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In addition to this circumstance, it ought to be observed, that the repeal takes effect at the close of the 30th of *June*, and the law has no existence on the 1st of *July*. Yet the duties on sugars sent out during the last quarter are to be secured or paid on the 1st of *July*. All admit that there was no disposition to relinquish these duties. Of consequence, if the proviso could be necesary in any possible construction of the law, it was necessary in this case.

After the most attentive consideration of the acts of Congress and the arguments of counsel, the court is of opinion, that the duties on refined sugars remaining in the building on the 1st of *July*, 1802, had not then accrued and were not then outstanding. The judgment of the circuit court, which was in favour of the plaintiff below, must therefore be reversed, and judgment rendered for the plaintiff in error.

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An American vessel sold in a Danish island, to a person who was born in the United States, but who had *bona fide* become a burgher of that island, and sailing from thence to a French island, in *June* 1800, with a new cargo purchased by her new owner, and under the *Danish* flag, was not liable to seizure un-

THE facts of this case, are thus stated by the district judge in his decree.

"The libel, in this cause, is founded on the act entitled "An act further to suspend the commercial intercourse between the *United States* and *France*, and the dependencies thereof;" (*Vol. 5. c. 10. p. 15. passed February 27*, 1800) and states that the Schooner sailed from *Baltimore*, after the passing of that act, owned, hired or employed, by persons resident within the *United States*, or by citizens thereof resident elsewhere, bound to *Guadaloupe*, and was taken on the high seas, on the 1st of *June* 1800, by the libellant, then commander of the public armed ship the *Constellation*, in pursuance of instructions given to the libellant, by the President of the *United States*, *there being reason to suspect* her to be engaged in a traffic, or commerce contrary to the said act, &c.

"The claim and answer, replication and rejoinder, are referred to for a further statement of the pic-

"ceedings in this case, on all of which I ground my "decree.

"On a careful attention to the exhibits and testimony "in this cause, and after hearing of counsel, I am of "opinion, that the following facts are either acknow- "ledged in the proceedings, or satisfactorily proved.

"That on or about the 10th of *April* 1800, the "schooner, now called the *Charming Betsy*, but then "called the *Jane*, sailed from *Baltimore* in the district "of *Maryland*, an *American* bottom, duly registered "according to law, belonging to citizens of, and resi- "dent in, the *United States*, and regularly documented "with *American* papers; that she was laden with a "cargo belonging to citizens of the *United States*; "that her destination was first to *St. Bartholomew's*, "where the captain had orders to effect a sale of both "vessel and cargo; but if a sale of the schooner "could not be effected at *St. Bartholomew's*, which was "to be considered the "*primary object*" of the voyage, "the captain was to proceed to *St. Thomas's*, with the "vessel and such part of the flour as should be unsold, "where he was to accomplish the sale. That although "a sale of the cargo, consisting chiefly of flour was "effected at *St. Bartholomew's*, yet the vessel could not "there be advantageously disposed of, and the captain "proceeded, according to his instructions to *St. Tho-* "*mas's* where a *bona fide* sale was accomplished, by "captain *James Phillips*, on behalf of the *American* "owners, for a valuable consideration, to a certain *Ja-* "*red Shattuck*, a resident merchant in the island of *St.* "*Thomas*.

"That although it is granted, that *Jared Shattuck* "was born in *Connecticut* before the *American* revolu- "tion, yet he had removed long before any differences "with *France*, in his early youth, to the island of *St.* "*Thomas*, where he served his apprenticeship, inter- "married, opened a house of trade, owned sundry ves- "sels, and as it is said, lands; which none but *Danish* "subjects were competent to hold and possess. About "the year 1796, he became a *Danish* burger, invested "with the privileges of a *Danish* subject, and owing "allegiance to his *Danish* majesty. The evidence on

der the non-intercourse law of 27th of *February* 1800. If there was no *reasonable* ground of suspicion that she was a vessel trading contrary to that law, the commander of a *United States* ship of war, who seizes and sends her in, is liable for damages.

The report of the assessors appointed by the court of admiralty to assess the damages, ought to state the principles on which it is founded, and not a gross sum without explanation.

An *American* citizen residing in a foreign country may acquire the commercial privileges attached to his *domicil*; and by making himself the subject of a foreign power he places himself out of the protection of the *United States*, while within

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"this head is sufficient to satisfy me of these facts; "though some of them might be more fully proved. "It does not appear that *Jared Shattuck* ever returned "to the *United States* to resume citizenship, but con- "stantly resided, and had his *domicil*, both before and "at the time of the purchase of the schooner *Jane*, at "*St. Thomas's*. That although the schooner was arm- "ed and furnished with ammunition, on her sailing "from *Baltimore*, and the cannon, arms and stores, were "sold to *Jared Shattuck*, by a contract separate from "that of the vessel, she was chiefly dismantled of these "articles at *St. Thomas's*, a small part of the ammuni- "tion, and a trifling part of the small arms excepted. "That the name of the said schooner was at *St. Tho- "mas's* changed to that of the *Charming Betsy*, and "she was documented with *Danish* papers, as the "property of *Jared Shattuck*. That so being the *bona "fide* property of *Jared Shattuck*, she took in a cargo "belonging to him, and no other, as appears by the pa- "pers found on board and delivered to this court.

the territory of the Sovereign to whom he has sworn alle- giance.

Quere, whe- ther a citizen of the *United States*, can di- vest himself absolutely of that character otherwise than in such man- ner as may be prescribed by law?

Whether, by becoming the subject of a foreign power, he is rescued from punish- ment for a crime against the *United States*?

"That she sailed, with the said cargo, from *St. Tho- "mas's* on or about the 25th day of *June* 1800, com- "manded by a certain *Thomas Wright*, a *Danish* "burgher, and navigated according to the laws of *Den- "mark*, for aught that appears to the contrary, bound to "the island of *Guadaloupe*.

What degree of arming con- stitutes an armed vessel?

"That on or about the first of *July* last, 1800, she "was captured on her passage to *Guadaloupe*, by a "*French* privateer, and a prize-master and seven or "eight hands put on board. The *Danish* crew (except "captain *Wright*, an old man and two boys,) being "taken off by the *French* privateer. That on the 3d "of the same *July*, she was boarded and taken pos- "session of, by some of the officers and crew of the "*Constellation*, under the orders of captain *Murray*, "and sent into the port of *St. Pierre*, in *Martinique*, "where she arrived on the 5th of the same month of "*July*. I do not state the contents of a paper called a "*proces verbal*, which however will appear among the "exhibits, because in my opinion it contains state- "ments, either contrary to the real facts, or illusory; "and calculated to serve the purposes of the *French*

" captors. Nor do I detail the number of cutlasses, " a musket and a small quantity of ammunition found " on board when the schooner was boarded by captain " *Murray's* orders. The *Danish* papers were on board, " and except the *proces verbal* formed by the *French* " captors, no other ship's papers. The instructions to " captain *Murray* from the *President of the United* " *States* comprehend the case of a vessel found in " the possession of *French* captors, but then it should " seem it must be a vessel belonging to citizens of the " *United States*. It does not appear that captain *Mur-* " *ray* had any knowledge of *Jared Shattuck* being a " native of *Connecticut*, or of any of the *United States*, " until he was informed by captain *Wright* at *Mar-* " *tinique*.

" It is unnecessary to go into any disquisition about " the instructions to the commanders of public armed " ships, whether they were directory to captain *Mur-* " *ray* in the case in question; and if so, whether they " were, or not, strictly conformable to law does not " finally justify an act which on investigation turns out " to be illegal, either as it respects the municipal laws " of our country, or the laws of nations. Captain " *Murray's* respectable character, both as an officer " and a citizen, forbids any idea of his intention to do " a wanton act of violence towards either a citizen of " the *United States*, or a subject of another nation. " He, no doubt, thought it his duty to send the vessel " in question, to the *United States* for adjudication. " He had also reasons prevailing with him, to sell " *Jared Shattuck's* cargo in *Martinique*. His sending " the schooner to *Martinique* was evidently proper, " and serviceable to the owner as she had not a sufficient " number of the crew on board to navigate her. But " the further proceeding turns out, in my opinion " wrong. Whatever probable cause might appear to " captain *Murray*, to justify his conduct, or excite " suspicion at the time, he runs the risk of, and is ame- " nable for consequences.

" On a full consideration of the facts and circum- " stances of this case, I am of opinion, that the schoon- " er *Jane*, being the same in the libel mentioned, did

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"not sail from the *United States* with an intent to vio-
"late the act, for a breach whereof the libel is filed.
"That she did not belong, when she sailed from *St.*
"*Thomas* for *Guadaloupe*, to a citizen of the *United*
"*States*, but to a *Danish* subject. *Jared Shattuck*
"either never was a citizen of the *United States* under
"our present national arrangement, or if he should at
"any time have been so considered, he had lawfully
"expatriated himself, and became a subject of a friend-
"ly nation. No fraudulent intent appears in his case,
"either of eluding the laws of the *United States* in
"carrying on a covered trade by such expatriation, or
"that he became a *Danish* burgher for any purposes
"which are considered as exceptions to the general
"rule which seems established on the subject of the
"right of expatriation. That, being a *Danish* burgher
"and subject, he had a lawful right to trade to the
"island of *Guadaloupe*, any law of the *United States*
"notwithstanding, in a vessel *bona fide* purchased, either
"from citizens of the *United States* or any other ves-
"sel documented and adopted by the *Danish* laws. I
"do not rely more than it deserves, on the circumstance
"of *Jared Shattuck's* burghership, *of which the best*
"*evidence, to wit, the brief, or an authenticated copy,*
"*has not been produced.* I know well that this brief
"alone, unaccompanied by the strong ingredients in
"his case, might be fallacious. I take the whole com-
"bination to satisfy me of his being *bona fide* a *Danish*
"adopted subject; and altogether it amounts, in my
"mind, to proof of expatriation. The captain *(Wright)*
"produces his *Danish* burgher's brief. He is a native
"of *Scotland.* But even the *British* case of *Pollard* v.
"*Bell*, 8. *T. R.* 435. to which I have been referred,
"shews that, with all the inflexibility evidenced in the
"*British* code, on the point of expatriation, a vessel
"was held to be *Danish* property, if documented ac-
"cording to the *Danish* laws, though the captain, who
"had obtained a *Danish* burgher's brief, was a *Scotch-*
"*man.* It shews too, that in the opinion of the *British*
"judges (who agree, on this point, with the general
"current of opinions of civilians and writers on general
"law,) the municipal laws or ordinances of a country
"do not control the laws of nations. The *British*
"courts have gone great lengths to modify their ancient

'feudal law of allegiance, so as to moderate its rigor, "and adapt it to the state of the modern world, which "has become most generally commercial. They hold "it to be clearly settled, that although a natural born sub- "ject cannot throw off his allegiance to the king, but "is always amenable for *criminal* acts against it, yet for "commercial purposes, he may acquire the rights of a "citizen of another country. *Com. Rep.* 677. 689. I "cite *British* authorities, because they have been pecu- "liarly tenacious on this subject. Naturalization in "this country may sometimes be a mere cover, so may, "and, no doubt, frequently are burgher's briefs. But "the case of *Shattuck* is accompanied with so many "corrobating circumstances, added to his brief, as to "render it, if not incontrovertibly certain, at least an "unfortunate case on which to rest a dispute as to the "general subject of expatriation. I am not disposed "to treat lightly the attachment a citizen of the *United* "*States* ought to bear to his country. There are cir- "cumstances in which a citizen ought not to expatriate "himself. He never should be considered as having "changed his allegiance, if mere temporary objects, "fraudulent designs, or incomplete change of domicil, "appear in proof. If there are any such in *Shattuck's* "case, they do not appear, and therefore I must take "it for granted that they do not exist. That therefore "the ultimate destruction of his voyage, and sale of his "cargo, are illegal.

"The vessel must be restored, and the amount of "sales of the cargo paid to the claimant, or his lawful "agent, together with costs, and such damages as "shall be assessed by the clerk of this court, who is "hereby directed to inquire into and report the amount "thereof. And for this purpose the clerk is directed "to associate with himself two intelligent merchants of "this district and duly inquire what damage *Jared* "*Shattuck*, the owner of the schooner *Charming Betsy* "and her cargo, hath sustained by reason of the premi- "ses. *Should it be the opinion of the clerk, and the as-* "*sessors associated with him, that the officers and crew* "*of the Constellation benefited the owner of the Charming* "*Betsy, by the rescue from the French captors, they*

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" *should allow in the adjustment, reasonable compensation* " *for this service.*

(Signed.) " RICHARD PETERS.
" 28th *April*, 1801."

On the 15th of *May* following, upon the report of the clerk and assessors, a final decree was entered for 20,594 dollars and 16 cents damages, with costs.

From this decree the libellant appealed to the Circuit Court, who adjudged, " that the decree of the District " Court be *affirmed* so far as it directs restitution of the " vessel, and payment to the claimant, of the *net pro-* " *ceeds of the sale of the cargo* in *Martinique*, deduct- " ing the costs and charges there, according to the ac- " count exhibited by captain *Murray's* agent, being one " of the exhibits in this cause; and that the said decree " be reversed for the residue, each party to pay his own " costs, and one moiety of the custody and wharfage bill " for keeping the vessel until restitution to the clai- " mant."

From this decree both parties appealed to the supreme court.

The cause was argued at last term, by *Martin*, *Key*, and *Mason* for the claimant.

No counsel was present for the libellant.

For the claimant it was contended, that the sale of the schooner to *Shattuck* was *bona fide*, and that he was a *Danish* subject. That although she was in possession of *French* mariners, she was not an armed *French* vessel within the acts of congress, which authorised the capture of such vessels. That neutrals are not bound to take notice of hostilities between two nations, unless war has been declared.

That the right of search and seizure is incident only to a state of war. That neutrals are not bound to take notice of our municipal regulations. That the non-intercourse act was simply a municipal regulation, binding only upon our own citizens, and had nothing to do with

the law of nations; it could give no right to search a neutral. *That in all cases where a seizure is made under a municipal law, probable cause is no justification, unless it is made so by the municipal law under which the seizure is made.*

As to the position, that the sale was *bona fide*, the counsel for the claimant relied on the evidence, which came up with the transcript of the record, which was very strong and satisfactory. Upon the question whether *Shattuck* was a *Danish* subject or a citizen of the *United States*, it was said, that although he was born in *Connecticut*, yet there was no evidence that he had ever resided in the *United States*, since their separation from *Great Britain*. But it appears by the testimony that he resided in *St. Thomas's* during his minority, and served his apprenticeship there: That he had married into a family in that island, had resided there ever since the year 1789, had complied with the laws which enabled him to become a burgher, and had carried on business as such, and had for some years been the owner of vessels and lands. Even if by birth he had been a citizen of the *United States*, he had a right to expatriate himself. He had at least the whole time of his minority, in which to make his election of what country he would become a citizen. Every citizen of the *United States*, has a right to expatriate himself and become a citizen of any other country which he may prefer, if it be done with a *bona fide and honest intention, at a proper time, and in a public manner*. While we are inviting all the people of the earth to become citizens of the *United States*, it surely does not become us to hold a contrary doctrine, and deny a similar choice to our own citizens. Circumstances may indeed shew the intention to be fraudulent and collusive, and merely for the purpose of illicit trade, &c. But such circumstances do not appear in the present case. *Shattuck* was fairly and *bona fide* domiciliated at St. Thomas's before our disputes arose with *France*. The act of Congress, "further to suspend," &c. cannot, therefore, be considered as operating upon such a person. The first act to suspend the intercourse was passed on the 13th of June, 1798, *vol. 4. p.* 129, and expired with the end of the next session of Congress. The next act, "further to suspend,"

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&c. was passed on the 9th of *February*, 1799, *vol.* 4. *p.* 244, and expired on the 3d of *March*, 1800. The act upon which the present libel is founded, and which has the same title with the last, was passed on the 27th of *February*, 1800, *vol.* 5. *p.* 15. All the acts are confine in their operations to persons resident *within* the United States, or under their *protection*.

She was not such an armed French vessel as comes within the description of those acts of Congress, which authorised the hostilities with France. She had only one musket, twelve ounces of powder, and twelve ounces of lead. The only evidence of further arms arises from the deposition of one *M'Farlan*. But he did not go on board of her till some days after the capture, and his deposition is inadmissible testimony, because he was entitled to a share of the prize money if the vessel should be condemned; and although a release from him to captain *Murray* appears among the papers, yet that release was not made until after the deposition was taken; and the fact is expressly contradicted by other testimony. The mere possession by nine Frenchmen did not constitute her an armed vessel. She was unable to annoy the commerce of the United States, which was the reason of the adjudication of this court, in the case of the *Amelia*, (See 1 *Cra. Rep.* 1. *Talbot v. Seeman.*) The *proces verbal* is no evidence of any fact but its own existence. If she had arms they ought to have been brought in, as the only competent evidence of that fact. No arms are libelled, and none appear, by the account of sales, to have been sold in *Martinique*.

It being then a neutral unarmed vessel, captain *Murray* had no right to seize and send her in. A right to search a neutral arises only from a state of public known war, and not from a municipal regulation. In time of peace the flag is to be respected. Until war is declared, neutrals are not bound to take notice of it.

The decrees of both the courts below have decided, that the vessel was not liable to capture. The only question is, whether the claimant is entitled to *damages?* Captain *Murray* has libelled her upon the non-intercourse act. He does not state that he seized her because she was a *French* armed vessel, although he

states her to be armed at the time of capture. It has also been decided by both the courts that she is *Danish* property. If an American vessel had been illegally captured by captain *Murray*, he would have been liable for damages; *a fortiori* in the case of a foreign vessel, where, from motives of public policy, our conduct ought not only to be just but liberal.

In cases of personsl arrest, if no crime has in fact been committed, *probable cause* is not a justification, unless it be made so by municipal law. As in the case of *Hue and Cry*, he who raises it is liable if it be false.

If the sheriff has a writ against A, and B is shewn to him as the person, and he arrests B instead of A, he is liable to an action of trespass at the suit of B. 1 *Buls.* 149. *Wale v. Hill.* So if he replevies wrong goods, or takes the goods of one upon a *fi. fa.* against another. In these cases it is no justification to the officer that he was informed, or believed he was right. He must in all cases seize at his peril. So it is with all other officers, such as those of the revenue, &c. *probable cause* is not sufficient to justify, unless the law makes it a justification. If the information is at *common* law for the thing seized and the seizure is found to have been illegally made, the injured party must bring his action of trespass; but by the course of the admiralty, the *captor*, being in court, is liable to a decree against him for damages. 2 *Rob.* 202. *(The Fabius.)* The case of *Wale* v. *Hill*, in 1 *Bulstrode* 149, shews that where a crime has not been committed, there probable cause can be no justification. But where a crime has been committed, the party arresting cannot justify by the suspicion of others; it must be upon his own suspicion.

In the case of *Papillon* v. *Buckner*, *Hardr*, 478, although the goods seized had been condemned by the commissioners of excise, yet it was not held to be a good justification. In 1 *Dall.* 182. *Purviance* v. *Angus*, it was held that an error in judgment would not excuse an illegal capture; and in *Leglise* v. *Champante*,

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2 *Str.* 820, it is adjudged that probable cause of seizure will not justify the officer.*

In 3d *Anstruther* 896, is a case of seizure of *hides*, where no provision was made in the law that probable cause should be a justification. This case cites 7 *T. R.* 53, *Pickering* v. *Truste*. For what reason do the revenue laws provide that probable cause shall be a justification, if it would be so without such a provision? In these cases the injury by improper seizures can be but small, compared with those which might arise under the non-intercourse law. *Great Britain* has never made probable cause, an excuse for seizing a neutral vessel for violating her municipal laws. A neutral vessel is only liable to your municipal regulations while in your territorial jurisdiction. But as soon as she gets to sea, you have lost your remedy. You cannot seize her on the high seas. Even in *Great Britain*, if a vessel gets out of the jurisdiction of one court of admiralty, she cannot be seized in another. It is admitted that a law may be passed authorising such a seizure, but then it becomes a question between the two nations. If the present circumstances are sufficient to raise a probable cause for the seizure, and if such probable cause is a justification, it will destroy the trade of the *Danish* islands. The inhabitants speak our language, they buy our ships, &c. It will be highly injurious to the interests of the *United States*; and this court will consider what cause of complaint it would furnish to the *Danish* nation. If a private armed vessel had made this seizure, the captain and owners would have been clearly liable on their bond, which the law obliges them to give. The object of this act of Congress, was more to prevent our vessels falling into the hands of the *French*, than to make it a war measure by starving the *French* islands.

* The Ch. J observed, that this case was overruled two years afterwards, in a case cited in a note to *Gwillim's edition of Bac. ab.*† The case cited in the note is from 12. *Vin.* 173. *Tit. evidence. P. b.* 6. in which it is said "that Lord Ch. *Baron Bury*, *Montague* and *Page*, against "*Price*, held that where an officer had made a seizure, and there was an "information upon it, &c. which went in favour of the party who afterwards brings trespass; the shewing these proceedings was sufficient to "excuse the officer: It was competent to make out a probable cause for "his doing the act. *Mich.* 6 *Geo.*"

† The case of *Leglise* v. *Champante* was in 2 *Geo.* 2. That cited in the note to *Bac. ab.* referred to by the Ch. J. was in 6 *Geo.* 1. The mistake arises from the note in *Gwillim's* edition not mentioning the date of the case cited from *Viner*.

Even if a *Danish* vessel should carry *American* papers and *American* colours, it would be no justification. In a state of peace we have no right to say they shall not use them if they please. In time of war, double papers, or throwing over papers, are probable causes of seizure, but this does not alter the property; it is no cause of condemnation. The vessel is to be restored, but without damages.

The mode of ascertaining the damages adopted by the district court, is conformable to the usual practice in courts of admiralty. See *Marriott's Reports*; and in the same book, p. 184, in the case of the *Vanderlee*, liberal damages were given.

In the revenue laws of the *United States*; *vol* 4. *p.* 391, probable cause is made an excuse for the seizure; but no such provision is, or ought to have been made in the non-intercourse law. The powers given were so liable to abuse, that the commander ought to act at his peril.

The Ch. J. mentioned the case of the *Sally*, *capt. Foy*, in 2 *Rob.* 185. (*Amer.* Ed.) where a vice-admiralty had decreed, in a revenue case, that there was no probable cause of seizure.

This cause came on again to be argued at this term by *Dallas* for the libellant, and *Martin* and *Key* for the claimant.

Dallas, as a preliminary remark, observed, that the Judge of the district court had referred to the clerk and his associates to ascertain, whether any and what salvage should be allowed. This was an improper delegation of his authority, not warranted by the practice of courts of admiralty, or by the nature of his office. Although they had not reported upon this point, yet he submitted it to the court for their consideration.

After stating the facts which appeared upon the record, and such as were either admitted or proved, he divided his argument into three general points.

1. That *Jared Shattuck* was a citizen of the *United States*, at the time of capture and recapture; and there-

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fore the vessel was subject to seizure and condemnation, under the act of Congress usually called the non-intercourse act.

2. That she was in danger of condemnation by the *French*, and therefore, if not liable to condemnation under the act of Congress, capt. *Murray* was at least entitled to salvage.

3. That if neither of the two former positions can be maintained, yet captain *Murray* had probable cause to seize and bring her in, and therefore he ought not to be decreed to pay damages.

1. The vessel was liable to seizure and condemnation under the *non-intercourse act; Shattuck* being a citizen of the *United States*, at the time of recapture.

Captain *Murray's* authority to capture the *Charming Betsy*, depends upon the municipal laws of the *United States*, expounded by his instructions, and the law of nations.

Before the non-intercourse act, measures had been taken by Congress to prevent and repel the injuries to our commerce which were daily perpetrated by *French* cruizers.

By the act of 28 *May*, 1798, *vol.* 4. *p.* 120, authority was given to capture "armed vessels sailing under authority or pretence of authority from the republic of *France*," &c. and to retake any captured *American* vessel.

The act of 28 *June*, 1798, *vol.* 4. *p.* 153, regulates the proceedings against such vessels when captured, ascertains the rate of salvage for vessels recaptured, and provides for the confinement of prisoners, &c.

The act of *July* 9, 1798, *vol.* 4. *p.* 163, authorises the capture of armed *French* vessels any where upon the high seas—and provides for the granting commissions to private armed vessels, &c.

The right to *retake* an armed, or unarmed neutral vessel in the hands of the French, is no where expressly given; but is an incident growing out of the state of war;

and is implied in several acts of Congress. This was decided in the case of *Talbot* v. *Seeman* in this court, at *Aug. term*, 1801.†

The right of recapture, carrying with it the right of salvage, gave the right of bringing into port; and that port must be a port of the captor.

The first non-intercourse act was passed *June* 13, 1798, *vol.* 4. *p.* 129.—A similar act was passed *Feb.* 9, 1799, *vol.* 4. *p.* 244.

The act upon which the present libel is founded was passed *Feb.* 27, 1800. *Vol.* 5. *p.* 15.

These are not to be considered as mere municipal laws for the regulation of our own commerce, but as part of the war measures which it was found necessary at that time to adopt. It was *quoad hoc* tantamount to a declaration of war.

Happily there is not, and has not been, in the practice of our government, an established form of declaring war.

Congress have the power, and may by one general act, or by a variety of acts, place the nation in a state of war. As far as Congress have thought proper to legislate us into a state of war, the law of nations in war is to apply.

By the general laws of war, a belligerent has a right not only to search for her enemy, but for her citizens trading with her enemy. If authorities for this position were necessary, a variety of cases decided by Sir *William Scott* might be cited.

As to the present case, *France* was to be considered as our enemy. The *non-intercourse act* of 1800, prohibits all commercial intercourse "between any person or persons re-"sident within the *United States*, or under their *protection*, "and any person or persons resident within the territories of "the *French* republic, or any of the dependencies thereof," "And declares that "any ship or vessel, owned, hired, or "employed, in whole, or in part, by any person or per-"sons resident within the *United States* or *any citizen*

† *Ante* Vol. I. p. 33.

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"or citizens thereof *resident elsewhere*," &c. "shall be "forfeited and may be seized and condemned."

A citizen of the *United States*, resident "*elsewhere*," must mean a citizen resident in a neutral country. If *Shattuck* was such a citizen, the case is clearly within the statute. It is not necessary that the vessel should be registered as an *American* vessel; it is sufficient if *owned* by a citizen of the *United States* Registering is only necessary to give the vessel the privileges of an *American* bottom. Nor is it it necessary that she should have been built in the *United States*.

By the 8th section of the act of *27th Feb.* 1800, *vol. 5. p.* 20, reasonable suspicion is made a justification of seizure, and sending in for adjudication. The officer is bound to act upon suspicion—and that suspicion applies both to the character of the vessel, and to the nature of the voyage.

Although the act of congress mentions only vessels of the *United States*, still from the nature of the case, the right to seize and send in must extend to *apparent* as well as *real American* vessels.

Such is the cotemporaneous exposition given by the instructions of the executive.†

The words of these instructions are "you are not only "to do all that in you lies, to prevent all intercourse *whether* "*direct or circuitous*, between the ports of the *United* "*States*, and those of France and her dependencies, in "cases where the vessels or cargoes are *apparently*, as "well as *really American*, and protected by *American* "papers only, but you are to be vigilant that vessels or

† Upon Mr Dallas's offering to read the instructions.

Chase J. said, he was always against reading the instructions of the executive; because if they go no further than the law, they are unnecessary; if they exceed it, they are not warranted.

Marshall, Ch. J. I understand it to be admitted by both parties, that the instructions are part of the record. The construction, or the effect they are to have, will be the subject of further consideration. *They may be read.*

Chase, J. I can only say, I am against it, and I wish it to be generally known. I think it a bad practice, and shall always give my voice against it.

"cargoes really *American*, but covered by *Danish* or other "foreign papers, and bound to *or from French* ports, do "not escape you."

The law and the instructions having thus made it his duty to act on reasonable suspicion, he must be safe though the ground of suspicion should eventually be removed.

Under our municipal law, therefore, the following propositions are maintainable.

1. That a vessel captured by the *French*, sails under *French* authority; and if armed, is, *quoad hoc*, a *French* armed vessel. The degree of arming is to be tested by the capacity to annoy the unarmed commerce of the *United States*.

2. The right to recapture an unarmed neutral, is an incident of the war, and implied in the regulations of congress.

3. The non-intercourse law justifies the seizure of *apparent*, as well as of real *American* vessels.

Nor does this doctrine militate with the law of nations. A war in fact existed between the *United States*, and *France*. An army was raised, a navy equipped, treaties were annulled, the intercourse was prohibited, and commissions were granted to private armed vessels. Every instrument of war was employed; but its operation was confined to the *vessels of war* of *France* upon the high seas.

So far as the war was allowed, the laws of war attached.

That it was a *public war*, was decided in the case of *Boas* v. *Tingey*, in this court, *Feb. Term*, 1800.

No authorities are necessary to shew that a state of war may exist without a public declaration. And the right to search follows the state of war. *Vattel*, *B.* 3. *c.* 7. § 114—1. *Rob.* 304. (The *Maria*,) 8 *Term. Rep.* 234. *Garrels v. Kensington*. Whether the vessel was *American* or *Danish*, she was taken out of the hands of *our enemy*.

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The law of nations in war, gives not only the right to search a neutral, but a right to recapture from the enemy. On this point the case of *Talbot* v. *Seeman* is decisive, both as to the law of nations, and as to the acts of Congress, and that the rule applies as well to a *partial* as to a *general* war.

Captain *Murray's* authority, then, was derived not only from our municipal law, and his instructions; but from the law of nations. If he has pursued his authority in an honest and reasonable manner, although he may not be entitled to reward, yet he cannot deserve punishment.

It remains to consider, whether the vessel was, in fact, liable to seizure and condemnation.

What where the *general facts* to create suspicion *at the time?*

1. The vessel was originally *American*. The transfer was recent and since the non-intercourse law. The voyage was to a dependency of the *French* republic and therefore prohibited, if she was really an *American* vessel.

2. The owner was an *American* by birth. The captain was a *Scotchman*. The crew were not *Danes*, but chiefly *Americans*, who came from *Baltimore*.

3. The *proces verbal* calls her an *American* vessel; which was corroborated by the declarations of some of the crew.

4. The practice of the inhabitants of the *Danish* islands, to cover *American* property in such voyages.

What was there *then* to dispel the cloud of suspicion, raised by these circumstances?

1. The declarations of *Wright*, the captain, whose testimony was interested, inconsistent with itself, and contradicted by others.

2. The documents found on board.

These were no other than would have been found, if fraud had been intended. T were

1. The sea letter or pass from the governor-general of the *Danish* islands, who did not reside at *St. Thomas's*, but at *St. Croix*. It states only by way of recital that the vessel was the property of *Jared Shattuck* a *burgher and inhabitant* of St. Thomas's. It does not state that he was naturalized or a subject of *Denmark*.

2. The muster roll, which states the names and number of the captain and crew, who were ten besides the captain, viz. *Wm. Wright*, captain, *David Weems*, *John Robinson*, *Jacob Davidson*, *John Lampey*; *John Nicholas*, *Frederick Jansey*, *George Williamson*, *William George*, *Prudentio*, a *Corsican*, and *Davy Johnson*, a *Norwegian*. There is but *one foreign* name in the whole. *Wright* in his deposition says, that three were *Americans*, one a *Norwegian* and the rest were *Danes*, *Dutch* and *Spaniards*.

The muster roll was not on oath, but was the mere *declaration* of the owner.

3. The *invoice*, which only says that *Shattuck* was the owner of the cargo.

4. The bill of lading, which says that he was the shipper.

5. The certificate of the oath of property of the *Cargo*, states only by way of recital, that *Shattuck*, a *burgher*, *inhabitant* and *subject* &c. was the owner of the *Cargo*, but says nothing of the property in the *vessel*.

By comparing this certificate with the oath itself, it appears that the word "*subject*" has been inserted by the officer and was not in the original oath.

6. *Shattuck's* instructions to captain *Wright*.

7. The bill of sale by Phillips, the agent of the American owners, to *Shattuck*—but his authority to make the sale was not on board. To shew what little credit such documents are entitled to, he cited the opinion of Sir *W. Scott*, in the case of the *Vigilantia*, 1 *Rob.* 6, 7, *and* 8. *Amer. ed.* and in the case of the Odin 1. *Rob.* 208, 211.

The whole evidence on board was a mere custom-house affair, all depending upon his own oath of property. His

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burgher's brief was not on board, nor did it appear even by his own oath, that *Shattuck* was a burgher. And no document is yet produced in which he undertakes to swear that he is a Danish subject.

Such documents could not remove a reasonable suspicion founded upon such strong facts.

There could never be a seizure upon suspicion, if this was not warrantable at the time.

What has appeared since to remove the suspicion, and to prove *Shattuck* to be a Danish subject?

All the original facts remain, and the case rests on *Shattuck's expatriation*, whence arise two inquiries.

1. As to the right, in point of law, to expatriate.

2. As to the exercise of the right, *in fact*.

1. As to the right of expatriation.

He was a native of Connecticut, and, for aught that appears in the record, remained here until the year 1789, when we first hear of him in the island of St. Thomas's. This was after the revolution, and therefore there can be no question as to *election*, at least there is no proof of his election to become a subject of Denmark.

If the account of the case of *Isaac Williams*, (1. *Tucker's Blackstone*, *part* 1, *appendix*, *p.* 436) * is correct, it was

* The state of the case and the opinion of *Ch. J. Elsworth*, as extracted by Judge *Tucker*, from "*The National Magazine*," *No.* 3, *p.* 254. are as follow.

On the trial of *Isaac Williams* in the *District* (*qu. Circuit?*) Court of *Connecticut*, *Feb.* 27, 1797, for accepting a commission under the *French* republic, and under the authority thereof committing acts of hostility against *Great Britain*, the defendant alleged, and offered to prove, that he had expatriated himself from the *United States* and become a *French* citizen before the commencement of the war between *France* and *England*. This produced a question as to the right of *expatriation*, when Judge *Elsworth*, then chief Justice of the *United States*, is said to have delivered an opinion to the following effect.

"The common law of this country remains the same as it was before "the revolution. The present question is to be decided by two great "principles; one is, that all the members of a civil community are bound

the opinion of *Ch. J. Elsworth*, that a citizen of the *United States* could not expatriate himself. That learned Judge is reported to have said in that case, that the common law of this country remains the same as it was before the revolution.

But in the case of *Janson v. Talbot*, 3. *Dall.* 133, this Court inclined to the opinion that the right exists, but the difficulty was that the law had not pointed out the mode of election and of proof.

It must be admitted that the right does exist, but its exercise must be accompanied by three circumstances.

1. Fitness in point of time.

2. Fairness of intent.

"to each other by compact; the other is, that one of the parties to this "compact cannot dissolve it by his own act. The compact between our "community and its members is, that the community shall protect its "members; and on the part of the members, that they will at all times "be obedient to the laws of the community and faithful to its defence. It "necessarily results that the member cannot dissolve the compact without "the consent, or default of the community. There has been no consent, "no default. Express consent is not claimed; but it is argued that the "consent of the community is implied, by its policy, its condition, and "its acts. In countries so crowded with inhabitants that the means of "subsistence are difficult to be obtained, it is reason and policy to permit "emigration; but our policy is different, for our country is but scarcely "settled, and we have no inhabitants to spare. Consent has been argued "from the condition of the country, because we are in a state of peace. "But though we were in peace, the war had commenced in *Europe*; we "wished to have nothing to do with the war—but the war would have "something to do with us. It has been difficult for us to keep out of the "war—the progress of it has threatened to involve us. It has been ne-"cessary for our government to be vigilant in restraining our own citizens "from those acts which would involve us in hostilities.

"The most visionary writers on this subject do not contend for the "principle in the unlimited extent, that a citizen may at any, and at all "times, renounce his own, and join himself to a foreign country.

"Consent has been argued from the acts of our government permitting "the naturalization of foreigners. When a foreigner presents himself "here, we do not inquire what his relation is to his own country; we "have not the means of knowing, and the inquiry would be indelicate; "we leave *him* to judge of that. If he embarrasses himself by contract-"ing contradictory obligations, the fault and folly are his own: but this "implies no consent of the government that our own citizens should also "expatriate themselves. It is therefore my opinion, that these facts "which the prisoner offers to prove in his defence, are totally irrelevant," &c. The prisoner was accordingly found guilty, fined and imprisoned.

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3. Publicity of the act.

But the right of expatriation, has certain characteristicks, which distinguish it from a *locomotive* right, or a right to change the *domicil.*

By expatriation the party ceases to be a citizen and becomes an alien. If he would again become a citizen, he must comply with the terms of the law of naturalization of the country, although he was a native.

But by a mere removal to another country for purposes of trade, whatever privileges he may acquire in that country, he does not cease to be a citizen of this.

With respect to other parties at war, the place of *domicil* determines his character, enemy, or neutral, *as to trade.* But with respect to his own country, *the change of place alone* does not justify his trading with her enemy; and he is still subject to such of her laws as apply to citizens residing abroad. 1 *Rob.* 165. (*The Hoop.*) 1 *Term Rep.* 84. *Gist v. Mason*, and particularly 8 *Term Rep.* 548. *Potts v. Bell*, where this principle is advanced by Doct. *Nicholl*, the king's advocate, *in p. 555*, admitted by Doct. *Swabey in p.* 561, and decided by the court.

This principle of general law is fortified by the positive prohibition of the act of congress.

In *France* the character of *French* citizen remains until a naturalization in a foreign country. In the *United States* we require an oath of abjuration, before we admit a person to be naturalized.

If he was naturalized, he has done an act disclaiming the protection of the *United States*, and is no longer bound to his allegiance. But if he has acquired only a special privilege to trade, it must be subject to the laws of his country.

2. But has he in fact exercised the right of expatriation? And is it proved by legal evidence?

His birth is *prima facie* evidence that he is a citizen

of the *United States* and throws the burden of proof upon *him*. No law has been shewn by which he could be a naturalized *subject* of *Denmark*, nor has he himself ever pretended to be more than a *burgher of St. Thomas's*. What is the character of *burgher*, and what is the nature of a *burgher's brief?*

It is said that to entitle a person to own ships, there must have been a previous residence; but no residence is necessary to enable a man to be a captain of a Danish vessel.

It is a mere licence to trade—a permit to bear the flag of *Denmark*—like the freedom of a corporation. It implies neither expatriation, an oath of allegiance, nor residence. 1 *Rob.* 133. *The Argo*, 8 *Term Rep.* 434, *Pollard* v. *Bell.* These cases shew with what facility a man may become a burgher; that it is a mere matter of purchase, and that it is a character which may be taken up and laid aside at pleasure, to answer the purposes of trade.

But there is no evidence that he ever obtained even this *burgher's brief.* He went from *Connecticut*, a lad, an apprentice or clerk in 1788 or 1789. He was not seen in business there until 1795 or 1796. In going in 1789, he had no motive to expatriate himself, as there was then no war. We find him first trading in 1796, *after the war*, and the law of *Denmark* forbids a naturalization in time of war.

At what time then did he become a *burgher?* If he ever did become such in fact, and it was *in time*, he can prove it by the record. *Wright's* burgher's brief is produced and shews that they are matters of record. The *brief, itself* then, or a copy from the record duly authenticated, is the *best* evidence of the fact, and is in the power of the party to produce.

Why is it withheld, and other *ex parte* evidence picked up *there*, and witnesses examined here? All the evidence they have produced is merely matter of inference. They have examined witnesses to prove that he carried on trade at *St. Thomas's*, owned ships and land, married and resided there. By the depositions they prove that a man is not by law permitted to do these things without being *a burgher;* and hence they infer his *burghership*.

These facts are equivocal in themselves, and not well proved.

Certificates of citizenship are easily obtained, but are not always true. This is noticed by Sir *W. Scott* in the cases before cited. A case happened in this country, 2 *Dall.* 370, *U. S.* v. *Gallato*, where a person having taken the oath of allegiance to *Pennsylvania*, agreeably to the naturalization act of that state, obtained a certificate from a magistrate confirmed by the attestation of the supreme executive of the state, that he was a citizen of the *U. States*. But upon a trial in the circuit court of *Pennsylvania*, it was adjudged that he was not a citizen. Captain *Barney* also went to *France*, became a citizen, took command of a *French* ship of war, returned to this country, and is now *certified* to be a citizen of the *U. S.* So in the case of the information against the ship *John and Alice*, Captain *Whitesides*, he was generally supposed to be a citizen of the *U. S.*

On the trial, evidence of his citizenship was called for, when it appeared that his father brought him into this country in the year 1784, and remained here until 1792, when the father died. Neither he nor his father were naturalized, and the vessel was condemned. These instances shew the danger of crediting such custom-house certificates.

All these certificates, in the present case do not form the *best* evidence, because better is still in the possession of the party, and he ought to produce it.

The general and fundamental rules of evidence are the same in courts of admiralty as in courts of common law. If they appear to relax, it is only in that stage of the business where they are obliged to act upon suspicion.

In the present case the opinion of *merchants only* is taken as to the *laws* of *Denmark*.—No *judicial* character, not even a *lawyer* was applied to. Certificates of merchants are no evidence of the law. 1 *Rob.* 58. *(The Santa Crux.)*

The evidence offered is both *ex parte*, and *ex post facto*. Fraud is not to be presumed, but why was not the *burg-*

her's brief produced, as well as the other papers, such as the oath of property, &c. when it was certainly the most important paper in the case?

The only reason which can be given, is, that it did not exist. It was a case like that of Captain *Whitesides*, where people were led into a mistake from the length of his residence, and from having seen him there from the time of his youth.

Upon the whole then we have a right to conclude that *Jared Shattuck* was not a *Danish* subject—or that if he was, the fact is not proved, and therefore he remains a citizen of the *U. S.* in the words of the act of congress, "*residing elsewhere.*"

The consequence must be a condemnation of the vessel.

II. She was in danger of condemnation in the *French* courts of admiralty, and therefore Captain *Murray* is intitled to *salvage*.

This depends 1. on the right to retake—2. on the degree of danger—and 3. the service rendered.

1. He had a right to retake, on the ground of suspicion of illicit trade, in violation of the *non-intercourse law*, as well as on the ground of her being a vessel sailing under *French* authority, and so armed as to be able to annoy unarmed *American* vessels. He had also a right to bring her in for salvage, if a service was rendered.

If his right to retake depends upon the suspicion of illicit trade, or upon her being a *French* armed vessel, he could take her only into a port of the *U. S.*

The point of *illicit trade* has already been discussed. That the vessel was sailing under *French* authority is certain; the only question is whether she was capable of annoying our commerce.

She had port-holes, a musket, powder and balls, and

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eight *Frenchmen*, who probably, as is usual, had each a cutlass. Vessels have been captured without a single musket. Three or four cutlasses are often found sufficient.

The vessel was sufficiently armed to justify Captain *Murray* under his instructions in bringing her in.

If then the taking was lawful, has she been saved from such danger as to entitle Captain *Murray* to salvage?

There is evidence that Captain *Wright* requested Captain *Murray* to take the vessel to prevent her falling into the hands of the English. He consented to be carried into *Martinique*. He protested only against the privateer, not against Captain *Murray*. His letter to Captain *Murray* does not complain of the *recapture*, but of the *detention*. The taking was an act of humanity, for if Captain *Murray* had taken out the *Frenchmen*, and left the vessel with only Captain *Wright* and the boy, they could not have navigated her into port, and she must have been lost at sea, or fallen a prey to the brigands of the islands. This alone was a service which ought to be rewarded with salvage.

But she was in danger of condemnation in the *French* courts of admiralty.

The case of *Talbot* v. *Seeman* has confirmed the principle adopted by Sir *W. Scott* in the case of the *War Ouskan*, 2 *Rob.* 246. that the departure of *France* from the general principles of the law of nations, varied the rule that salvage is not due for the recapture of a neutral out of the hands of her friend; and that the general conduct of *France* was such as to render the recapture of a neutral out of *her* hands, an essential service which would intitle the recaptors to salvage. If she had been carried into a *French* port, how unequal would have been the conflict? Who would have been believed, the privateer or the claimant? The *Danish* papers would have been considered only as a cover for *American* property. The danger is shewn by the apprehensions of Captain *Wright* and his crew; by the declarations of the privateer; by the *proces verbal*; and by the actual imprisonment of the crew.

But independent of the general misconduct of *France*, there are several *French* ordinances under which she might have been condemned. The case of *Pollard* v. *Bell*, 8 *Term Rep.* 444, shews that such ordinances may justify the condemnation. The case of *Bernardi* v. *Motteaux*, *Doug.* 575, shews that the *French* courts actually do proceed to condemnation upon them, as in the case of *throwing over papers*, &c. So in the case of *Mayne* v. *Walter*, *Park on Insurance*, 414, (363) the condemnation was because the vessel had an *English supercargo* on board.

By the ordinances of *France*, *Code des prises*, *vol.* 1, *p.* 306, § 9, "all foreign vessels shall be good prize in which there shall be a *supercargo*, *commissary*, or *chief officer* of an enemy's country; or the crew of which shall be composed of one third sailors of an enemy's state; or which shall not have on board the *roles d'equipage* certified by the public officers of the neutral places from whence the vessels shall have sailed."

And by another ordinance, 1 *Code des prises*, 303, § 6, "No regard is to be paid to the passports granted by neutral or allied powers to the owners or masters of vessels, subjects of the enemy, if they have not been naturalized, or if they shall not have transferred their domicil to the states of the said powers three months before the 1st of *September* in the present year; nor shall the said owners and masters of vessels, subjects of the enemy, who shall have obtained such letters of naturalization, enjoy their effect, if, after they shall have obtained them, they shall return to the states of the enemy, for the purpose of there continuing their commerce;" and by the next article, "vessels, *enemy built*, or which shall have been owned by an enemy, shall not be reputed *neutral* or *allied*, if there is not found on board authentic documents, executed before public officers who can certify their date, and prove that the sale or transfer thereof had been made to some of the subjects of an allied or neutral power, before the commencement of hostilities; and if the said deed or transfer of the property of an enemy to the subject of the neutral or ally, shall not have been duly enregistered before the principal officer of the place of departure, and signed by the owner, or the person by him authorised."

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In violation of these ordinances, the *chief officer*, Captain *Wright*, was a *Scot*, an enemy to *France;* for although he had a *burgher's brief*, yet it did not appear that he had resided *three months* before he obtained it; and we have before seen that a previous residence was not necessary by the laws of *Denmark* to entitle him to a burgher's brief for the purpose of being master of a vessel. In the next place, the whole number of the crew, with the Captain, being eleven, and three of the crew being *Americans* and the captain a *Scot*, more than one third of the crew were enemies of *France*. The muster roll did not describe the place of nativity of the crew. The vessel was purchased after the commencement of hostilities between *France* and the *U. S.*—And there was no authority on board from the *American* owners to *Phillips*, the agent who made the sale, in violation of the regulation of 17th *February* 1694, *Art.* 4. 2 *Code des prises, p.* 14, which declares "the vessel to be good prize, if being *enemy built*, or belonging originally to the enemy, the neutral, the allied, or the *French* proprietor, shall not be able to shew, by authentic documents *found on board*, that he had acquired his right to her before the declaration of war."—See also 2 *Valin.* 249, § 9—251 § 12 and 244.

What chance of escape had this vessel, under all these ordinances which the *French* courts were bound to enforce? The case of *Pollard* v. *Bell*, 8 *Term*, 434, is precisely in point. The vessel in that case was *Danish*, and had all the papers usually carried by *Danish* vessels. But she was condemned in the highest court of appeal in *France* because the captain was a *Scot* who had obtained a *Danish* burgher's brief subsequent to the hostilities.

Has there, then, been no service rendered?

It is no objection to the claim of salvage that it is not made in the libel. Salvage is a condemnation of part of the thing saved. The prayer for condemnation of the whole includes the part. It may be made by petition, or even *ore tenus*.

The means used for saving need not be used with that sole view. *Talbot* v. *Secman*.

As to the *quantum* of salvage, he referred to the opinion of Sir *W. Scott*, in the case of the *Sarah*. 1 *Rob.* 263.

III. But if the *Charming Betsey* is not liable to condemnation under the *non-intercourse law*, and if Captain *Murray* is not entitled to salvage, yet the restitution ought to be made of the net proceeds of the sale only, and not with damages and costs.

In maritime cases *probable cause* is always a justification. The grounds of suspicion in the present instance have been already mentioned; and when to these are added the circumstances that it was at Captain *Wright's* request that Captain *Murray* took possession of the vessel—that he consented to be carried into *Martinique*—that if he had taken out the *Frenchmen* and left the vessel in the midst of the ocean with only Captain *Wright* and his boy, they would have been left to destruction—that part of the cargo was damaged, part rifled, and all perishable—and that Captain *Murray* offered to release the vessel and cargo, on security, there can hardly be a stronger case to save him from a decree for damages.

In the case of the *Two Susannahs*, 2 *Rob.* 110, it is by Sir *W. Scott*, taken as a principle that a seizure is justified by an order for further proof, and he decreed a restitution of the proceeds only, it not being shewn that the captors *conducted themselves otherwise than with fair intentions.*

In the present case there is no pretence that Captain *Murray* did not act from the purest motives, and from a wish faithfully to execute his instructions.

Key, contra.

1. The schooner *Charming Betsey* and her cargo were neutral property, and not liable to capture under the *non-intercourse law.*

2. When recaptured she was not an *armed French vessel capable* of annoying our commerce, and therefore not liable under the acts of congress authorising the capture of such vessels.

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3. She was not in imminent danger when recaptured, and therefore Captain *Murray* is not entitled to salvage.

4. Under all the circumstances of the case, he acted illegally, and is liable for damages which have been properly assessed.

I. As to the neutral character of the vessel and cargo, he contended,

1. That *Jared Shattuck* never was an *American* citizen.

2. That if he was, he had expatriated himself, and had become a *Danish* subject.

3. That if not a *Danish* subject, yet he was not a citizen of the *U. S.*

The evidence is that he was born in *Connecticut, but before the declaration of independence*, and was therefore a natural born subject of *Great-Britain*. He was in trade for himself in *St. Thomas's* in 1794.—This he could not do until he was 21 years of age, which will carry back the date of his birth to the year 1773. He was an apprentice at *St. Thomas's* in the year 1788 or 1789.—There is no evidence of his being in the *U. S.* since the declaration of independence. But if he had been, yet he went away while a minor, and he could not make his election during his minority. There is no evidence that his parents were citizens of the *United States*. Being a natural born subject of *Great-Britain*, he could not become a citizen of the *U. S.* unless he was here at the time of the revolution—or his parents were citizens, or unless he became naturalized according to law.

It is incumbent upon Captain *Murray* to prove him to be a citizen of the *U. S.* It is sufficient for us to shew that he was born a subject of *Great-Britain*.—*They* must shew how he became a citizen. This is a highly penal law, and every thing must be proved which is necessary to bring the case within the penalty.

2. But if he ever was a citizen of the *U. S.* he had expatriated himself.

That every man has a right to expatriate himself, is admitted by all the writers upon general law; and it is a principle peculiarly congenial to those upon which our constitutions are founded.

Some of the states of the Union have expressly recognized the right, and even prescribed the form of *expatriation*. But where the form is not prescribed, nothing more is necessary than that it be accompanied with *fairness of intention—fitness of time—and publicity of election*.

In the present instance, all these circumstances concur.

No time could have been more fit, than the year 1788 or 1789, when all *Europe* and *America* were in a state of profound peace. His country had then no claim to his service.

The *fairness of intention*, is evidenced by its having been carried into effect by an actual *bona fide* residence of 10 or 11 years—by serving an apprenticeship—by actual *domiciliation*—by marriage—by becoming a burgher—by acquiring lands—and by owning ships.

The *publicity of election*, is witnessed by the same acts, and by taking the oath of allegiance to *Denmark*.

The *United States* have prescribed no form of expatriation. All that he could do to render the act public and notorious has been done.

It is said a man cannot cease to be a citizen of one state, until he has become a citizen or subject of another. But a man may become a *citizen of the world*—an alien to all the governments on earth.* It is in evidence that by the laws of *Denmark*, a man cannot become a subject and carry on trade, without being naturalized—that an oath of allegiance, and an actual *domicil* are necessary to naturalization—but that a domicil is not necessary to

* CH J.—There can be no doubt of that.
Daniel, said he had been misunderstood. He only said that the act of becoming a citizen of another state was the most public act of expatriation and the best evidence of the fact.

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become a burgher for the purpose of navigating a *Danish* vessel.

In the two cases cited from 1 *Rob.* 133, *the Argo, and* 8 *Term Rep.* 434, *Pollard* v. *Bell*, the question was only as to the national character of the *master* of the vessel, not of the owner; and therefore they do not apply to the present case.

The burgher's brief of Captain *Wright* is dated 19th *May*, 1794, and certifies that he had taken the oath of fidelity to his *Danish* majesty, and was entitled to all the privileges of a subject.

3. But if the facts stated in the record are not sufficient to prove *Shattuck* to be a *Danish* subject, yet they do not prove him to be a citizen of the *U. S.* and if he is not a citizen of the *U. S.* it is immaterial of what country he is a subject.

By the law of nature and nations a man may, by a *bona fide* domicil, and long continued residence in a country, acquire the character of a neutral, or even of an enemy. In the case of *Scott* v. *Schawrtz*, *Comyns' Rep.* 677, it was decided that residence in, and sailing from *Russia*, gave the mariners of a *Russian* ship, the character of *Russian* mariners, within the meaning of the *British* navigation act: and in the case of the *Harmony*, 2 *Rob.* 264, Sir *W. Scott* condemned the goods of an *American* citizen, because by a residence in *France* for four years he had acquired a domicil in that country which had given his property the character of the goods of an enemy. In the case of *Wilson* v. *Marryat*, 8 *Term Rep.* 31, it was adjudged that a natural born *British* subject might acquire the character of a citizen of the *U. S.* for commercial purposes.

II. The *Charming Betsey* was not a *French* armed vessel, capable of annoying our commerce, and therefore not liable to capture or condemnation, by virtue of the limited war which existed between the *United States* and *France*.

In supporting this proposition it is not intended to in-

terfere with the decision of this court in the case of *Talbot* v. *Seeman*. There is a great difference between the force of the *Amelia*, in that case, and that of the *Charming Betsey*.—The *Amelia* had eight cannon, was manned by twelve *Frenchmen*, and had been in possession of the *French* ten days, and must be admitted to have been such an armed *French* vessel as came within the meaning of the acts of congress

But in the present case, the vessel was built at *Baltimore*, and owned by citizens of the *United States*.—When she sailed from *Baltimore* she had four cannon, a number of muskets, &c. which *Shattuck* was obliged to purchase with the vessel, and which he afterwards sold at a considerable loss.

The captain swears that at the time of recapture she had only one musket, a few balls, and twelve ounces of powder; and although *McFarlan* deposes to a greater quantity of arms, yet it appears that he did not go on board of her until eight days after the recapture.

If arms were on board, they ought to have been brought in with the vessel. This is particularly required by the act of congress. No arms are mentioned in the account of sales. It is to be presumed, as none were brought in, that none were on board. The captain expressly swears that the *French* put no force or arms on board when they took her.

She could not, therefore, be such an armed vessel as was intended by the acts of congress.

III. She was not in imminent danger when recaptured, and therefore the recaptors are not entitled to salvage.

It is a general principle that the recapture of a neutral does not entitle to salvage.

It is not intended to question the correctness of the decision of this court in the case of *Talbot* v. *Seeman*, nor that of Sir *W. Scott*, in the case of the *War Ouskan*. Those cases were exceptions to the general rule, because the conduct of *France* was in violation of the law

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of nations, and because neutral vessels had no chance of escaping the rapacity of the *French* prize courts. This system of depredation upon neutral commerce continued during the years 1798 and 1799. The *Amelia* was recaptured by Captain *Talbot* in *September*, 1799, while the *arret* of 18th *January* 1798, so injurious to neutral commerce, and the violences of the prize courts were in full operation.

The *Charming Betsey* was recaptured by Captain *Murray* on the 3d of *July* 1800. During this interval great events had occurred in *France*.

On the 9th of *November* 1799, *Bonaparte* was placed at the head of the government, and a new order of things commenced.

On the 24th of *December* 1799, the *arret* of the council of five hundred of 18th *January* 1798, which made the character of neutral vessels dependent upon the quality of the cargo, and declared good prize all those laden *in whole or in part* with the productions of *England* or her possessions, was repealed, and by a new decree the ordinance of 1778 was re-established. The government adopted a more enlightened and liberal policy towards neutrals.

On the 26th of *March* 1800, a new tribunal of prizes was erected, at the head of which was placed the celebrated *Portalis*, author of the *Civil Code*.

On the 29th of *May* 1800, their principles were tested in the case of the *Pigou*, an *American* ship belonging to *Philadelphia*. This case was a public declaration to all the world that they began to entertain a proper respect for the law of nations, and from this time the rule of salvage, as established in the case of the *War Ouskan*, ceased.

The *Pigou* had been condemned in an inferior tribunal.

On an appeal to the council of prizes, *Portalis*, with a degree of liberality and correctness which would confer honour upon any court in the world, declared that

"excepting the case when a prize is evidently and actually enemy's property, all questions about the validity or invalidity of prizes, *come to the examination of a fact of neutrality.*" And in discussing the question as to the necessity of a *role d'equipage*, he says, "I will "begin with the principle that all questions about "neutrality, are what are called in law, questions *bona* "*fide*, in which due regard is to be had to *facts*, and "weigh them properly without adhering to trifling ap- "pearances."—"But it would be a gross error in be- "lieving that the want of, or the least irregularity in, "one of these papers, could operate so far as to cause "the vessel to be adjudged good prize.

"Sometimes regular papers cover an enemy's proper- "ty, which other circumstances unmask. In other cir- "cumstances the stamps of neutrality break through "omissions and irregularities in the forms, proceeding "from mere negligence, or grounded on motives free "from fraud.

"We must speak to the point; and in these matters "as well as in those which are to be determined, we "must decide not by mere strict forms, *but by the prin- "ciples of good faith;* we must say with the law, that "mere omissions or mere irregularities in the forms, "cannot prejudice the truth, if it is stated by any other "ways: and *si aliquid ex solemnibus deficiat, cum equitas "poscit, subveniendum est.*"—"The main point in eve- "ry case is, that the judge may be satisfied that the "property is neutral or not." He then cited a case decided upon the 6th article of the regulation of the 21st of *October* 1744; by which article the act of throwing over papers is made a substantive ground of condemnation. But it was decided that the papers ought to be of such a nature as to prove the property to be enemy's.

The two grounds upon which the *Pigou* was condemned in the *inferior* tribunal were, that she was armed *for war*, without any commission or authority from the *U. S.* and that there was on board no *role d'equipage* attested by the public officers of the port of departure. She mounted ten guns, and was provided with muskets and other warlike stores.

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Upon the first point it was decided in the council of prizes that she was not armed for war, but for lawful defence; and on the second that a *role d'equipage* was not absolutely necessary, if the property appeared otherwise clearly to be neutral.*

* There is so much reason, justice and good sense appearing through a bad translation of probably, not a very accurate account of this case, that it is with pleasure transcribed as it has been published in this country from the *London* public prints.

Opinion of *Portalis*.—After having read the opinion of commissioners of the government, left in writing on the table, which is as follows:

It appears that a judgment of the tribunal of commerce at *l'Orient*, had granted Captain *Green* the replevy of his vessel and part of the goods and specie which composed the cargo; and that on the appeal entered by the comptroller of marine at *l'Orient* against that judgment, the tribunal of the department of *Morbihan* declared the vessel and cargo a good prize.

The grounds on which rested the decision of the tribunal of *Morbihan* were, that the vessel was armed for war without any commission or authorization from the *American* government; and tha there was on board no role d'equipage attested by the public officers of the port of his departure.

The *captured* claim the nullity of the prize, and that the vessel be reinstated in the situation she was in when captured, and that she be delivered up as well as her cargo, and the dollars which were on board, and also the papers, with damages and interest adequate to the losses they had sustained.

To be able to determine on the respective demands, we must first fix upon the validity or invalidity of the prize, *excepting the case when a prize is evidently and actually enemy's property, all questions about the validity or invalidity of prizes come to the examination of a fact of neutrality.*

In this case, was the tribunal of *Morbihan* authorised to determine that the ship *Pigou* was in such circumstances as to be prevented from being acknowledged and respected as neutral?

It is said the vessel was armed for war, and without any authorization from her government; that she mounted 10 guns of different rates, and that muskets and warlike stores have been found in her.

The captured reply, that the vessel being bound to *India*, was armed for her own defence, and that the warlike ammunition, the muskets and guns, did not exceed what is usual to have on board for long voyages; for my part, *I think it is not for having arms on board only, that a vessel can be said to be armed for war.* The warlike armament is merely of an offensive nature; it is deemed so when there is no other end than attacking, or at least when every thing shows that attack is the main point of the armament: then a vessel is reputed inimical, or pirate if she has no commission or papers which may remove the suspicion. But defence is of natural right, and every means of defence is lawful in voyages at sea, as in every other dangerous occurrence of life.

A vessel consisting but of a small crew, and whose cargo in goods amounted to a considerable sum, was evidently intended for trade, and not for war. The arms found on board were not to commit plunder and hostility, but to avoid them; not for attack, but for defence. The pretence of armament for war, in my opinion, cannot be founded.

In another case *(the Statira)* which was decided very shortly after that of the *Pigou*, by the same council

I am now to discuss the second argument against the captors on the want of a *role d'equipage*, attested by the public officers of the place of her departure.

To support the validity of the prize they allege the regulation of the *21st October 1774, of the 26th of July 1778*, and the decree of the directory of the *12th Ventose, 5th year*, which require a *role d'equipage*.

The captured, on their part, claim the execution of the treaty of commerce, between *France* and the *United States of America*, of the *6th February 1778*; they contend that general regulations could not derogate from a special treaty, and that the directory could not infringe the treaty by an arbitrary decree.

It is a fact that the regulations of 1774 and 1778, and the decree of the directory require a *role d'equipage* asserted by the public officers of the place of departure. It is also a fact, that the *role d'equipage* is not mentioned in the treaty of the 6th *February*, as one of the papers requisite to establish neutrality, but I believe I am not under the necessity of discussing whether the treaty is superior to the regulations, or whether the regulations are superior to the treaty.

I will begin with the principle that all questions about neutrality, are what are called in law, questions BONA FIDE, in which due regard is to be had to facts which are to be properly weighed, without adhering to trifling appearances.

Neutrality is to be proved; for this reason, the *regulation of marine of 1681, article* 9, on prizes, states, that vessels with their cargoes, which shall not have on board charter parties, bills of lading, nor invoices, shall be considered as good prize.

From the same motives, the *regulations of* 1774 and 1778, put the commanders of neutral vessels under obligation of proving at sea their property being neutral, by passports, bills of lading, invoices and vessels' papers.

The regulation of 1774, whose enacting parts have been renewed by the directory, literally expresses, among the papers requisite to prove neutral property, that there must be a *role d'equipage* in due form.

But it would be a gross error to suppose that the want of, or the least irregularity in, one of these papers, could operate so far as to cause the vessel to be adjudged good prize.

Sometimes regular papers cover an enemy's property, which other circumstances unmask. In other circumstances the stamps of neutrality break through omissions and irregularities in the forms, proceeding from mere negligence, or grounded on motives free from fraud.

We must speak to the point, and in these matters as well as in those which are to be determined, we must decide not by mere strict forms, but by the principles of good faith; we must say with the law, that mere omissions, or mere irregularities in the forms, cannot prejudice the truth, if it is stated by any other ways: and *si aliquid ex solemnibus deficiat, cum equitas poscit, subveniendum est.*

Therefore, *the regulation of the 26th July, 1778, art.* 2, after having stated that the masters of neutral vessels shall prove at sea their property being neutral, by passports, bills of lading, invoices and other vessel-papers, adds, *one of which at least* shall establish the property being neutral, or shall contain an exact description of it.

It is not then necessary in every case to prove the property neutral by the simultaneous concurrence of all the papers enumerated in the regulations. But it is sufficient according to the circumstances, that *one* of

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of prizes, two questions arose—1st, whether the *Statira*, being an *American* vessel captured by a *British* ship and these papers establish the property, if it is not opposed or destroyed by more peremptory circumstances.

The main point in every case is, that the judge may be satisfied that the property is neutral or not.

We have a precedent of what I assert in art. 6, of the regulation of the 21st October 1774; by that article every vessel belonging to what nation soever, neutral, enemy or ally, from which papers shall be proved to have been thrown overboard, shall be adjudged good prize, on the proof only of the papers having been thrown overboard; nothing can be more explicit.

Some difficulties arose on the execution of that severe clause of the law, which has been renewed by the regulation of 1778.

On the 13th *November* 1779, the king wrote to the admiral, that he left entirely to him and to the commissioners of the council of prizes to apply the rigidity of the decree, and of the regulation of the 26th *July*, or to moderate their clauses as peculiar circumstances would require it in their opinion.

A judgment of the council of the 27th *December*, in the said year, rendered between *Pierre Brandebourg*, master of the *Swedish* ship *Fortune* and *M. de la Rogredourden*, captain of the king's xebec the *Fox*, liberated the said vessel notwithstanding some papers had been thrown overboard. It was determined that to ground an adjudication of the vessel on the papers being thrown overboard, *they ought to be of such nature as to prove the property enemy's*, and that the captain ought to have had a concern in throwing his papers overboard; which was not the case with the *Swedish* captain.

In this case without discussing whether *American* captains are obliged or not to exhibit a *role d'equipage*, attested by the public officers of the place of their departure, I observe that this *role* is supplied by the *passport*, and that the captured allege the impossibility for them to have their *role d'equipage* attested by public officers in *Philadelphia*, since the intercourse was forbidden, under pain of death, with *Philadelphia*, where a most tremendous epidemic was raging: I must add, that the passport, the invoice, and all the vessel's papers, establish evidently the property of the vessel and cargo being neutral; none of these papers have ever been disputed. Thus the invalidity of the capture is obvious; whence it follows that every thing which has been taken from them, ought to be restored in kind or by a just indemnification.

As to their claim for damages and interest, I must observe, that such a claim is not in every case the sequel of the invalidity of the capture.

Suspicious proceedings of the captured, may occasion the mistake of the captors. But when the injustice on the part of the captors cannot be excused, the captured have a right to damages and interest.

Let us apply these principles to the cause. Could the captors entertain any grounded suspicions against the captain of the ship *Pigou?* was not the neutrality of the ship proved by her being an *American* built ship, by her flag, by her destination, by the crew being composed of *Americans*, by her cargo consisting of *American* goods, without any contraband articles, by the name and the character of Captain *Green*, very well known by services he rendered to the *French* nation, by the register, the passport, the invoice, by the papers on board, finally, by the place where she was captured, which was far from any suspicious destination? It was then impossible for the captors to make any mistake; the vessel struck her colors at the first summons, the officers and crew made faithful declara-

recaptured by a *French* privateer, was liable to confiscation on the ground of her being in the hands of an enemy; and 2d, whether her cargo was ground of condemnation?

On the *first point* it was held, that the mere capture does not before condemnation, vest the property in the *captor*, so as to make it transferable to the *recaptor*, and therefore no ground of confiscation.

On the 2d there were two inquiries. 1st, whether, in point of law, the character of the vessel, neutral or not, should be determined by the nature of the cargo? 2d. whether the cargo consisted of contraband?

As to the first, the commissary *(Portalis,)* reviews the laws upon this subject prior to the *arret of the council of 500, of the 29th Nivose, year* 6, *(January* 18, 1798,)

tions, they answered plainly in their examination; no pretence whatever was left to the captors; they don't appear to have observed the forms prescribed by the regulation. Some very heavy charges are uttered against them; but I think it is not time yet to take notice of them; they will be discussed when the articles captured are restored.

In these circumstances I am of opinion, that a more absolute and full replevy be granted to Captain *Green* of the *American* ship *Pigou*, and her cargo, as well as the papers found on board; as to the claim of damages and interest, made by Captain *Green*, that the former be granted to him, and they shall be settled by arbitrators in the usual form.

(Signed) PORTALIS.

Paris, 6 *Prairial*, 8*th year.*

The council declare that the capture of the ship *Pigou* and her cargo, is null and of no effect; therefore, grant a full and absolute replevy of the vessel, rigging and apparel, together with the papers and cargo, to Captain *John Green*; as to the damages and interest claimed by Captain *Green*, the council grant them to him, and they shall be settled by arbitrators in the usual forms.

DONE at *Paris* on the 9th *Prairial*, 8th year of the Republic.

Present,

Citizen Presidents REDON, NIOU CANTE, MOREAU, MONTIGNY, MONPLACID, BARENNES, DUSAUB, PAREVAL, GRANDMAISON, TOURNACHER.

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the severity of which, he condemns; but as the *Statira* was captured while it was in force, the captor was entitled to have the capture tried by it. He observes that such regulations are improperly styled *laws*, and they are essentially variable *pro temporibus et causis;* that they should always be tempered by wisdom and equity. He adverts to the words *in whole, or in part*, by which he says ought to be understood *a great part*, according to the judicial maxim *parum pro nihilo habetur*. Upon this principle he is of opinion, that a ship ought not to be subject to confiscation, even under the law of *the 29th Nivose*, unless such a part of the cargo comes under the description of what is there made contraband, *as ought to excite a presumption of fraud against all the rest.*

The question of *contraband*, related to 40 barrels of *pitch*, part of the cargo of the *Statira*. He observed that pitch was not made contraband by the treaty of 1778, but as *France* was by that treaty, entitled to all the advantages of the most favored nation, and as by a subsequent treaty between the *United States* and *Great Britain*, pitch was among the enumerated articles of contraband, it necessarily became such in regard to *France*.

He however decides the quantity to be too small to justify condemnation, even upon the principle of the law of 24th, *(quere 29th) Nivose*. And the ship was restored.*

* The following account of the case of *the Statira* is extracted from *London* papers of *June* 1700.

We stated to our readers some time ago the principles upon which the new council of prizes at *Paris* proceeded with respect to neutral vessels, and we gave the decision at length upon the *American* ship *Pigou*, which was ordered to be restored with costs. That decision shewed, that a greater degree of system had been established, and that the loose and frequently unjust principles upon which the directory acted with respect to captures of neutral ships, were meant to be abandoned. The following is the decision of the council on another case, that of the *Statira:*

The *Statira*, captain *Seaward*, an *American* ship, had been captured by an *English* vessel, and recaptured by the *French* privateer the *Hazard*.

The first point which the commissary considers is, the effect which the *Statira* having been in the possession of the *English* ought to have

These cases are read to show that *France* had abstained from those violations of the law of nations, which had

He observes, that if the vessel captured and recovered had been *French*, and recaptured by a national vessel, there would have been nothing due to the re-captor, because this is only the exercise of that protection which the state owes to all its subjects in all circumstances. If it had been recaptured by a privateer, the *French* regulation gives the property of the vessel to the recaptor, on account of the risk and danger of privateering. It might be an act of generosity to restore the vessel to the original owner, but it is not of right that it should.

In the next place, he considers the case of a neutral recaptured from the enemy. If really neutral, he says the vessel must be released. The ground of this higher degree of favor for a neutral he states to be, that the *French* vessel must have been lost in the country. But it is not certain that the neutral captured by an enemy may not be released by the admiralty courts of the enemy. The mere capture does not vest the property immediately in the captor, so as to make it transferable to the recaptor. The commissary considers the property not vested in the captor till sentence of condemnation.

We believe this is much milder, and more favorable for neutrals than our practice. The being a certain time in the enemy's custody, or *intra mœnia*, transfers the property to the captor. This was held in the late well known case of the *Spanish* prize, captured by the *French*, and recaptured by the *English*. It is to be observed, however, that a principle of reciprocity is pursued, and that we give the same indulgence to the neutral which they would have given us in a similar case.

Having proved that the *Statira* was not liable to confiscation, on the ground of her being in the hands of an enemy, the commissary considers whether her cargo was ground of confiscation.

Upon this point he considers two questions, 1st, whether in point of law, the character of the vessel, neutral or not, should be determined by the nature of the cargo? 2d, whether the cargo consisted of contraband?

He then reviews all the laws upon this head. He shews that till the decree of the 29th *Nivose*, (year 6) *January* 18, 1798, the regulation states, "His majesty prohibits all privateers to stop and bring into the ports of the kingdom the ships of neutral powers, even though coming from or bound to the ports of the enemy, with the exception of those carrying supplies to places blockaded, invested or besieged. With regard to the ships of neutral states laden with contraband commodities for the enemy, they may be stopped and the said commodities shall be seized and confiscated, but the vessels and the

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caused the rule in the case of the *War Ouskan;* and to bring the present case within the principles established by the court in the case of *Talbot* v. *Seeman.*

residue of their cargo shall be restored, unless the said contraband commodities constituted three-fourths of the value of the cargo, in which case the ship and cargo shall be wholly confiscated. His majesty however reserves the right of revoking the privileges above granted, if the enemy do not grant a reciprocal indulgence in the course of six months from the date hereof.

The law of the 29th *Nivose*, (year 6) overturned all this system, and enacted, "That the state of ships in regard to their being neutral or hostile, should be determined by their cargo; that accordingly every vessel found at sea, laden in whole or in part with commodities coming from England or its possessions, should be declared good prize, whoever might be owners of their articles and commodities."

The severity of this regulation the commissary condemns, but as the *Statira* was captured while it was in force, the captor was entitled to have the capture tried by it.

He examines next how the regulation applies, premising his opinion that such regulations are improperly stiled *laws*, and they are essentially variable *pro temporibus et causis;* that they should always be tempered by wisdom and equity. He adverts to the words in whole or in part. By the whole, he says, ought to be understood a great part, according to the judicial maxim *parum pro nihilo habetur.* Upon this principle then, he is of opinion that a ship ought not to be subject to confiscation even under the law of the 29th *Nivose*, unless such a part of the cargo comes under the description of what is there made contraband, as ought to excite a presumption of fraud against all the rest. What that part should be is not capable of definition, but should be left to the enlightened equity and sound discretion of the judge.

The *Statira* had on board sixty barrels of turpentine and forty barrels of pitch. The captor contended that these were contraband; the captured said, that by the treaty of 1778 with the Americans, they were not enumerated as contraband.

But the commissary shews, that the Americans by the treaty were bound to admit the French to all the advantages of the most favourite nations; that having, in a subsequent treaty with England, made *pitch* contraband, with respect to the latter, necessarily it became contraband with regard to France.

The learned commissary, however, thinks that even upon the principle of the law of the 24th *Nivose*, the quantity of pitch was too small to justify confiscation.

In the next place the captor alleged, that 2911 pieces of Cam-

The general conduct of *France* having been changed, it is to be presumed, she would have been released with damages and costs; if not upon the principles of justice, good faith, and the law of nations, yet upon those of policy. *France* was at war with *Great Britain;* partial hostilities existed with the *United States.* The non-intercourse law prevented our vessels from trading with *France* or her dependencies; and the *French West-Indies* could only be supplied from the *Danish* islands. It is not to be believed, therefore, that they would, by condemning this vessel, (coming to them with those very supplies which they wanted,) embarrass a trade necessary to their very existence.

But independent of the general misconduct of *France* towards neutrals, the captors rely upon three points arising under *French* ordinances.

1. That the *Rôle d'Equipage* wants the place of nativity of the crew. But according to the opinion of *Portalis*, this is not a fatal defect, nor is it, of itself, a sufficient ground of condemnation.

peachy wood, part cargo of the *Statira*, was the produce of *English* possessions.

This point however had not been regularly ascertained, as the report on the subject was made without the captured being called as a party.

The commissary states, however, strong circumstances of suspicion on this head. The captured had not appealed against the confiscation of the cargo. The point came under the consideration of the court on the appeal of the captor, who wanted to get both ship and cargo.

The commissary therefore saw no reason for condemning the ship, which was clearly neutral; but on account of the suspicions against the character of the cargo, he thought no indemnification whatever was due to the captured.

Judgment was pronounced accordingly.

The piratical decree of the 29th *Nivose*, (year 6) mentioned above with so much severity by *Portalis*, has been repealed, and things have been placed upon the footing of the regulation of 1778; that is, the *French* are to treat neutrals in regard to contraband in the same way in which they are treated by us; they will not allow the *Americans* to carry into *England* a commodity which the *English* would seize as contraband going into the ports of *France*.

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2. That more than one third of the crew were enemies of *France*. The word *matelot* in the ordinance of 1778, means a *sailor*, in contradistinction to the captain or master. Exclude the captain and there were only 10 persons on board, and only three of those are pretended to be enemies; so that one third were not enemies within the meaning of the ordinance.

But these three pretended enemies were *Americans*. The hostilities which existed between *France* and the *United States*, amounted at most to a partial, limited war, according to the decision of this court in the case of *Boas* v. *Tingey*. It was only a war against *French* armed force found on the high seas.

It did not authorise private hostilities between the citizens of the two countries. Individuals are only enemies to each other in a *general* war. The war extended only to those objects pointed out in the acts of Congress; as to every thing else, the state of the two nations was to be considered as a state of peace. It was a war only *quoad hoc*. The individuals of the two nations were always neutral to each other. A citizen of the *United States* could only be considered an enemy of *France* while in arms against her; the neutrality was the counterpart, or (to use a mathematical expression) the complement of the war. A citizen of the *United States*, peaceably navigating a neutral vessel, could not be burthened with the character of enemy.

3. The captain was a *Scot* by birth.

The ordinance cited from 1 *Code des prises*, 303. § 6. in support of this objection, is in the alternative. The master of the vessel must be naturalized in a neutral country, *or* must have transferred his domicil to the neutral country three months before the first of September in *that year*. Naturalization is not necessary, if there be such a transfer of the domicil; and the domicil is not necessary if the party be naturalized.

But the authority of *Portalis* shows that these decrees are not to be considered as *laws* but *sub modo*.

They are only regulations made at particular times, for particular purposes.

If the same evidence had been produced at *Guadaloupe* which has been brought here, (and the same would have been more easily obtained there) there can be no doubt the vessel would have been restored.

It is in evidence that other vessels of Mr. *Shattuck* had been released.

No salvage can be allowed unless the danger was imminent, not problematical.

IV. Under all the circumstances of the case, Captain *Murray* acted illegally, and is liable for damages; which have been properly assessed.

His subsequent conduct rendered the transaction tortious *ab initio*. If he was justified in rescuing the vessel from the hands of the *French*, his subsequent detention of the vessel, and the sale of the cargo at *Martinique* by his own agent, without condemnation, were unauthorised acts in violation of the rights of neutrality.

The libel says nothing of the cargo. It is first mentioned in the replication. The libel only prays condemnation of the vessel, on the ground of violation of the non-intercourse law.

By law he was bound to bring the vessel and cargo into a port of the *United States* for adjudication, and had no authority to sell the cargo before condemnation.—As to the pretence of her being an armed *French* vessel, he ought to have sent the arms into port with the vessel as the only evidence of their existence.

The commander of the *French* privater, in his commission to the prize-master, calls her the *Danish* schooner *Charming Betsy*, *William Wright*, master.

There was no evidence to impeach the credence due to the papers found on board of her, and which at that

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time had every appearance of fairness, and which have since been incontestibly proved to be genuine.

The facts stated in the *proces verbal*, are that she had no log-book—that the mate declared himself to be an *American*—that the flag and pendant were *American*—that the *Danish* flag had been made during the chase, which was confirmed by the two boys—and that she had no pass from the *French* consul. Whatever weight might be given to these facts, if true, yet the outrageous and disorderly conduct of the crew of the privateer, entirely destroys the credit of the *proces verbal*, and at best it would be only the declaration of interested plunderers.

But it is said that, by the law of nations, probable cause is a sufficient excuse; and that this law operates as the law of nations.

In revenue laws, probable cause is no justification, unless it is made so by the laws themselves.

This is not a war measure. If the *United States* were at war it was unnecessary, because the act of trading with an enemy is itself a ground of condemnation. This law was passed because the *United States* were *not* at war, and wished to avoid it, by shewing their power over the *French* colonies in the *West-Indies*. It is a municipal regulation, as well suited to a state of peace as of war. It affects our own citizens only. It is no part of the law of nations. What would other nations call it, were they bound to notice it? It can give no right to search and seize neutrals. It could not affect their rights.

He who takes must take at his peril. The law only gives authority to seize vessels of the *United States*. If he takes the vessel of another nation, he must answer it.

As to the damages. Nothing can justify Captain *Murray*; but it was a mistake of the head, not of the heart. His intentions were honest and correct, but he suffered his suspicions to carry him too far. If it was an error in judgment, shall he have salvage? If an injury has been done to the innocent and unfortunate

owner, shall he have no redress? The consequences to him were the same, whatever might have been the motive. The damages have been properly assessed in the District Court. If damages are to be given they ought not to be less than the original cost of vessel and cargo, with the outfit, insurance, interest and expenses; and upon calculation it will be found that the damages assessed do not exceed the amount of these.*

Dallas. It is said that Mr. *Shattuck* never was a citizen of the *United States*.

What is averred and admitted need not be proved.

Mr. *Soderstrom*, in his rejoinder, expressly admits that he was once a citizen of the *United States* by alleging that he had transferred his allegiance from the government of the *United States* to his *Danish* majesty.

Mr. *Shattuck's* burgher's brief, is at length, for the first time, produced and admitted to be made a part of the record. It bears date on the 10th of April, 1797. It may here be remarked that some of the witnesses have testified that he became a burgher in 1795. This shews how little reliance ought to be placed upon their testimony. If then Mr. *Shattuck* did expatriate himself, it was not until *April* 1797. It has been conceded, that a man cannot expatriate himself unless it be done in a *fit time*, with *fairness of intention*, and *publicity of act*.

As to the fitness of the time. What was the situation of this country and *France* in the year 1797.

In 1795 the *British* treaty had excited the jealousy of *France*. In 1796 she passed several edicts highly injurious to our commerce. Mr. *Pinckney* had been sent as an Envoy extraordinary, and was refused. *France* had gone on in a long course of injury and insult, which at

* *Marshal, Ch. J.* What would have been the law as to *probable cause*, if there had been a public general war between France and the United States, and the vessel had been taken on suspicion of being a vessel of the United States, trading with the enemy, contrary to the laws of war? Would *probable cause* excuse, in such a case, if it should turn out that she was a neutral?

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length roused the spirit of the nation. On the 14th of *June* 1797, the act of Congress was passed, prohibiting the exportation of arms—On the 23d, the act for the defence of the ports and harbours of the *United States*—On the 24th the act for raising 80,000 militia—On the 1st of *July*, the ac providing a naval armament—On the 13th of *June* 1798, the first *non-intercourse* bill was passed, and on the 7th of *July* the treaties with *France* were annulled.

These facts shew that the time when Mr. *Shattuck* chose to expatriate himself, was a time of *approaching hostilities*, and when every thing indicated *war*.

As to the *fairness of his intention*. The same facts shew what that intention was. It was to carry on that trade which every thing tended to shew would soon become criminal by the laws of war, and from the exercise of which the other citizens of the *United States* were about to be interdicted.

The act of Congress points to this very case. It was to prevent transactions of this nature, that the word "*elsewhere*" was inserted.

But why was not this burgher's brief, or a copy of it, put on board the vessel? The answer is obvious—because it would have discovered the *time* of expatriation, which would have increased the suspicions excited by the origin of the vessel, by the recent transfer, by the nature of the cargo, and by the character of the crew.

Domicil in a neutral country gives a man only the rights of trade: it will not justify him in a violation of the laws of his country.

If then Mr. *Shattuck* could not expatriate himself, or if he has not expatriated himself, he is bound to obey the laws of the *United States*. A nation has a right to bind, by her laws, her own citizens residing in a foreign country; as the *United States* have done in the act of Congress respecting the slave trade, and in the *non-intercourse* law.

The question, whether the vessel was capable of annoying our commerce, depends upon matter of fact, of which

the court will judge. The number of men was sufficient; the testimony respecting the cutlasses is supported by the nature of the transaction and by the usage in such cases. Some arms were necessary to prevent Capt. *Wright* and his boys from rising and rescuing the vessel. Circumstances are as strong as oaths, and are generally more satisfactory.

The vessel, having port-holes, was constructed for war, and in an hour after her arrival at Guadaloupe might have been completely equipped. Upon the principles of the case of *Talbot v. Seeman*, Captain *Murray* was bound to guard against this, and he would have been culpable if he had suffered her to escape.

But it is said that she was not in danger of condemnation by the *French*, because *France* had ceased from her violation of the laws of nations, because she had repealed the obnoxious arret of 18th *January* 1798, and because one third of the crew were not her enemies. Admitting all this, yet if one ground of condemnation remained, she would have been condemned. The vessel was transferred from an enemy, to a neutral, during the heat of hostilities. This alone was a sufficient ground of condemnation under the ordinance already cited from 1. *Code des prises*, 304. Art. 7. In the case of *Talbot v. Seeman*, the ground of salvage was, that the vessel was liable to condemnation under a *French arret*—And that the courts of *France* were bound to carry the arret into effect.

The conduct of Captain *Murray* was not illegal. He was bound by law, as well as by his instructions, to take the vessel out of the hands of the *French*. It was with the consent, if not at the request, of Captain *Wright*; and it was in itself an act of humanity. His conduct was fair, upright and honorable in the whole transaction. He offered to take security for the vessel and cargo. The cargo was perishable; if it had been brought to the *United States* it would not have been in a merchantable condition; or if it had been, it would not have sold so high here (being chiefly articles of *American* produce) as at *Martinique*. The sale was fair and the proceeds brought to the *United States* to wait the event of the trial.

Probable cause is a thing of maritime jurisdiction; and authorities in point may be found even at common law.

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If it is a municipal regulation, it is one which affects the whole world. It is engrafted upon the law of nations. It is municipal only as it emanates from the municipal authority of the nation. But the whole world is bound to notice a law which affects the interests of all nations in the world.

As to the damages; the principles upon which they are assessed do not appear from the report of the assessors, but the probability is that they were founded upon the estimates of the probable profits of the voyage, as stated in the testimony of some of the witnesses. In a case of this kind, where the purity of intention is admitted, it can never be proper to give *speculative* or *vindictive* damages.†

Martin, in reply.

1. As to the national character of *Shattuck*.

He was born before the revolution; probably in 1773 or 1774; at least 21 years before *April* 10th 1797, which will bring it before the declaration of independence.

In *Duane's* case, it was decided that even if it had been proved that he was born in *New-York*, yet his birth being before the revolution, and having been carried to Ireland during his minority, he was an alien.

The rejoinder of Mr. *Soderstrom* does not admit the fact, that *Shattuck* was a citizen of the *United States*; but if it did, it is coupled with an express allegation that he had duly expatriated himself; and if part is taken, the whole must be taken. The words of the rejoinder are, "and this party expressly alleges and avers that "the said *Jared Shattuck*, at the several times and pe- "riods above mentioned, and long before, and in "the intermediate times which elapsed between the "said several times or periods, had been, then was, "ever since hath been, and now is, a subject of his "majesty the king of *Denmark*, owing allegiance to his

† In answer to an inquiry by the *Chief Justice* for authorities to support the position that probable cause is always a justification in maritime cases, Mr. *Dallas* referred *generally* to *Brown's Civil and Admiralty Law*, and to the *decisions of Sir Wm. Scott*.

"said majesty, and to no other prince, potentate, state "or sovereignty whatever; and that he the said *Jared* "*Shattuck* had, long before his said purchase of the said "schooner, *duly expatriated* himself from the domin- "ions of the *United States*, to those of his said majesty; "and transferred his allegiance and subjection from the "said *United States* and their government, to his said "majesty and his government." The whole purport of which is, that if he was ever a citizen of the *United States* he had expatriated himself.

Even if it was an admission of the fact, yet it could not prejudice Mr. *Shattuck*, as the rejoinder is by Mr. *Soderstrom* in character of Consul of *Denmark*, and as the representative of the nation.

If he was born before the revolution he never owed natural allegiance to the *United States*; and if he remained here after the revolution, during part of his minority, he owed only a temporary and local allegiance; during the existence of which, if he had taken up arms against the *United States*, he would have been guilty of treason; but that allegiance continued only while he was a resident of the country; he had a right to transfer such temporary allegiance whenever he pleased. *Foster Cr. Law*, 183. 185.

That he acted with a fair and honest intention is proved by his *bona fide* residence and domicil for 10 or 11 years. 2. *Brown's Civil and Admiralty Law*, 328.

The navigation act of Great Britain is a municipal law, and yet a *bona fide* domicil and residence of foreigners were held sufficient to bring the persons within its provisions. *Comyns' Rep.* 677. *Scott qui tam* v. *Schwartz*.*

* The case of *Scott* v. *Schwartz*, was an information against the Russian ship *The Constant*, because the master and three fourths of the mariners were not of that *country or place*, according to the *Statute of* 12. *Car.* 2. c. 18. § 8. The ship was built in Russia, and the cargo was the product of that country. The master was born out of the Russian dominions, but in 1733 was admitted, and ever since continued a burgher of *Riga*; and had been a resident there, when not engaged in foreign voyages, and traded from thence, 9 years before the seizure. There were only 11 mariners on board, of whom 4 were born in *Russia*; *Morgan* a fifth was born

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But a stronger case than that is found in 1 *Bos. & Pul.* 430. *Marryatt v. Wilson*, in the Exchequer chamber, on a writ of error from the King's bench.

In that case a natural born *British* subject, naturalized in the *United States* since the peace, was adjudged to be a citizen of the *United States* within the treaty, and navigation acts of *Great Britain*, so as to carry on a direct trade from *England* to the *British East-Indies*.

The opinion of *Eyre Ch. J.* beginning in p. 439, is very strong in our favour.

There is no probability that the vessel would have been condemned at Guadaloupe. Mr. *Shattuck*, and his course of trade, were well known there, and they had already released some of his vessels. Another reason is, that Bonaparte was at that time negotiating with the northern powers of Europe, to form a coalition to support the principle that free ships should make free goods; and he would have succeeded, but for the *able negotiations of Lord Nelson at Copenhagen*.

In *Park on Insurance*, 363, it is said, "If the ground "of decision appear to be, not on the want of neutrality, "but upon a foreign ordinance manifestly unjust, and "contrary to the law of nations, and the insured has "only infringed such a partial law; as the condemnation "did not proceed on the point of neutrality, it cannot "apply to the warranty, so as to discharge the insurer." And in support of this position he cites the case of *Mayne v. Walter*.

There is no ordinance of *France*, which, upon the principles established in the case of the *Pigou*, would have been a sufficient ground of condemnation.

in *Ireland* and there bound apprentice to the master, and as such went with him to *Riga*, and for three or four years before the seizure, served on board the same ship and sailed therein from *Riga*, on this and former voyages. The other 6 were born out of the dominions of *Russia*, but *Stephen Hanson*, one of them, had resided at *Riga* 8 years next before the seizure---*Hans Tasper* 5 years---*Rein Steingrave* 4 years, and *Derrick Andrews*, the cook, 7 years, and these 4, during those years had sailed from *Riga* in that and other vessels.

It was adjudged that these people were of that *country or place*, within the meaning of the Statute, and the vessel properly manned and navigated.

The circumstances required by those ordinances are only evidence of neutrality, which is always a question of *bona fide*. A condemnation upon either of these ordinances alone would have been contrary to the law of nations; but if they are considered as only requiring certain circumstances tending to establish the fact of neutrality, they are perfectly consistent with that law. This is the light in which they have been considered by *Portalis*.

The *French* have never considered our vessels as the vessels of an enemy. Our vessels have not been condemned by them as enemy-property; but their sentences have always been grounded upon a pretended violation of some particular ordinance of *France*. Hence it appears that they would not have considered an *American* vessel, sold to a Dane, as an enemy's vessel transferred to a neutral during a state of war.

But the claim of salvage is an after thought. It was not necessary to bring her to the *United States* to obtain salvage. Salvage is a question of the law of nations, and may be decided by the courts of any civilized nation. Instead of rendering a service, he has done a tenfold injury. Captain *Murray's* intentions were undoubtedly correct and honourable, and we do not wish *vindictive* damages; but Mr. *Shattuck* will be a loser, even if he gains his cause, and recovers the damages already assessed.

Probable cause cannot justify the taking and bringing in a neutral; but it may prevent vindictive damages.

Feb. 22*d.* *Marshall*, Chief Justice, delivered the opinion of the court:—The *Charming Betsy* was an *American* built vessel, belonging to citizens of the *United States*, and sailed from *Baltimore*, under the name of the *Jane*, on the 10th of *April*, 1800, with a cargo of flour for *St. Bartholomew's*; she was sent out for the purpose of being sold. The cargo was disposed of at *St. Bartholomew's*; but finding it impossible to sell the vessel at that place, the captain proceeded with her to the island of *St. Thomas*, where she was disposed of to *Jared Shattuck*, who changed her name to that of the *Charming Betsy*, and

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having put on board her a cargo consisting of *American* produce, cleared her out as a *Danish* vessel for the island of *Guadaloupe*.

On her voyage she was captured by a *French* privateer, and eight hands were put on board her for the purpose of taking her into *Guadaloupe* as a prize. She was afterwards recaptured by captain *Murray*, commander of the *Constellation* frigate, and carried into *Martinique*. It appears that the captain of the *Charming Betsy* was not willing to be taken into that island; but when there, he claimed to have his vessel and cargo restored, as being the property of *Jared Shattuck*, a *Danish* burgher.

Jared Shattuck was born in the *United States*, but had removed to the island of *St. Thomas* while an infant, and was proved to have resided there ever since the year 1789 or 1790. He had been accustomed to carry on trade as a *Danish* subject, had married a wife and acquired real property in the island, and also taken the oath of allegiance to the crown of *Denmark* in 1797.

Considering him as an *American* citizen who was violating the law prohibiting all intercourse between the *United States* and *France* or its dependencies, or the sale of the vessel as a mere cover to evade that law, captain *Murray* sold the cargo of the *Charming Betsy*, which consisted of *American* produce, in *Martinique*, and brought the vessel into the port of *Philadelphia*, where she was libelled under what is termed the non-intercourse law. The vessel and cargo were claimed by the consul of *Denmark* as being the *bona fide* property of a *Danish* subject.

This cause came on to be heard before the judge for the district of *Pennsylvania*, who declared the seizure to be illegal, and that the vessel ought to be restored and the proceeds of the cargo paid to the claimant or his lawful agent, together with costs and such damages as should be assessed by the clerk of the court, who was directed to inquire into and report the amount thereof; for which purpose he was also directed to associate with himself two intelligent merchants of the district, and duly inquire what damage *Jared Shattuck* had sustained by reason of the premises. If they should be of opinion that the

officers of the *Constellation* had conferred any benefit on the owner of the *Charming Betsy* by rescuing her out of the hands of the *French* captors, they were in the adjustment to allow reasonable compensation for the service.

In pursuance of this order the clerk associated with himself two merchants, and reported, that having examined the proofs and vouchers exhibited in the cause, they were of opinion that the owner of the vessel and cargo had sustained damage to the amount of 20,594 dollars and 16 cents, from which is to be deducted the sum of 4,363 dollars and 86 cents, the amount of monies paid into court arising from the sales of the cargo, and the further sum of 1,300 dollars, being the residue of the proceeds of the said sales remaining to be brought into court, 5,663 dollars and 86 cents. This estimate is exclusive of the value of the vessel, which was fixed at 3,000 dollars.

To this report an account is annexed, in which the damages, without particularizing the items on which the estimate was formed, were stated at 14,930 dollars and 30 cents.

No exceptions having been taken to this report, it was confirmed, and by the final sentence of the court captain *Murray* was ordered to pay the amount thereof.

From this decree an appeal was prayed to the circuit court, where the decree was affirmed so far as it directed restitution of the vessel and payment to the claimant of the net proceeds of the sale of the cargo in *Martinique*, and reversed for the residue.

From this decree each party has appealed to this court.

It is contended on the part of the captors in substance,

1st. That the vessel *Charming Betsy* and cargo are confiscable under the laws of the *United States*. If not so,

2d. That the captors are entitled to salvage. If this is against them,

3d. That they ought to be excused from damages,

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because there was probable cause for seizing the vessel and bringing her into port.

1st. Is the *Charming Betsy* subject to seizure and condemnation for having violated a law of the *United States?*

The libel claims this forfeiture under the act passed in *February*, 1800, further to suspend the commercial intercourse between the *United States* and *France* and the dependencies thereof.

That act declares "that all commercial intercourse," &c. It has been very properly observed, in argument, that the building of vessels in the *United States* for sale to neutrals, in the islands, is, during war, a profitable business, which Congress cannot be intended to have prohibited, unless that intent be manifested by express words or a very plain and necessary implication.

It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.

These principles are believed to be correct, and they ought to be kept in view in construing the act now under consideration.

The first sentence of the act which describes the persons whose commercial intercourse with *France* or her dependencies is to be prohibited, names any person or persons, resident within the *United States* or under their protection. Commerce carried on by persons within this description is declared to be illicit.

From persons the act proceeds to things, and declares explicitly the cases in which the vessels employed in this illicit commerce shall be forfeited. Any vessel owned, hired or employed wholly or in part by any person residing within the *United States*, or by any citizen thereof residing elsewhere, which shall perform certain

acts recited in the law, becomes liable to forfeiture. It seems to the court to be a correct construction of these words to say, that the vessel must be of this description, not at the time of the passage of the law, but at the time when the act of forfeiture shall be committed. The cases of forfeiture are, 1st. A vessel of the description mentioned, which shall be voluntarily carried, or shall be destined, or permitted to proceed to any port within the *French* Republic. She must, when carried, or destined, or permitted to proceed to such port, be a vessel within the description of the act.

The second class of cases are those where vessels shall be sold, bartered, entrusted, or transferred, for the purpose that they may proceed to such port or place. This part of the section makes the crime of the sale dependent on the purpose for which it was made. If it was intended that any American vessel sold to a neutral should, in the possession of that neutral, be liable to the commercial disabilities imposed on her while she belonged to citizens of the *United States*, such extraordinary intent ought to have been plainly expressed; and if it was designed to prohibit the sale of *American* vessels to neutrals, the words placing the forfeiture on the intent with which the sale was made ought not to have been inserted.

The third class of cases are those vessels which shall be employed in any traffic by or for any person resident within the territories of the *French* Republic, or any of its dependencies.

In these cases too the vessels must be within the description of the act at the time the fact producing the forfeiture was committed.

The *Jane* having been completely transferred in the island of *St. Thomas*, by a *bona fide* sale to *Jared Shattuck*, and the forfeiture alleged to have accrued on a fact subsequent to that transfer, the liability of the vessel to forfeiture must depend on the inquiry whether the purchase was within the description of the act.

Jared Shattuck having been born within the *United*

States, and not being proved to have expatriated himself according to any form prescribed by law, is said to remain a citizen, entitled to the benefit and subject to the disabilities imposed upon *American* citizens; and, therefore, to come expressly within the description of the act which comprehends *American* citizens residing elsewhere.

Whether a person born within the *United States*, or becoming a citizen according to the established laws of the country, can divest himself absolutely of that character otherwise than in such manner as may be prescribed by law, is a question which it is not necessary at present to decide. The cases cited at bar and the arguments drawn from the general conduct of the *United States* on this interesting subject, seem completely to establish the principle that an *American* citizen may acquire in a foreign country, the commercial privileges attached to his domicil, and be exempted from the operation of an act expressed in such general terms as that now under consideration. Indeed the very expressions of the act would seem to exclude a person under the circumstances of *Jared Shattuck*. He is not a person under the protection of the *United States*. The *American* citizen who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of our government; and if, without the violation of any municipal law, he should be oppressed unjustly, he would have a right to claim that protection, and the interposition of the *American* government in his favour, would be considered a justifiable interposition. But his situation is completely changed, where by his own act he has made himself the subject of a foreign power. Although this act may not be sufficient to rescue him from punishment for any crime committed against the *United States*, a point not intended to be decided, yet it certainly places him out of the protection of the *United States* while within the territory of the sovereign to whom he has sworn allegiance, and consequently takes him out of the description of the act.

It is therefore the opinion of the court, that the

Charming Betsy, with her cargo, being at the time of her recapture the *bona fide* property of a *Danish* burgher, is not forfeitable, in consequence of her being employed in carrying on trade and commerce with a *French* island.

The vessel not being liable to confiscation, the court is brought to the second question, which is:

2d. Are the recaptors entitled to salvage?

In the case of the *Amelia** it was decided, on mature consideration, that a neutral armed vessel in possession of the *French* might, in the then existing state of hostilities between the two nations, be lawfully captured; and if there were well founded reasons for the opinion that she was in imminent hazard of being condemned as a prize, the recaptors would be entitled to salvage. The court is well satisfied with the decision given in that case, and considers it as a precedent not to be departed from in other cases attended with circumstances substantially similar to those of the *Amelia*. One of these circumstances is, that the vessel should be in a condition to annoy *American* commerce.

The degree of arming which should bring a vessel within this description has not been ascertained, and perhaps it would be difficult precisely to mark the limits, the passing of which would bring a captured vessel within the description of the acts of Congress on this subject. But although there may be difficulty in some cases, there appears to be none in this. According to the testimony of the case, there was on board but one musket, a few ounces of powder, and a few balls. The testimony respecting the cutlasses is not considered as shewing that they were in the vessel at the time of her recapture. The capacity of this vessel for offence appears not sufficient to warrant the capture of her as an armed vessel. Neither is it proved to the satisfaction of the court, that the *Charming Betsy* was in such imminent hazard of being condemned as to entitle the recaptors to salvage.

* *Ante vol.* 1. *p.* 1.

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It remains to inquire whether there was in this case such probable cause for sending in the *Charming Betsy* for adjudication as will justify captain *Murray* for having broken up her voyage, and excuse him from the damages sustained thereby.

To effect this there must have been substantial reason for believing her to have been at the time wholly or in part an *American* vessel, within the description of the act, or hired, or employed by *Americans*, or sold, bartered, or trusted for the purpose of carrying on trade to some port or place belonging to the *French* Republic.

The circumstances relied upon are principally,

1st. The *proces-verbal* of the *French* captors.

2d. That she was an *American* built vessel.

3d. That the sale was recent.

4th. That the captain was a *Scotchman*, and the muster roll shewed that the crew were not *Danes*.

5th. The general practice in the *Danish* islands of covering neutral property.

1st. The *proces verbal* contains an assertion that the mate declared that he was an *American*, and that their flag had been *American*, and had been changed during the cruise to *Danish*; which declaration was confirmed by several of the crew.

If the mate had really been an *American*, the vessel would not on that account have been liable to forfeiture, nor should that fact have furnished any conclusive testimony of the character of the vessel. The *proces verbal* however ought for several reasons to have been suspected. The general conduct of the *French West-India* cruisers and the very circumstance of declaring that the *Danish* colors were made during the chase, were sufficient to destroy the credibility of the *proces verbal*. Captain *Murray* ought not to have believed that an *American* vessel trading to a *French* port in the assumed character of a *Danish* bottom, would have been without *Danish* colors.

That she was an *American* vessel, and that the sale was recent, cannot be admitted to furnish just cause of suspicion, unless the sale of *American* built vessels had been an illegal or an unusual act.

That the captain was a *Scotchman* and that the names of the crew were not generally *Danish*, are circumstances of small import, when it is recollected that a very great proportion of the inhabitants of *St. Thomas's* are *British* and *Americans*.

The practice of covering *American* property in the islands might and would justify captain *Murray* in giving to other causes of suspicion more weight than they would otherwise be entitled to, but cannot be itself a motive for seizure. If it was, no neutral vessel could escape, for this ground of suspicion would be applicable to them all.

These causes of suspicion taken together ought not to have been deemed sufficient to counterbalance the evidence of fairness with which they were opposed. The ship's papers appear to have been perfectly correct, and the information of the captain uncontradicted by those belonging to the vessel who were taken with him, corroborated their verity. No circumstance existed, which ought to have discredited them. That a certified copy of *Shattuck's* oath, as a *Danish* subject, was not on board, is immaterial, because, being apparently on all the papers a burgher and it being unknown that he was born in the *United States*, the question whether he had ceased to be a citizen of the *United States* could not present itself.

Nor was it material that the power given by the owners of the vessel, to their captain to sell her in the *West-Indies*, was not exhibited. It certainly was not necessary to exhibit the instructions under which the vessel was acquired, when the fact of acquisition was fully proved by the documents on board and by other testimony.

Although there does not appear to have been such cause to suspect the *Charming Betsy* and her cargo to have been *American*, as would justify captain *Murray* in bringing her in for adjudication, yet many other circumstances combine with the fairness of his character to pro-

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duce a conviction that he acted upon correct motives, from a sense of duty; for which reason this hard case ought not to be rendered still more so by a decision in any respect oppressive.

His orders were such as might well have induced him to consider this as an armed vessel within the law, sailing under authority from the *French* republic; and such too as might well have induced him to trust to very light suspicions respecting the real character of a vessel appearing to belong to one of the neutral islands. A public officer entrusted on the high seas to perform a duty deemed necessary by his country, and executing according to the best of his judgment the orders he has received, if he is a victim of any mistake he commits, ought certainly never to be assessed with vindictive or speculative damages. It is not only the duty of the court to relieve him from such when they plainly appear to have been imposed on him, but no sentence against him ought to be affirmed where, from the nature of the proceedings, the whole case appears upon the record, unless those proceedings are such as to shew on what the decree has been founded, and to support that decree.

In the case at bar damages are assessed as they would be by the verdict of the jury, without any specifications of items which can shew how the account was made up, or on what principles the sum given as damages was assessed. This mode of proceeding would not be approved of if it was even probable from the testimony contained in the record that the sum reported by the commissioners of the district court was really the sum due. The district court ought not to have been satisfied with a report giving a gross sum in damages unaccompanied by any explanation, of the principles on which that sum was given. It is true captain *Murray* ought to have excepted to this report. His not having done so however does not cure an error apparent upon it, and the omission to shew how the damages which were given had accrued, so as to enable the judge to decide on the propriety of the assessment of his commissioners, is such an error.

Although the court would in any case disapprove of this mode of proceeding, yet in order to save the parties the costs of further prosecuting this business in the circuit

court, the error which has been stated might have been passed over, had it not appeared probable that the sum, for which the decree of the district court was rendered, is really greater than it ought to have been according to the principles by which the claim should be adjusted.

This court is not therefore satisfied with either the decree of the district or circuit court, and has directed me to report the following decree:

Decree of the Court.

THIS cause came on to be heard on the transcript of the record of the circuit court, and was argued by counsel; on consideration whereof, it is adjudged, ordered, and decreed, as follows, to wit: That the decree of the circuit court, so far as it affirms the decree of the district court, which directed restitution of the vessel, and payment to the claimant of the net proceeds of the sale of the cargo in Martinique, deducting the costs and charges there, according to amount exhibited by capt. *Murray's* agent, being one of the exhibits in the cause, and so far as it directs the parties to bear their own costs, be affirmed; and that the residue of the said decree, whereby the claim of the owner to damages for the seizure and detention of his vessel was rejected, be reversed.

And the court, proceeding to give such further decree as the circuit court ought to have given, doth further adjudge, order, and decree, that so much of the decree of the district court as adjudges the libellant to pay costs and damages, be affirmed; but that the residue thereof, by which the said damages are estimated at 20,594 dollars, 16 cents, and by which the libellant was directed to pay that sum, be reversed and annulled. And this court does further order and decree, that the cause be remanded to the circuit court, with directions to refer it to commissioners, to ascertain the damages sustained by the claimants, in consequence of the refusal of the libellant to restore the vessel and cargo at Martinique, and in consequence of his sending her into a port of the *United States* for adjudication; and that the said commissioners be instructed to take the actual prime cost of the cargo and vessel, with interest thereon, including

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the insurance actually paid, and such expenses as were necessarily sustained in consequence of bringing the vessel into the *United States*, as the standard by which the damages ought to be measured. Each party to pay his own costs in this court and in the circuit court.—All which is ordered and decreed accordingly.

A true copy.

E. B. CALDWELL, *Clerk*
Sup. Court U. States.

Captain *Murray* was reimbursed his damages, interest and charges, out of the Treasury of the *United States*, by an act of Congress, *January* 31st, 1805.

CAPRON v. VAN NOORDEN.

CAPRON *v.* VAN NOORDEN.

A *plaintiff* may assign for error the want of jurisdiction in that court to which he has chosen to resort.
A party may take advantage of an error in his favor, if it be an error of the Court.
The Courts of the U. S. have not jurisdiction unless the record shews that the parties are citizens of different states, or that one is an alien, &c.

ERROR to the Circuit Court of *North-Carolina*. The proceedings stated *Van Noorden* to be *late of Pitt county*, but did not allege *Capron*, the plaintiff, to be an alien, nor a citizen of any state, nor the place of his residence.

Upon the general issue, in an action of trespass on the case, a verdict was found for the defendant, *Van Noorden*, upon which judgment was rendered.

The writ of Error was sued out by *Capron*, the plaintiff below, who assigned for error, among other things, first "That the circuit court aforesaid is a court "of limited jurisdiction, and that by the record afore-"said it doth not appear, as it ought to have done, that "either the said *George Capron*, or the said *Hadrianus* "*Van Noorden* was an *alien* at the time of the commence-"ment of said suit, or at any other time, or that one of "the said parties was at that or any other time, a citi-"zen of the state of *North-Carolina* where the suit was "brought, and the other a citizen of another state; or "that they the said *George* and *Hadrianus* were for "any cause whatever, persons within the jurisdiction of "the said court, and capable of suing and being sued "there."