

Legal History Seminar: Maryland Prize Court Decisions in the Supreme Court, 1789-1830  
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### *McCall v. Marine Insurance Company*

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**Abstract**

*Marine insurance contracts were one of the most important categories of federal litigation in the early nineteenth century. The increase in international conflict resulted in a corresponding increase in the risk associated with maritime activity and the number of claims insurance companies litigated in an effort to minimize losses. Accordingly, a rich body of commercial law was developed by the federal courts in which the cases were tried. One such case was *McCall v. Marine Insurance Company*, in which the Supreme Court determined the impact of the addition of a single unusual word in the clause that set forth the risks protected against, employing principles of the law of nations as well as principles of contractual construction.*

**Disciplines**

*Law, Maritime History*

## **I. Prelude: A Brief History of the Role and Treatment of Marine Insurance in the United States**

*Marine insurance is a difficult and complex subject. Yet its importance in maritime affairs cannot be overemphasized. Without exception it pervades every single sphere of maritime activities, and absent marine insurance protection, maritime commerce could come to a standstill.<sup>1</sup>*

Some legal scholars opine that marine insurance cases present the most “important category of commercial litigation” from the first several decades of the nineteenth century.”<sup>2</sup>

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<sup>1</sup> 1 ALEX L. ET AL., *THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE* 3 (1987).

<sup>2</sup> See William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1515 (1984) (noting that marine insurance cases “produced the most uniform—and therefore the most successful—system of commercial law in the American states”).

Underwriting of marine insurance risks by American individuals and partnerships began in New York around 1759.<sup>3</sup> The first American marine insurance corporation was formed in Philadelphia in 1792, and in light of its initial general success,<sup>4</sup> marine insurance companies began to spring up in other cities along the east coast, including many in Baltimore.<sup>5</sup> While the initial efforts of American underwriters were quite successful, due largely to the fact that the era was generally prosperous for shipping, that success was short lived.<sup>6</sup> With the turn of the century, the Napoleonic Wars and the War of 1812 marked a dramatic increase in the loss of vessels and their cargo, and in an effort to remain viable, marine insurance companies regularly litigated policy claims in an effort to minimize their losses.<sup>7</sup>

Part of the complexity of marine insurance law stems from its dual nature; it implicates aspects of both admiralty law and commercial law, and it has been subject to different judicial treatment throughout distinct periods of American legal history. Pursuant Article III of the Constitution, which delegates authority over “all Cases of admiralty and maritime Jurisdiction,”<sup>8</sup> federal courts have always had subject matter jurisdiction over cases involving marine insurance contracts.<sup>9</sup> However the Court’s jurisprudence concerning which body of law federal courts should apply when deciding cases involving marine insurance contracts has changed over time, seemingly in conjunction with broader shifts in the Court’s jurisprudence concerning federalism

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<sup>3</sup> PARKS ET AL., *supra* note 1, at 12.

<sup>4</sup> See WILLIAM D. WINTER, MARINE INSURANCE, ITS PRINCIPLES AND PRACTICE 21 (3d ed. 1952)

<sup>5</sup> WINTER, *supra* note 4, at 21; ROBERT M. IRELAND, THE LEGAL CAREER OF WILLIAM PINKNEY 1764-1822 68 (1986).

<sup>6</sup> WINTER, *supra* note 4, at 21.

<sup>7</sup> IRELAND, *supra* note 5, at 95-96.

<sup>8</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>9</sup> See *Delovio v. Boit*, 7 F.Cas 418 (C.C.D.Mass 1815) (No. 3,776) (holding that the Constitution’s “delegation of cognizance of ‘all civil cases of admiralty and maritime jurisdiction’ to the courts of the United States comprehends all maritime contracts, torts, and injuries,” including marine insurance contracts).

and the common law. Even prior to the Supreme Court’s explicit holding 1842 that federal courts were not bound to adhere to state court decisions when deciding matters of general commercial law,<sup>10</sup> federal courts employed both admiralty and commercial aspects of the general common law when deciding marine insurance cases.<sup>11</sup> However, even since the Court overturned its precedent in 1938, holding instead that “there is no federal general common law,” such that any matter not governed by either the Constitution or by an act of Congress is governed by state law,<sup>12</sup> there is still a body of federal admiralty common law.<sup>13</sup> Accordingly, federal courts continued to decide all aspects of marine insurance cases pursuant to that body of law until 1955, when the Court held that, in the absence of either conflicting federal legislation or a specific conflicting federal admiralty rule, the law of the state in which the federal court sits should govern the regulation of marine insurance contracts.<sup>14</sup>

#### **A. History and Interpretation of the Perils Clause**

Marine insurance is essentially a contract of indemnity, but the scope of that indemnity is wholly dependent on the terms of the contract. The clause of the marine insurance contract that the Court had occasion to interpret in *McCall v. Marine Insurance Co.* is known as the “perils clause,” since it enumerates the risks that are insured against. The perils clause typically includes

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<sup>10</sup> *Swift v. Tyson*, 41 U.S. 1, 19 (1842).

<sup>11</sup> *Fletcher*, *supra* note 2, at 1539-40 (“The law merchant, usually described as part of the common law, was the general law governing transactions among merchants in most of the trading nations of the world. The maritime law was an even more comprehensive and eclectic general law than the law merchant.”).

<sup>12</sup> *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

<sup>13</sup> *See Wilburn Boat Co. v. Fireman’s Fund Ins. Co.*, 348 U.S. 310, 314 (1955) (“[I]n the absence of controlling Acts of Congress, this Court has fashioned a large part of the existing rules that govern admiralty. And states can no more override such judicial rules validly fashioned than they can override Acts of Congress.”).

<sup>14</sup> *Wilburn*, 348 U.S. at 313-14.

both marine hazards and war hazards.<sup>15</sup> It took its traditional form in 1779 in the policies of Lloyd's S.G. of London,<sup>16</sup> and, in its entirety, provided as follows:

*Touching the adventures and perils which we, the assurers, are contented to bear and do take upon us in this voyage: they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship etc. or any part thereof.*<sup>17</sup>

The perils clause in the contract at issue in *McCall v. Marine Insurance Co.* contained the unusual addition of the word “unlawful” prior to the phrase “arrests, restraints, and detainments.”

In the clause's common form, the word “arrests” referred to stopping a ship either at sea or in port “for the purpose of making an examination of her papers or cargo, but without any intention of appropriating either the ship or cargo.”<sup>18</sup> Alternatively, “restraints” referred to governmental restrictions on the use of ports by commercial ships, like embargos, that might interrupt the voyages of those ships and result in a loss of their cargo.<sup>19</sup> Finally, “detainments” referred to the detention of a vessel pursuant to a nation's police power, such as a blockade, while a vessel is in port.<sup>20</sup> In *McCall v. Marine Insurance Company*, the owners of the cargo alleged a total loss<sup>21</sup> that resulted from the *Cordelia* being turned away from her port of destination by a blockading squadron. Accordingly, because the word “unlawful” had been

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<sup>15</sup> WINTER, *supra* note 4, at 174.

<sup>16</sup> The American marine insurance industry of the early nineteenth century was influenced largely by its British counterpart, which was dominated by the well known Lloyd's S.G. of London. Over the course of the prior century, Lloyd's had evolved from a coffee house where ship owners, merchants, and the like would meet to gossip about marine interests, into a well organized association of underwriters. PARKS ET AL., *supra* note 1, at 8-10.

<sup>17</sup> PARKS ET AL., *supra* note 1, at 272. The “letters of mart and countermart” insured against in the traditional form of the perils clause are synonymous with letters of marque and reprisal, which authorize privateering on behalf of a belligerent nation. VI THE OXFORD ENGLISH DICTIONARY 189 (1933).

<sup>18</sup> WINTER, *supra* note 4, at 188.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *See infra*, text accompanying note 68.

added to the perils clause, the legality of the blockade was a major factor impacting whether the Marine Insurance Company was required to indemnify the owners of the cargo for any loss resulting therefrom.

## **B. The Law of Nations and Blockades**

The legality of a blockade in the early nineteenth century was governed largely by the law of nations. In *Thirty Hogsheads of Sugar v. Boyle*, Chief Justice John Marshall explained that “[t]he law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states throughout Europe and America. This law is in part unwritten, and in part conventional.”<sup>22</sup>

Pursuant to the law of nations, belligerent countries generally accord respect to the right of a neutral country to carry on regular commercial activity between the ports of its own coast and those of its colonial possessions.<sup>23</sup> However, if a neutral country engages in trade with any nation that is in a state of conflict with another nation, that country loses its neutral character and is instead seen as an ally of the belligerent country with whom it trades.<sup>24</sup> The very purpose of colonial trade is to furnish the mother country with valuable commodities from the colony while the colony simultaneously supplies a market for the consumption of the exports of the mother country<sup>25</sup>. Accordingly, a belligerent’s rights with respect to the colonial possessions of its enemy was equal to its right to its rights with respect to any other possession of its enemy.<sup>26</sup> The

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<sup>22</sup> 13 U.S. 191, 198 (1815). Chief Justice Marshall went on to explain that in America, “[t]he decisions of the Courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the Courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.” *Id.*

<sup>23</sup> FRANCIS H. UPTON, *THE LAW OF NATIONS AFFECTING COMMERCE DURING WAR* 173-74 (1862).

<sup>24</sup> *Id.* at 174.

<sup>25</sup> *Id.* at 179.

<sup>26</sup> *Id.*

most important of those rights was undoubtedly the right to blockade the ports of an enemy.<sup>27</sup> A blockade was “the carrying into effect by an armed force, of that rule of war which renders commercial intercourse with the particular port or place subject to subject to such force, unlawful on the part of neutrals.”<sup>28</sup>

However, in order for a belligerent’s blockade to be fully valid such that it would subject a neutral to penalty upon its violation, it was required to meet three criteria: (1) there must have existed an actual, continuous, physical blockade, declared by sovereign authority (2) the neutral challenged with violating the blockade must have had notice of the blockade,<sup>29</sup> and (3) the neutral must have entered or exited the port laden with cargo after the commencement of the blockade.<sup>30</sup> Moreover, pursuant to a 1794 agreement between the United States and Great Britain, when a vessel set sail for a port without the knowledge that that port was blockaded, that vessel would be turned away and would not be subject to confiscation unless she again attempted to enter the port.<sup>31</sup>

## **II. *McCall v. Marine Insurance Company***

### **A. The Facts of the Case**

On 5 April 1811, the *Cordelia* embarked on a voyage from the island of Tenerife; her cargo included \$15,000 worth of “lawful goods and merchandise.”<sup>32</sup> Tenerife is a Spanish island off the northwestern coast of Africa. It is roughly the center island of the Canary Islands and is

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<sup>27</sup> *Id.* at 189.

<sup>28</sup> *Id.*

<sup>29</sup> The notice requirement was typically satisfied either by the belligerent nation informing the neutral nation of the existence of the blockade, upon which any subject of the neutral nation was chargeable with such knowledge, or by notoriety of the blockade itself. However, the notice requirement was occasionally relaxed in the Napoleonic Wars for neutrals who were at a great distance from the blockading power. *Id.* at 192-94.

<sup>30</sup> *Id.* at 190 (explaining the “indispensable” nature of the requirements as a function of the harshness of impact of a blockade on the well being of its subject ports).

<sup>31</sup> *Id.* at 194.

<sup>32</sup> *McCall v. Marine Ins. Co.*, 12 U.S. 59 (1814).

the current home of one of the Canary Islands' two capital cities, Santa Cruz de Tenerife. Tenerife's most common agricultural products include bananas and tobacco.<sup>33</sup>

After departing from Tenerife, the *Cordelia* was bound first for the port of Surabaya, located on the island of Java, and ultimately for Philadelphia.<sup>34</sup> Java was a major spice producer and part of the Dutch East Indies colony (which later became modern Indonesia), then under the control of the Dutch Republic.<sup>35</sup> At the time the *Cordelia* departed, unbeknownst to the *Cordelia*'s crew, the owner of her cargo, or the Marine Insurance Company, the British were attempting to capture the colony from the Dutch, a process that included blockading Surabaya and its neighboring ports. The aim of the British blockade was likely to harm the commerce and resources of the Dutch East Indies by inhibiting its imports and exports.<sup>36</sup>

Thus, on the 8th of July, more than three months after leaving Tenerife, when she was only twelve hours away from reaching Surabaya, the *Cordelia* was boarded by an officer of a British frigate.<sup>37</sup> The frigate was part of the squadron then blockading the port of Surabaya as well as all other ports of Java and its neighboring island, Madura.<sup>38</sup> Pursuant to the law of nations,<sup>39</sup> the British blockade of the Dutch East Indies was a legitimate means of attempting to cut off the Dutch East Indies from trade with neutral nations, including the United States.<sup>40</sup> The

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<sup>33</sup> David Harris, *Canary Island Facts*, USA Today (November 18, 2013, 10:45 AM), <http://traveltips.usatoday.com/canary-islands-facts-21395.html>.

<sup>34</sup> *McCall*, 12 U.S. at 60.

<sup>35</sup> See generally Antoine Cabaton, *Java, Sumatra, and the Other Islands of the Dutch East Indies* (1911).

<sup>36</sup> 78 Am. Jur. 2d War § 90 (citing *The Circassian*, 69 U.S. 135 (1864)).

<sup>37</sup> *McCall*, 12 U.S. at 60.

<sup>38</sup> *Id.* at 60.

<sup>39</sup> See *supra* note 22 and accompanying text.

<sup>40</sup> *McCall*, 12 U.S. at 65; see also 78 Am. Jur. 2d War § 90 (citing *The Amy Warwick*, 67 U.S. 635 (1862)).

*Cordelia* was bound to recognize the rights of the British as a belligerent engaged in war, and the port was effectively closed to her.<sup>41</sup>

After taking possession of the *Cordelia*, the frigate escorted her to the admiral in command of the squadron.<sup>42</sup> The following day, the admiral dismissed the *Cordelia*, warning her master that she would be captured if she attempted to enter any of the ports subject to the blockade.<sup>43</sup> But her master was undeterred, and later that same day the *Cordelia* attempted to enter the port of Surabaya for a second time. Her attempt was unsuccessful; the *Cordelia* was once again apprehended and, this time, was detained for two days before she was released with orders to leave the area immediately under threat of capture and impressment.<sup>44</sup> Pursuant to the law of nations, the commander of the British frigate had the right to make good on his threat of capturing the *Cordelia* for attempting to enter the port of Surabaya once she acquired the knowledge it was blockaded.<sup>45</sup> Accordingly, after she was let go for a second time, the master thought better of any further attempt at running the blockade and made way for Philadelphia, where she arrived on 19 November 1811.<sup>46</sup>

## **B. Procedural History**

Although the Court's opinion stated that the goods and merchandise on board the *Cordelia* were valued at \$15,000, it did not identify the goods. However, they were presumably perishable in nature because once the *Cordelia* arrived in Philadelphia, the owners of the cargo

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<sup>41</sup> *McCall*, 12 U.S. at 65; *see also* 78 Am. Jur. 2d War § 90 (citing *The Amy Warwick*, 67 U.S. 635 (1862)).

<sup>42</sup> *McCall*, 12 U.S. at 60.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 65; *see also* *Fitzsimmons v. Newport Ins. Co.*, 8 U.S. 185, 199 (1908) (holding that, pursuant to the law of nations and the treaty then in place between the United States and England, in order for an attempt to enter a blockaded port to constitute a breach, the entering vessel must be on notice of the blockade).

<sup>46</sup> *McCall*, 12 U.S. at 60.



abandoned to the Marine Insurance Company for the cost of the cargo.<sup>47</sup> Abandonment is the act by which an insured transfers to his insurer his right, title, and interest in what remains of the property after a loss has occurred.<sup>48</sup> The pertinent part of the insurance policy held by the owners of the cargo provided that the Marine Insurance Company would indemnify the owners for losses resulting from “unlawful arrests, restraints, and detentions of all kings, princes, or people of what nation, condition or quality soever.”<sup>49</sup> When the insured tenders abandonment, the insurance company either accepts it, in which case it indemnifies the claimant, or refuses it, in which case it declines to do so. Because of the “unlawful” qualification in the indemnity clause, the Marine Insurance Company refused the abandonment.

The owners thus brought a lawsuit against the insurance company in the Circuit Court for the District of Maryland seeking reimbursement of their losses.<sup>50</sup> Pursuant to the Judiciary Act of 1789, the original jurisdiction of federal district courts was limited to admiralty and maritime cases and a few minor civil and criminal cases.<sup>51</sup> At the time, federal circuit courts were composed of two justices of the Supreme Court and the district court judge for the district in which the court was held.<sup>52</sup> The circuit courts had a more general original jurisdiction, concurrent with that of state courts, over all civil suits involving a dispute over more than five

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<sup>47</sup> *Id.* While it is unclear from the language of the Supreme Court’s opinion whether the action was for a total loss of only her cargo or for both the ship and her cargo, because the *Cordelia’s* voyage to Philadelphia was successful, and because the record is void of a description of an event that would have caused physical damage to the ship, it is unlikely that the plaintiffs’ claim of total loss pertained to the ship. This paper thus assumes that the action was for a total loss of the *Cordelia’s* cargo. *See infra* note 68 and accompanying text.

<sup>48</sup> WINTER, *supra* note 4, at 207.

<sup>49</sup> *McCall*, 12 U.S. at 60. The more common practice in marine insurance policies was apparently to include this clause without the “unlawful” qualification. *See* Fletcher, *supra* note 2, at 1543 (“A customary clause in insurance policies provided that the underwriters agreed to indemnify the insured against ‘arrests, restraints, and detentions of all kings, princes, or people.’”).

<sup>50</sup> *Id.*

<sup>51</sup> Act of September 24 1789, 1 Stat. 73.

<sup>52</sup> *The First Judges of the Federal Courts*, 1 Am. J. Legal Hist. 76, 76-7 (1957).

hundred dollars if either the United States was a party, one of the parties was an alien, or the parties were residents of different states.<sup>53</sup> While the Circuit Court for the district of Massachusetts later held that marine insurance contracts were properly subject to federal admiralty jurisdiction,<sup>54</sup> it appears that this case was brought in the circuit court pursuant to its original jurisdiction over the civil suit due to the value of the goods involved and the diversity of citizenship of the parties. Moreover, that the case was heard by a jury indicates that it was treated as a matter of common law; if it had been brought under federal admiralty jurisdiction, it would not have been subject to a trial by jury.<sup>55</sup>

The Circuit Court directed a jury verdict in favor of the Marine Insurance Company because, as a matter of law, the plaintiffs could not recover. That decision was appealed to the Supreme Court through a writ of error,<sup>56</sup> and its opinion in *McCall v. Marine Insurance Company* ensued.

### C. The Parties to the Case

Archibald McCall was the name plaintiff and appellant in *McCall v. Marine Insurance Company*. McCall was born in 1767 in Philadelphia.<sup>57</sup> His father, also Archibald, was a member

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<sup>53</sup> THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOLUME TWO THE JUSTICES ON CIRCUIT 2 (Maeva Marcus et al. eds., 1988).

<sup>54</sup> See *supra* note 9 and accompanying text.

<sup>55</sup> 1 Stat 73 at § 9; See *Waring v. Clarke*, 46 U.S. 411, 460 (1847) (“But there is no provision, as the constitution originally was, from which it can be inferred that civil causes in admiralty were to be tried by a jury, contrary to what the framers of the constitution knew was the mode of trial of issues of fact in the admiralty. We confess, then, we cannot see how they are to be embraced in the seventh amendment of the constitution, providing that in suits at common law the trial by jury should be preserved.”)

<sup>56</sup> “Petition in error” was the review mechanism required pursuant to the Judiciary act of 1789 for both review of a district court decision by a circuit court and of a circuit court decision by the Supreme Court. 1 JULIUS GOBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES 478 (1971). The petition was required to contain “an authenticated transcript of the record, an assignment of errors and a prayer for reversal . . .” but was not required to contain a “bill of exceptions, an instrument essential to secure review of mistakes of law that in strict common law practice never appeared on the record.” *Id.* at 478-79.

<sup>57</sup> Lucius F. Ellsworth, *Archibald McCall: The Business Career of a Philadelphia Sedentary Merchant 1800-1817*, 2 (approx. 1960) (Hagley Museum and Library Digital Archives, Accession No. 1645).

of the Philadelphia Common Council and a businessman who operated a local store and traded dry goods in the East and West Indies.<sup>58</sup> The elder McCall had a clear influence on his son; in the 1790s the younger McCall became increasingly active in Philadelphia's commercial and civic circles.<sup>59</sup> In addition to engaging in extensive mercantile and trading ventures, McCall helped organize the Philadelphia Chamber of Commerce and was the director of the First Bank of the United States for the institution's entire life.<sup>60</sup> In the early nineteenth century McCall's trading business continued to expand; he sent ships to Indian, Caribbean, South American, European, Baltic, and East Indian ports.<sup>61</sup> Such widespread trading in a period rife with conflicts at sea frequently required McCall to obtain marine insurance to cover the risks associated with the voyages.<sup>62</sup> Many of his ventures were insured by the United States Company,<sup>63</sup> and if he engaged in any other transactions with the Marine Insurance Company, they were not well documented. Marine insurance premiums at the time ranged from between two and five percent, and were largely impacted by the level of international conflict.

#### **D. The Parties' Arguments Before the Court**

Before the Supreme Court, Robert Goodloe Harper argued on behalf of the plaintiffs, the owners of the ship's cargo. Harper argued that the *Cordelia's* "voyage was broken up and lost" as an initial matter by "men of war" and also by "detention of princes," which gave the owners of cargo a right to abandon.<sup>64</sup> Although its current meaning has changed in response to technological advancements over time, the traditional definition of "men of war" in the context

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<sup>58</sup> *Id.* at 2.

<sup>59</sup> *Id.* at 2-3.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 3-4.

<sup>62</sup> *Id.* at 4.

<sup>63</sup> *Id.*

<sup>64</sup> *McCall*, 12 U.S. at 61.

of a marine insurance policy refers to “aggressive acts of a belligerent government committed on the seas by means of war machines.”<sup>65</sup>

Jones<sup>66</sup> and William Pinkney argued on behalf of the defendants, the Marine Insurance Company. Jones first argued that an interruption to a voyage at an intermediate port, as opposed to a port of final destination, could not constitute a “total loss.”<sup>67</sup> Under marine insurance law, a total loss of cargo occurs when the cargo is completely lost or destroyed, including both actual physical destruction as well as total loss of worth.<sup>68</sup> Jones argued that the distinction between an intermediate and final port was critical because a voyage directly from Tenerife to Philadelphia might have been equal in profit to that of the entire voyage as planned.<sup>69</sup>

Jones also focused on the inclusion of “unlawful” prior to the word “arrests,” arguing that because the owners had not shown that the detention was unlawful, it did not fall within the policy.<sup>70</sup> Moreover, Jones pointed out that because it was executed in full conformance with the law of nations, the owners could not possibly establish that the blockade or the detention resulting therefrom was unlawful.<sup>71</sup> Finally, Jones challenged the timing of the owners’ abandonment of the cargo, arguing that it was invalid because it was not made during the impediment that occasioned the loss.<sup>72</sup>

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<sup>65</sup> WINTER, *supra* note 4, at 186.

<sup>66</sup> Pinkney’s co-counsel may have been General Walter Jones, with whom Pinkney occasionally argued before the Supreme Court. *See* IRELAND, *supra* note 5, at 142, 202 n.4. Jones frequently argued before the Supreme Court, and in 1815, stood in for the unavailable Attorney General Richard Rush to argue on behalf of the United States. *Id.* at 142 n.57.

<sup>67</sup> *McCall*, 12 U.S. at 61.

<sup>68</sup> WINTER, *supra* note 4, at 399.

<sup>69</sup> *McCall*, 12 U.S. at 61.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 62.

William Pinkney, the former United States Attorney General and a well known member of the elite Supreme Court bar of the early nineteenth century,<sup>73</sup> also argued on behalf of the Marine Insurance Company. Not only was Pinkney extremely active before the Supreme Court at the time, but he was also an expert in marine insurance law and would ultimately be considered the foremost marine insurance expert in the country.<sup>74</sup> Marine insurance law was also closely linked to Pinkney's other area of expertise, prize law; privateering was usually one of the very risks insured against in a marine insurance policy.<sup>75</sup> Moreover, Pinkney was from Baltimore, which was home to a large portion of the American marine insurance industry at the time, and all but two of the marine insurance cases Pinkney argued before the Court involved Baltimore companies.<sup>76</sup> In the eight years that Pinkney was an active member of the Supreme Court bar, the Court heard nineteen reported marine insurance cases, thirteen of which were argued by Pinkney.<sup>77</sup> And like he did in *McCall*, Pinkney almost always represented the insurance company.<sup>78</sup>

Pinkney first expounded upon Jones's argument, noting that because the term "unlawful" was not usually inserted in English policies, it must be construed to mean *something*.<sup>79</sup> Additionally, Pinkney noted that pursuant to the contract, the vessel was bound by a warranty of neutrality.<sup>80</sup> Pinkney explained that when the *Cordelia* attempted to enter Surabaya, especially after she had been warned against doing so by the commander of the British squadron, she

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<sup>73</sup> KEVIN T. MCGUIRE, *THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY* 12, 14 (1993).

<sup>74</sup> IRELAND, *supra* note 5, at 68.

<sup>75</sup> *Id.* at 69.

<sup>76</sup> *Id.* at 68.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *McCall*, 12 U.S. at 61.

<sup>80</sup> *Id.* at 62.

violated the warranty of neutrality and breached the policy such that it was immediately discharged in its entirety.<sup>81</sup> Finally, Pinkney argued that because the restraint was of a moral rather than a physical nature, it did not justify an abandonment.<sup>82</sup>

In reply, Harper argued that the effect of the addition of the word “unlawful” was irrelevant inasmuch as the owners of the cargo alleged that the loss was a result of “men of war” which was not so qualified. In the alternative, Harper argued that the “unlawful” qualification extended only to arrests, rather than to arrests, restraints, and detainments.<sup>83</sup> As to the warranty of neutrality argument advanced by Pinkney, Harper responded that the loss was complete prior to the Cordelia’s second attempt to enter Surabaya, such that any subsequent actions that might otherwise have violated the warranty of neutrality did not impact her ability to recover for that loss.<sup>84</sup> Finally, Harper argued that the owners of the cargo could not have abandoned before the ship arrived in Philadelphia, prior to which they had no knowledge of the loss.<sup>85</sup>

#### **E. The Opinion of the Court**

Associate Justice Joseph Story delivered the opinion of the Supreme Court. Justice Story announced that the issue before the Court was the “correctness” of the holding of the circuit court that “Plaintiff, under the circumstances, was not entitled to abandon as for a total loss.”<sup>86</sup> The Court, however, declined to express an opinion on both whether, as a general matter, the turning away of a vessel from her port of destination due to a blockade is a valid cause for abandonment, and, if so, specifically whether such a cause would be valid in the context of a policy that requires a ship to abandon its voyage in the event that it cannot continue in a neutral

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 63-64.

<sup>83</sup> *Id.* at 64.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 65.

manner.<sup>87</sup> Instead, the Court opined that the case could be “decided upon an independent ground.”<sup>88</sup>

The Court emphasized that, under the law of nations, the British squadron was well within its rights as a belligerent to blockade Surabaya, a port under the control of its enemy.<sup>89</sup> Moreover, the *Cordelia*'s attempt to enter the port, once on notice of the blockade, constituted a violation of the law of nations, such that her character was no longer neutral and she became subject to condemnation by the British frigate.<sup>90</sup> Accordingly her detention, which the owners of her cargo alleged caused the loss of its value, constituted a “*lawful* arrest and restraint by the blockading squadron.”<sup>91</sup> Because of the lawful nature of the detention, the Court held that the detention did not fall within the ambit of the risks covered by the insurance policy, and that the Marine Insurance Company thus was not obligated to indemnify the owners of the cargo for any losses resulting therefrom.<sup>92</sup> Finally, the Court refuted any argument that the “unlawful” qualifier applied only to arrests, such that the Marine Insurance Company was bound to indemnify the owners of the cargo for both lawful and unlawful restraints and detainments. The Court held that as a matter of construction, “‘arrests, restraints and detainments’ should be coupled together; and, if so, the qualification of unlawful must be annexed to them all.”<sup>93</sup> Accordingly, the Court affirmed the judgment of the Circuit Court.

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* (emphasis in original).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

### **III. Conclusion: The Legal Implications of *McCall***

In the years since *McCall* was decided, no courts have had occasion to cite the Supreme Court's opinion for any legal propositions. However, its import lies in the fact that it aptly illustrates the influence of the principles of the law of nations on federal admiralty common law, especially the principle that a blockade is a legitimate act undertaken by a belligerent nation. That very principle's role in the actions taken decades later by President Abraham Lincoln in the American Civil War cannot be denied. That the whole of the body of Supreme Court precedent upholding the principles of the law of nations strengthened President Lincoln's attenuated claim of authority to institute a domestic blockade cannot be denied.

Moreover, *McCall* aptly illustrates the extent of the hardships faced by the marine insurance industry in the early nineteenth century. The very inclusion of the term "unlawful" in the insurance contract, the sole ground upon which the abandonment was rejected, shows a clear effort by the marine insurance underwriter to limit its liability for losses resulting from legitimate acts of war.



## APPENDIX

### Archibald McCall (1767-1843)

Biography:

Source: Lucius F. Ellsworth, *Archibald McCall: The Business Career of a Philadelphia Sedentary Merchant 1800-1817*, 2 (approx. 1960) (Hagley Museum and Library Digital Archives, Accession No. 1645).

Archibald McCall was a businessman and civic leader who was born into the merchant community of Philadelphia. McCall's father, also Archibald, and uncle, Samuel, were proprietors of a local store, and subsequent to their death, the younger McCall took over the family business. Throughout the 1790's, McCall became increasingly active in Philadelphia's commercial and civic circles. In addition to engaging in extensive mercantile and trading ventures, McCall helped organize the Philadelphia Chamber of Commerce and became the director of the First Bank of the United States, a position that he held for the entirety of the institution's existence.

As McCall's trading business continued to expand in the early nineteenth century, he had occasion to send ships to India, the Caribbean, South America, Europe, and the East and West Indies. Due to the risks inherent in such widespread international trade, McCall frequently had occasion to purchase marine insurance policies. Although McCall insured many of his ventures with Philadelphia-based companies, Baltimore held a place of prominence in the American marine insurance industry, and on at least one occasion, McCall insured cargo in which he had an ownership interest with the Baltimore-based Marine Insurance Company.

McCall also regularly conducted business on behalf of Eleuthere Irenee du Pont, the French founder of the now famous gunpowder company that bore his name, and his brother, Victor. That business regularly included the procurement of raw materials for du Pont's manufacture of gunpowder as well as the purchase of a variety of personal articles requested by the Frenchman. McCall also engaged in advertising, selling, and shipping du Pont gunpowder to private individuals and the United States government. Finally, McCall assisted the du Ponts in procuring financing for their commercial ventures.

In 1813, McCall co-founded a cotton-spinning venture, Duplanty, McCall & Co. that lasted nine years. McCall served as the company's general agent in Philadelphia. But by 1817 McCall was in a great deal of financial trouble. He transferred his share of the company to his brother and went bankrupt due to an inability to pay his creditors. Although McCall managed to avoid imprisonment, his business career never recovered. He died in Philadelphia in 1843.