

**The Mary**

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**Court :** US Supreme Court

**Decided On :** 1815

**Appeal No. :** 13 U.S. 126

**Appellant :** The Mary

**Judgement :**

The Mary - 13 U.S. 126 (1815)

U.S. Supreme Court The Mary, 13 U.S. 9 Cranch 126 126 (1815)

**The Mary**

**13 U.S. (9 Cranch) 126**

*APPEAL FROM THE CIRCUIT COURT*

*FOR THE DISTRICT OF RHODE ISLAND*

## **SYLLABUS**

The condemnation of a vessel as enemy's property for want of a claim cannot prejudice the claim for her cargo, but it is still competent for the claimant of the cargo to controvert the fact that the vessel was enemy's property so far as that fact could prejudice his claim.

One claimant cannot be injured by the contumacy of another.

The holder of a bottomry bond cannot claim in a court of prize. An American vessel sailing from England in August, 1812, in consequence of the repeal of the British orders in council, and compelled by dangers of the seas to put into Ireland, where she was necessarily detained until April, 1813, when she sailed again for the United States under the protection of a British license, being captured on the voyage by an American privateer, was protected by the President's instructions of 28 August, 1812. The continuity of the voyage was not broken.

If a cargo be innocently put on board in an enemy's country, if at that time the importation be lawful, it cannot be rendered unlawful by a detention occasioned in the course of the voyage either by the perils of the sea or the act of the enemy unless this effect be produced by some positive act of the legislature.

A judgment against one defendant for the want of a plea, or a decree against one defendant for want of an answer, does not prevent any other defendant from contesting, as far as respects himself, the facts admitted by the absent party.

The decisions of a court of exclusive jurisdiction are necessarily conclusive on all other courts, because the subject matter is not examinable in them, but in the same court they are no further conclusive than judgments and decrees of courts of common law and equity; they bind the subject matter as between parties and privies.

The reason of the doctrine that the whole world are parties in an admiralty cause, and therefore bound by the decision, determines its extent. Every person may make himself a party and appeal from the sentence, but notice of the controversy is necessary in order to become a party, and before the rights of an individual are bound by a judicial sentence, he must have notice, either actual or implied, of the proceedings. When those proceedings are against the person, notice is served personally, or by publication; when they are *in rem*, notice is served upon the thing itself. This is necessarily notice to all those who have any interest in the thing, and it is reasonable, because it is necessary and because it is the part of

common prudence for all who have an interest, to guard it by persons in a situation to protect it.

But those who have no interest in the vessel which could be asserted in a court of admiralty, have no notice of the seizure, and can on no principles of justice or reason be considered as parties in the cause.

Appeal from the sentence of the Circuit Court for the District of Rhode Island condemning the cargo of the *Mary* as prize to the privateer *Paul Jones*.

This cause was argued at last term, when leave was given by this Court for further proof by affidavits on the following points.

1. As to the citizenship of N. J. Visscher.
2. As to the names of the other heirs of General Fisher, who are interested in the property, the place of their residence, and their national character.
3. As to the time when N. J. Visscher went to England, the object he had in view in going thither, how long he resided there, when the cargo was purchased, and when he returned to the United States.
4. As to the instructions which the *Paul Jones* had on board at the time of the capture of the *Mary*, and particularly whether the President's instruction of 28 August, 1812, had been delivered to the captain or had come to his knowledge at the time of the capture, or whether the *Paul Jones* had been in port after 28 August, 1812, and before the capture.

The captors also had leave to make further proof as to the same points.

The further proof now offered consisted of the affidavits of the claimant, N. J. Visscher, Jacob S. Pruyn, and David Gelston, Collector of the Customs for the port of New York. The affidavit of N. J. Visscher stated in substance that he and sundry other persons (whose names and places of residence are mentioned, and who are all citizens and residents of the United States) are

the sole heirs at law and personal representatives of the late general Garret Fisher. who died in London intestate. That he, in behalf of himself and as agent for the other heirs, went to England (having first obtained leave from the War Department, he being a military officer in the service of the United States) in consequence of an agreement between him and the other heirs dated June 19, 1811 (which original agreement is annexed to the affidavit). He arrived in England on 22 August, 1811, and obtained letters of administration on the estate of General Fisher, collected the effects, converted them into cash, paid the debts, and was prepared to remit the balance to the United States long before the war was known in England, and was waiting for a favorable opportunity of investing the same in property that could be advantageously sent to the United States, the balance of exchange being then greatly against him, and not being able to invest the whole in United States stock. That as soon as the revocation of the English orders in council took place, supposing that it would be followed by the repeal of the nonimportation law of the United States, he gave orders for the purchase of British goods to nearly the whole amount of the balance remaining in his hands, which purchase, including the goods now in question, was made by Harman Visger, his agent, before the war was known in England, who caused them to be sent to Bristol to be shipped, where they arrived in July and August, whence they were shipped early in August on board the American brig *Mary*. That the goods were the sole property of the claimant, for himself and the other heirs of General Fisher. That he left England as soon as his business was settled, and arrived in the United States on 19 October, 1812.

The affidavit of Mr. Pruyn confirms that of Mr. Visscher as to the residence and citizenship of the claimant and the others interested in the cargo.

The affidavit of Mr. Gelston states the fact that a copy of the President's instruction of 28 August, 1812, was given to the commander of the *Paul Jones* before she sailed on the cruise in which she captured the *Mary*.

No further proof was offered on the part of the Captors.

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court as follows:

Nanning J. Visscher, an American citizen, administrator of General Garret Fisher, deceased, went to Great Britain in the year 1811 for the purpose of collecting the estate of the said general Garret Fisher in that country and remitting it to the United States for those who were entitled to it by law. Immediately after the repeal of the orders in council, the said Nanning J. Visscher invested a considerable portion of the funds of the said estate in British merchandise, and engaged the brig *Mary*, a vessel having an American register, to convey it to the United States. The *Mary* was engaged at Whoolwich and came round to Bristol, where her cargo was procured. She began to take it on board on 3 August, 1812, and on 15 August, having completed her lading, she sailed from the port of Bristol for the United States, having on board a British license dated on 8 July, 1812. While prosecuting her voyage, she encountered such severe weather and received such damage as to be under the necessity, in order to avoid the danger of foundering at sea, to put into the port of Waterford, in Ireland, for the purpose of being repaired. While lying in Waterford

and undergoing repairs, she was also detained by a general embargo imposed on all American vessels in the ports of Great Britain. The *Mary* being released by the High Court of Admiralty, and her repairs being completed, her license was renewed on 27 March, 1813, and she sailed from Waterford for Newport, in Rhode Island, on the 7th of the following month. On 22 April she was captured by the American privateer *Paul Jones*, captain Taylor, and brought into Newport, Rhode Island, where the vessel and cargo were libeled as enemy property. No claim being put in for the vessel, she was condemned, but the cargo, which was claimed by Nanning J. Visscher, for himself and the other heirs of General Fisher, was restored. From this sentence the captors appealed. In the circuit court, the sentence of the district court was reversed and the cargo was condemned. From

this sentence of condemnation an appeal was taken to this Court, and the case was argued at the last term.

The President's instructions of 28 August, 1812, were then for the first time relied on, but it was not admitted on the part of the captors that these instructions were known to captain Taylor. For the ascertainment of this important fact it was necessary to admit further proof.

It being uncertain how this fact would appear, the Court also directed further proof on other points which were involved in some degree of doubt.

It is now proved incontestably that the instructions of 28 August were on board the *Paul Jones* at the time of the capture. These additional instructions direct

"the public and private armed vessels of the United States not to intercept any vessels belonging to citizens of the United States coming from British ports to the United States laden with British merchandise in consequence of the alleged repeal of the British orders in council."

The effect and operation of these instructions were settled in the case of *The Thomas Gibbons*, [12 U. S. 421](#) . The only inquiry to be made in this case is do they apply to the *Mary*?

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To sustain their application it must appear,

1. That the *Mary* belonged at the time of capture to a citizen of the United States.
2. That she was coming from a British port to the United States, laden with British merchandise, in consequence of the alleged repeal of the British orders in council.

1. Was the *Mary* the property of an American citizen?

She carried an American register, which represented her as the property of James B. Kennedy, a citizen of the United States.

She sailed from Charleston, in South Carolina, as an American vessel, commanded by Captain Stafford, a native American citizen, who continued to command her until her capture, and who always supposed her to be the property of Mr. Kennedy. Her first license, which was granted before intelligence of the declaration of war had reached England, was granted to her as an American vessel, and in the renewed license she was still considered as an American vessel.

In opposition of this testimony is the deposition of one of the mariners, who supposes one Smith, a British subject, to be a part owner of the *Mary*, because the captain so informed him, and because Smith ordered the people about as much as Mr. Kennedy or the captain.

So much of this deposition as refers to the information of the captain is not very probable, and if true, must either discredit the captain's testimony or be considered as a communication made for some particular purpose while the vessel was in a British port. That part of it which states Smith to have ordered the people about as much as Mr. Kennedy is not very intelligible, since Mr. Kennedy, the owner of the *Mary*, does not appear to have been on board the vessel or at Bristol or at Waterford.

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Had a claim been put in for the *Mary*, this testimony, opposed to the proof furnished by the register and the deposition of the captain would have been light indeed.

But no claim was filed for the *Mary*, and she was consequently, according to the course of the court of admiralty, condemned as enemy property.

This sentence is now relied on by the captors as establishing the fact. The argument has been pressed with great earnestness, and is certainly entitled to serious consideration.

The conclusive effect which the captors would give to this sentence is founded in part on reasoning which is technical, and in part on the operation which the fact itself ought to have on the human mind in producing a conviction that the claim was not filed because it could not be sustained.

A sentence of a court of admiralty is said not only to bind the subject matter on which it is pronounced, but to prove conclusively the facts which it asserts. This principle has been maintained in the courts of England, particularly as applying to cases of insurance, and has been adopted by this Court in the case of [Croudson v. Leonard](#), 4 Cranch 434. Its application to the case at bar will be considered.

The *Mary* was not condemned by the sentence of a foreign court of admiralty in a case prior to and distinct from that in which the cargo was libeled. She was comprehended in the same libel with the cargo.

The whole subject formed but one cause, and the whole came on together before the same judge. By the rules of the court, the condemnation of the vessel was inevitable, not because in fact she was British property, but because the fact was charged and was not repelled by the owner, he having failed to appear and to put in his claim. The judge could not close his eyes on this circumstance; nor could he, in common justice, subject the cargo, which was claimed according to the course of the court, to the liabilities incurred by being

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imported in a hostile bottom. In the same cause, a fact, not controverted by one party, who does not appear, and therefore as to him taken for confessed, ought not, on that implied admission, to be brought to hear upon another who does appear, does controvert and does disprove it. The owners of the cargo had no control over the owner of the vessel. Visscher could not force Kennedy to file a claim, nor could Visscher file a claim for him.

The evidence that the vessel was American property could not be looked into so far as respected the rights of Kennedy, because he was in contumacy; but Visscher was not in contumacy. He was not culpable for, and therefore ought not

to suffer for, the contumacy of Kennedy. That contumacy, in reason and in justice, ought not to have prevented the district court from looking into the testimony concerning proprietary interest in the vessel so far as the rights of other claimants depended on that interest. Nor is the Court informed of a legal principle which should have restrained the district judge from looking into this testimony. If we reason from analogy, we find no principle adopted by the courts of law or equity which in its application to courts of admiralty would seem to subject one claimant to injury from the contumacy of another.

A judgment against one defendant for the want of a plea, or a decree against one defendant for want of an answer, does not prevent any other defendant from contesting, so far as respects himself, the very fact which is admitted by the absent party.

No reason is perceived why a different rule should prevail in a court of admiralty, nor is the Court informed of any case in which a different rule has been established.

If the district court was not precluded by the nonclaim of the owner of the vessel from examining the fact of ownership, so far as that fact could affect the cargo, it will not be contended that an appellate court may not likewise examine it.

This case is to be distinguished from those which

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have been decided on policies of insurance, not only by the circumstance that the cause respecting the vessel and the cargo came on at the same time before the same court, but by other differences in reason and in law which appear to be essential.

The decisions of a court of exclusive jurisdiction are necessarily conclusive on all other courts, because the subject matter is not examinable in them. With respect to itself, no reason is perceived for yielding to them a further conclusiveness than is allowed to the judgments and decrees of courts of common law and equity.

They bind the subject matter as between parties and privies.

The whole world, it is said, are parties in an admiralty cause, and therefore the whole world is bound by the decision. The reason on which this *dictum* stands will determine its extent. Every person may make himself a party and appeal from the sentence, but notice of the controversy is necessary in order to become a party, and it is a principle of natural justice of universal obligation that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. Where these proceedings are against the person, notice is served personally or by publication; where they are *in rem*, notice is served upon the thing itself. This is necessarily notice to all those who have any interest in the thing, and is reasonable because it is necessary, and because it is the part of common prudence for all those who have any interest in it to guard that interest by persons who are in a situation to protect it. Every person, therefore, who could assert any title to the *Mary* has constructive notice of her seizure, and may fairly be considered as a party to the libel. But those who have no interest in the vessel which could be asserted in the court of admiralty have no notice of her seizure, and can on no principle of justice or reason be considered as parties in the cause so far as respects the vessel. When such person is brought before a court in which the fact is examinable, no sufficient reason is perceived for precluding him from reexamining it. The judgment of a court of common law or the decree of a court of equity would, under such

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circumstances, be reexaminable in a court of common law or a court of equity, and no reason is discerned why the sentence of a court of admiralty under the same circumstances should not be reexaminable in a court of admiralty.

This reasoning is not at variance with the decision that the sentence of a foreign court of admiralty condemning a vessel or cargo as enemy property is conclusive in an action against the underwriters on a policy in which the property is warranted to be neutral.

It is not at variance with that decision, because the question of prize is one of which courts of law have no direct cognizance, and because the owners of the vessel and cargo were parties to the libel against them.

In the case of [Croudson v. Leonard](#), 4 Cranch 434, two judges expressed their opinions. Those who were silent but who concurred in the opinion of the Court undoubtedly acquiesced in the reasons assigned by those judges. On the conclusiveness of a foreign sentence, judge JOHNSON said

"The doctrine appears to me to rest on three very obvious considerations: the propriety of leaving the cognizance of prize questions exclusively to courts of prize jurisdiction; the very great inconvenience, amounting nearly to an impossibility, of fully investigating such cases in a court of common law; and the impropriety of revising the decisions of the maritime courts of other nations whose jurisdiction is coordinate throughout the world."

These reasons undoubtedly support the opinion founded on them, but it will be readily perceived that they would not apply to the case before the Court.

After stating the conclusiveness of the sentence of courts of exclusive jurisdiction, JUDGE WASHINGTON said

"This rule, when applied to the sentences of courts of admiralty, whether foreign or domestic, produces the doctrine which I am now considering upon the ground that all the world are parties in an admiralty cause. The proceedings are *in rem*, but any person having an interest in the property may interpose a claim or may prosecute an appeal from the sentence. "

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"The insured is emphatically a party, and in every instance has an opportunity to controvert the alleged grounds of condemnation by proving, if he can, the neutrality of the property. The master is his immediate agent, and he is also bound to act for the benefit of all concerned, so that in this respect he also represents the insurer."

The very foundation of this opinion that the insured is bound by the sentence of condemnation is that he was in law a party to the suit, and had a full opportunity to assert his rights. This decision cannot be applicable to one in which the person to be affected by the sentence of condemnation was not and could not be a party to it.

If the sentence condemning the *Mary* did not technically preclude the owners of the cargo from asserting in the court of admiralty her American character, the weight of the evidence on that point is to be fairly estimated.

In support of her American character, the documentary evidence is complete and unequivocal, and corroborative testimony is calculated to strengthen a belief in the verity of the register. In support of her hostile character, the omission of the owner to file his claim is chiefly relied on. The importance of this circumstance is not to be controverted. Its weight, however, is much diminished by the consideration that the case affords no reasonable ground for believing that the owner could have been restrained from making his claim by the apprehension of failing to support it. There is no testimony, and there is no reason to suspect that any testimony was attainable, which could have successfully opposed the register. This consideration gives plausibility to the argument that the worthlessness of the vessel, the bottomry bond with which she was charged, the expectation that the condemnation would relieve him from that debt, might be the motives for not resisting that condemnation. It is possible, too, that in point of fact he might not have actual notice of the proceedings. This is not to be presumed, and is not to benefit the owner, but it is possible; and may be taken into the

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account in estimating the effect of this negligence on persons who are not culpable for it.

It has been said that the owners of the cargo, and that Nanning J. Visscher, who held the bottomry bond, ought to have filed a claim. But the interest under the bottomry bond could not have been asserted, nor had the owners of the cargo any

right to the vessel. Had they known that they were to be in any manner affected by the character of the vessel, they might, and most probably would, have exerted themselves to have brought forward Kennedy as a claimant or to have accounted for his silence; but in the district court the President's instructions were unknown, and their effect unthought of. The owners of the cargo therefore neither troubled themselves about the vessel nor attempted to account for the claim to her not being filed. When afterwards in this Court the bearing of those instructions was discovered and further proof was directed, that direction did not extend to proof which might account for the failure of Kennedy to assert his title to the vessel. This may excuse the claimants for not producing testimony to that point.

Upon the best consideration we have able to bestow upon the subject, the Court is of opinion that the *Mary*, in this claim, must be deemed to have been the property of an American citizen.

2. Did she sail from a British port in consequence of the alleged repeal of the British orders in council?

That the voyage in its inception was produced by the opinion that the repeal of the British orders in council would terminate the differences between the two nations is too clear for controversy. Had the *Mary* proceeded directly from Bristol to her port of destination in the United States, the counsel for the captors would not contend that it was not a voyage described by the instructions of 28 August. But the delay in the port of Waterford, it is said, has broken the continuity of the voyage, and in deciding on its character, the departure from Waterford, not the departure from Bristol, must be considered as its commencement.

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It is not denied that, in a commercial sense, this is one continued voyage, to take its date at the departure of the *Mary* from Bristol. But it is urged that where the rights of war intervene, a different construction must take place.

The Court does not accede to the correctness of this distinction.

The *Mary* was forced into Waterford by irresistible necessity, and was detained there by the operation of causes she could not control. Had her departure been from a neutral port, and she had been thus forced, during the voyage, into a hostile port, would it be alleged that she had incurred the liabilities of a vessel sailing from a port of the enemy? It is believed that this allegation could not be sustained and that it would not be made. But as between the captors and the captured in this case, the voyage was, in its commencement, as innocent as if made from a friendly port. The detention at Waterford, then, can no more affect the character of the voyage in the one case than in the other.

But it is said that the owners of the cargo ought to have applied to the American government for a license to bring it into the United States.

So far as respects the captors, there could be no necessity for a license, since the vessel was already protected from them by the orders of the President under which they sailed, and for any other purpose a license was unnecessary, provided the importation, if the voyage had been immediate and direct from Bristol, could be justified.

If a cargo be innocently put on board in an enemy country, if at that time it be lawful to import it into the United States, the importation cannot be rendered unlawful by a detention occasioned in the course of the voyage either by the perils of the sea or the act of the enemy unless this effect be produced by some positive act of the legislature.

There is no such act.

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It has been contended that the act for the remission of fines, penalties and forfeitures in certain cases, passed on 2 January, 1813 controls the instructions given by the President on 28 August, 1812, and limits the operation of those instructions to the specific cases described by Congress, and as that act protects only those importations which were made previous to its passage, it has been

argued that the President's instructions can go no further.

Independent of the war, all British merchandise was excluded from the ports of the United States by a system of policy supposed to have been founded on the British orders in council.

The Secretary of the Treasury had power to remit forfeitures incurred under these laws. When the orders in council were repealed, large shipments were made of British merchandise by American merchants in the full confidence that the American restrictive system would fall with the orders which produced it. This opinion and the proceedings in consequence of it were thought excusable both by the executive and legislative departments of government. The President instructed the cruisers of the United States not to molest vessels of this description,

"but on the contrary, to give aid and assistance to the same in order that such vessels and their cargoes may be dealt with on their arrival as may be decided by the competent authorities."

These instructions act solely on the rights of war, and regulate the conduct of the public and private armed vessels of the United States.

The legislature passed an act on 2 January, 1813, taking away the discretion of the Secretary of the Treasury and directing him absolutely to remit all penalties and forfeitures incurred by violating the nonintercourse laws, in all cases of importation made before the passage of the act, in American vessels, provided the goods were the property of citizens of the United States and the vessels departed from any port of the United Kingdom of Great Britain and Ireland between 23 June and 15 September then preceding.

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This act does not contemplate the conduct of captors or the rights of war. Its sole object is to remit certain penalties already incurred by a violation of municipal law. The legislature does not appear to have had in view the instructions given by the President to the armed vessels of the United States, much less to have intended

to control those instructions.

But in effecting these different objects, the executive and the legislature were impelled by the same motive -- the peculiar hardship of exposing the citizens of the United States in such a case to the penalties either of war or of municipal law. The one intended to protect from capture, the other from forfeiture, property which had been shipped in the reasonable confidence that peace and commercial intercourse between the two countries were the fruits of the repeal of the British orders in council. The President recognized the principle, but left the time within which it should operate to be decided by the armed vessels and by the courts according to the circumstances of each case. The legislature prescribed certain limits within which it should operate. This Court, in construing the less explicit instructions of the President with respect to the departure of a vessel from a British port, has respected the more explicit language of the legislature on the same subject. But the instructions of the President relate only to the departure of the vessel. They do not extend to the time of its arrival. In this respect there is nothing to be explained. Consequently the act of Congress can furnish no aid in their construction. That the instructions were intended to protect from capture all vessels which had sailed in that confidence which was inspired by the repeal of the British orders in council, however the voyage might be protracted, is apparent from their language, and from the fact that they continued to be delivered to the armed vessels of the United States after the passage of the Act of 2 January, 1813.

It is the unanimous opinion of the Court that the *Mary* was, at the time of her capture, protected by the instructions under which the captor sailed.

This opinion renders all inquiry into the character of the cargo unnecessary.

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The counsel for the captors have claimed their costs and expenses on the ground that there was probable cause of capture.

This claim is sustained by the Court. Further proof has been required, and the lateness of the period at which the *Mary* was found on the ocean justified a suspicion that her case was not one to which the instructions of the President extended.

*The sentence of the circuit court condemning the cargo of the Mary is reversed and the cause is remanded to that court with directions to dismiss the libel so far as respects the cargo and to restore the same to the claimants and to allow the captors their reasonable costs and expenses.*

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