. Such is the rapidity of proceeeding in a court of admirality, that its mandate of restoration is figuratively said to be "borne on the wings of the wind." Commercial contracts have but little connection with figurative language, and are seldom rightly expounded by a course of artificial reasoning. Merchants generally regard the fact itself; and if the fact be attended to, an embargo seldom continues as long as the trial of a prize cause, where an ap-

peal is interposed. The history of modern Europe, it is believed, does not furnish an instance of an embargo of equal duration with the question whether the cargo of the Manhattan be or be not lawful prize. The reasoning of the books in the case of a capture by an enemy, and of an embargo, applies in terms, but certainly in reason, to an arrest by a belligerent, not an enemy. 2 Marshall 483.

The reasoning of the English judges, in all the cases which have been read at bar, and their decisions on the question of abandonment, have received the attention of the court. To go through those cases, would protract this opinion to a length unnecessarily tedious. With respect to them, therefore, it will only be observed, that the principles laid down appear to be applicable to an arrest, as well as to a capture or detention of foreign powers; and that a distinction between an arrest and such capture or detention, has never been taken.

*45] *The contract of insurance is said to be a contract of indemnity, and therefore (it is urged by the underwriters, and has been repeatedly urged by them), the assured can only recover according to the damage he has sustained. This is true, and has uniformly been admitted. But if full compensation could only be demanded, where there was an actual total loss, an abandonment could only take place where there was nothing to abandon.

There are situations in which the delay of the voyage, the deprivation of the right to conduct it, produce inconveniences to the assured, for the calculation of which, the law affords, and can afford, no standard. In such cases, there is, for the time, a total loss: and in this state of things, the assured may abandon to the underwriter, who stands in his place, and to whom justice is done, by enabling him to receive all that the assured might receive. A capture by an enemy, and an embargo by a foreign power, are admitted to be within this rule, and a complete arrest by a belligerent, not an enemy, seems, in reason, to be equally within it.

It is, therefore, the unanimous opinion of the court, that where, as in this case, there is a complete taking at sea, by a belligerent, who has taken full possession of the vessel as prize, and continues that possession to the time of the abandonment, there exists, in point of law, a total loss, and the act of abandonment vests the right to the thing abandoned, in the underwriters, and the amount of insurance, in the assured.

2. Have any circumstances occurred, since the abandonment, which have converted this total into a partial loss? Without reviewing the conduct of the assured, subsequent to that period, it will be sufficient to observe, that he has performed no act which can be construed into a relinquishment of the right which was vested in him by the offer to abandon.

It only remains, then, to inquire, whether the release and return of the

*46] Manhattan deprives the assured of *the right to resort to the underwriters for a total loss, which was given by the abandonment? This point has never been decided in the courts of England. In the case of *Hamilton* v. *Mendes*, Lord MANSFIELD leaves it completely undetermined, whether the state of loss, at the time the abandonment is made, or at the time of action brought, or at the time of the verdict rendered, shall fix the right to recover for a partial or a total loss.

A majority of the judges are of opinion, that the state of loss, at the time of the abandonment, must fix the rights of the parties to recover on an

action afterwards brought; and the judge who doubts respecting it, is of opinion, that, in this case, counter-security having been refused by the underwriters, the question of freight is yet suspended. It is to be certified to the circuit court of Pennsylvania, that in the case stated for the opinion of this court, the plaintiff is entitled to recover for a total loss.

Montalet *v.* Murray. (*a*)

Jurisdiction.—Costs.

When both parties are aliens, the courts of the United States have not jurisdiction.[1]

If it do not appear upon the record, that a suit might have been maintained in the courts of the United States, between the original parties to a promissory note, no suit can be maintained upon it, in those courts, by any subsequent holder.[2]

Costs are not given, upon reversal of judgment.

Error to the Circuit Court for the district of Georgia. The action was brought in the court below by Murray, a citizen of the state of New York, against Montalet, an alien, and citizen of the French republic, upon sundry promissory notes, made by the defendant, at St. Domingo, *payable to the order of Monsieur Caradeaux de la Caye, whose residence, or citizenship, or national character, did not appear in the declaration. [*47

It was suggested, that it did not appear by the record, that a suit could have been prosecuted in that court, to recover the contents of those notes, if no assignment had been made, and therefore, the court could not take cognisance of the present case, being prohibited by the act of congress, (1 U. S. Stat. 78, § 11.)

P. B. Key, for the defendant in error, stated, that it appeared in the plea, that the payee of the note was also an alien, and subject of France. *Turner* v. *Bank of North America*, 4 Dall. 8.

The Court was unanimously of opinion, that the courts of the United States have no jurisdiction of cases between aliens.

Key then suggested, that perhaps it did not sufficiently appear upon the record, that the original parties to the notes were aliens; But—

Marshall, Ch. J., said, that if it did not appear upon the record, that the character of the original parties would support the jurisdiction, that objection was equally fatal, under the uniform decisions of this court.

Judgment reversed, for want of jurisdiction, and with costs, under the authority of *Winchester* v. *Jackson* (3 Cr. 514).

(*a*) Present, Marshall, Chief Justice, Washington, Johnson and Livingston, Justices.

[1] Hinckley *v.* Byrne, 1 Deady 224.

[2] Gibson *v.* Chew, 16 Pet. 315; Drumgoole *v.* Farmers' and Merchants' Bank, 2 How. 241; Coffee *v.* Planters' Bank, 13 Id. 183. The jurisdiction is determined by the citizenship of the indorser, at the time of the commencement of the suit. Chamberlain *v.* Eckert, 2 Biss. 126. The statute applies to non-negotiable, as well as negotiable paper. Shuford *v.* Cain, 1 Abb. U. S. 302. But not to a note made payable to bearer, though indorsed by the payee. Varner *v.* West, 1 Woods 493.