The Frances, Boyer, Master: Gillespie's claim.

Prize.—Domicil.

The commercial domicil of a merchant, at the time of the capture of his goods, determines the character of those goods—hostile or neutral.

This also was an appeal from the sentence of the Rhode Island Circuit Court, condemning certain goods captured on board the Frances, by the Yankee privateer.

These goods were shipped by Colin Gillespie, the claimant, who had been naturalized in the United States, and consigned to Archibald Bryce and Alexander Muirhead, for sale and remittance to the shipper, at Glasgow.

To ascertain the national character of the claimant, further proof was ordered by the court below, calling upon him to show how long, after his naturalization, he resided in the United States, before he went to Great Britain? how long he had since resided in the United States, at any time or times? how long in Great Britain? what was the nature of his business in the latter country? and in whom the property vested at the time it was shipped?

Upon the production of this further proof, it appeared, that the property was vested in the claimant, at the time of its being shipped; that he was a native of Great Britain; that he emigrated to the United States in 1793; was naturalized in 1798; having, in the *interim*, returned to his native country, on mercantile business, in 1794 and 1796, and revisited the United States in 1795 and 1797; that he again returned to his native country in 1799, was there married and revisited the United *States, with his wife, in the same year; that he continued to reside in New York [*364 until June 1802, when he once more returned to Great Britain, and resided there until November 1805, when he came to the United States (Mrs Gillespie having died in Scotland), formed a partnership with John Graham, of New York, and returned to Glasgow, in the same year, where he carried on the business of the partnership, under the firm of Colin Gillespie & Co.; that he remained there until the partnership was dissolved, and until the 2d of July 1813; on which day, he left the enemy's country, and arrived in the United States with his family, in October 1813; that he kept house at Glasgow, and built a warehouse there, which he still owns, and kept his counting-house therein. He formed a determination to return to the United States, as he deposes, on being informed of the declaration of war by the United States against Great Britain, which took place on the 18th of June 1812, and was known in England, about the 20th of July following, but was prevented, by his engagements and commercial concerns, from carrying that intention into effect, until the period above mentioned, still leaving some of his affairs unarranged.

Upon this evidence, the property was condemned in the circuit court; and an appeal was taken, by the claimant, to this court, where the cause was argued by *Jones*, *Harper* and *Dexter*, for the claimant; and *Pinkney*, for the captors.

Jones, for the claimant.—The goods in question were purchased early in July 1812, they were shipped on the 14th of that month, at which time, the declaration of war was not known in England. It does not appear, that the

claimant shipped any other goods than those in question. In less than a year after he had received information of the war, he returned to the United States, with his family, thereby giving unequivocal evidence of the *quo animo* of his residence in Great Britain. In such a case, even the property of a neutral would be protected; *à fortiori*, ought the property of one of our own citizens to receive protection. Cases of this kind are analogous to cases of confiscation. If there be any particular period at which *we
*365] can consider this property as assuming a hostile character, it must be that, at which it would have been confiscable by the enemy, supposing the party to continue an American citizen. Had that period arrived? Were the circumstances such as would have justified Great Britain in confiscating this property? If not, surely the United States ought not to condemn it. Vattel, lib. 3, § 63.

This case may be considered in another point of view, viz., whether the case of a naturalized citizen returning to his native country, and carrying on trade, as in the present case, is distinguishable in its consequences, in the event of war, from that of a native citizen going to a foreign country and engaging in trade. We contend, that it is not. One authority, and one only, seems to favor the distinction; and that is the case of *La Virginie*, 5 Rob. 99. But in that case, it does not appear that the American character of Mr. Lapierre was acquired by naturalization. It might and very probably did depend on domicil alone. We contend, that a person naturalized in this country, is as much a citizen of the United States, to all the intents and purposes of the present case, as a native. The naturalization law of the United States requires of the applicant for the privileges of naturalization, unqualified abjuration of allegiance to his former sovereign. The law of England on the subject goes to an equal extent. Naturalized and native subjects are looked upon as the same, to all legal purposes. *Dawson's Lessee* v. *Godfrey*, 4 Cr. 321.

A denizen may be made such for life or in tail; "but one cannot be naturalized, either with limitation, for life or in tail, or upon condition; for that is against the absoluteness, purity and indelibility of natural allegiance." Co. Litt. 129 *a*; 2 Domat 376.

If, according to the doctrince of perpetual allegiance, on the return of a naturalized citizen to his native country, his former duties return, and his duties to his adopted country still continue, under what contradictory obligations would he be placed. This was Lord Hale's doctrine, but it is now done away. Foster's Crown Law 185, § 4. *It has been decided, in
*366] England, in the case of *Marryat* v. *Wilson*, 1 Bos. & Pul. 430, that a natural-born subject of that country admitted a citizen of the United States of America, either before or after the declaration of American independence, may be considered as a subject of the United States, so as to entitle him to trade to the East Indies, under the 13th article of the treaty of 19th November 1794."

Harper, on the same side, asked, whether the court, in the case of *The Rapid*, had decided the question, as to the difference between the British acts concerning letters of marque, prizes and prize goods, which authorize the capture of the property of inhabitants in hostile countries (and on which the British admiralty decisions are founded), and the act of congress

declaring war, which only gives a right to capture the property of British subjects.

JOHNSON, J., said, the court had fully considered that point and decided it in the case of *The Rapid* (*ante*, p. 155).

Pinkney, for the captors.—We contend, that the property even of a native American citizen, domiciled in an enemy country, at the time of the capture of such property, is liable to condemnation as prize of war; and, *à fortiori*, the property of a naturalized American citizen, a native of the enemy country, under like circumstances; which is the case before the court, and which will be first considered.

It has been contended on the other side, that a person naturalized in the United States is as much a citizen of this country as a native, and that he continues to be so, though he return to his native country and there engage in trade. It has been argued, that in order to become an American citizen, he must abjure his allegiance to his former government, that, consequently, though he should return to his native country, he can no longer be considered as under the protection of that government: that his new allegiance to the United States continues, and that our government is bound to protect him: that he is, therefore, to be considered in the *same light as a native citizen, and that his property is equally to be protected in case of war. [*367

That a person so abjuring his native allegiance cannot claim protection from his former government, while he continues in the country of his adoption, is admitted; but we contend, that if he voluntarily returns within the sphere of his original allegiance, he is as much a subject of his former government, as if he had never emigrated; that the reciprocal duties of allegiance and protection, on the respective parts of the subject and the sovereign, are revived: he is no longer a citizen of the United States. The two allegiances are incompatible, we admit; the naturalization law of the United States clearly goes upon this idea; but in case of the party's return to his native country, it is the old allegiance which must prevail, and not the new, as is contended by the claimant. By his return, he has, in fact, consented to resume his former allegiance: for he must be presumed to have known the laws of his country, and that those laws would impose upon him his old duties in case of his return. He is now, as Sir W. SCOTT would call him, a redintegrated subject of his native country, and is liable to all his former obligations. He is now bound actively to support the government to which he has returned. In case of war he may be compelled to take up arms against the country he has adopted; to pay taxes for the support of the war, &c., and this, not by arbitrary power, but of right. These obligations, it will be recollected, we contend, are the effect of a voluntary return. We do not mean to say, that if a naturalized citizen should enter the army of the United States, and be captured by the nation to which he formerly belonged, during a war between the two countries, he would, on being carried to his native country as a prisoner, incur those obligations. But in the case now before the court, the return of Gillespie, the claimant, to England, was entirely voluntary. Without regard, therefore, to the question of domicil, Gillespie was, according to the doctrine for which we have been contending, politically an enemy of the United States, at the time of the capture of the

Frances. If he was not an enemy, I should be glad to know, who can be considered as such. If he is not *hostis*, who has every hostile duty upon him, I am at a loss to know who is.

*368] *If the war had been sudden, humanity might plead in behalf of the claimant. But in this case, there was no surprise. War had been threatening for a long time previous to its actual declaration. No indulgence, therefore, on this ground, can be claimed.

The counsel for the claimant has cited Lord Coke in support of his doctrine of naturalization, but does not seem to have considered that, according to that author, a British subject can never become a citizen of any other country. The case of *Marryat* v. *Wilson* has also been cited. That case is, perhaps, entitled to some consideration; but even there, the court had, at first, decided against Collet, and it was only upon the request of the American minister (Mr. King) that they consented to reconsider the case, when they finally decided in his favor.

2. If Gillespie was politically an enemy, at the time of the capture, the doctrine of commercial domicil is wholly immaterial in the present case. But as the court may not view the subject in the same light as we do, a few remarks on the latter point may not be unnecessary. We lay it down, then, as an indisputed position, that the character of captured goods is decided by the commercial domicil of the owner, at the time of capture. And we contend, that Gillespie had a commercial domicil in Great Britain, at the time of the capture of the goods in question. It does not appear, that he had, in any manner, put himself in motion—*in itinere*, to return, before the capture. All the evidence, showing his intention to return, arose after that event. A hostile character, therefore, attached to the property, if not to the owner.

This is not a case of withdrawing funds: it is a case of trade, originating before the war, and continued after the war. Besides, the rule of withdrawal applies only to cases where the domicil of the party is not in the enemy country, though his trade is carried on and his property situated there. See *Coopman's Case*, cited in *The Vigilantia*, 1 Rob. 12, 14;

*369] *Escott's Case*, cited in *The Hoop*, *Ibid. 170, 201; *The Madonna delle Gracie*, 4 Ibid. 161, 195.

It has been said, that at the time of the shipment of the goods in question, the war was not known in England, and that it would be a case of great hardship, under such circumstances, to subject this property to condemnation. But want of notice, in cases like this, is an excuse not known to the law of nations. See *Whitehill's Case* (referred to in the case of *The Hoop*, 1 Rob. 170, 201): Whitehill was a British subject, had been at St. Eustatius only two days, and had no knowledge of the war, yet his property was condemned.

As to the fact, that public treaties frequently allow a particular time for the respective subject of both parties to withdraw in case of war, it may be observed, that this is only providing against the exercise of a right which the contracting parties would otherwise have had. But these mutual concessions do not alter the nature or effect of the domicil. At all events, Gillespie ought to have put himself in motion to return to the United States, immediately upon knowledge of the war. This he does not appear to have done: and according to Sir W. Scott, nothing but the

actual force of the government is a sufficient excuse for the neglect. But no such excuse has been offered.

On either of the grounds, therefore, which have been taken in this argument, we conceive that the property in controversy must be condemned.

Harper, in reply.—It is the nature of the trade, not the place of residence, which determines the hostile or neutral character of the trader.

We must still insist, that a naturalized citizen of the United States is a citizen to every intent, the right to be president of the United States only excepted, which exception but proves the general rule.

It is said, on the part of the captors, that a naturalized *American citizen ceases to be such, when he returns to his native country. [*370 Suppose, then, while absent in his native country, a descent should be cast upon him in this—would he be considered by our courts as an alien, so as to deprive him of the estate so cast upon him ? Again, suppose, in case of war between the two countries, he should enlist himself under the banners of our enemy, and be found in arms against us, should we not consider him as a traitor, and treat him accordingly? If he chooses to take such double responsibilities upon himself, it is his business to reconcile them : we can only consider him as an American citizen.

We might admit, perhaps, that by a return to his native country, in time of war, he must be considered as having abandoned his rights as a citizen of the United States, in relation to trade : still, however, he could not throw off his duties. But Gillespie returned in time of peace. He, therefore, did not assume new duties incompatible with those he owed to this country. He assumed only that temporary allegiance to the government of Great Britain, which every other stranger in that country owed. Upon the breaking out of the war, perhaps, new duties might arise, inconsistent with his duties as an American citizen. Yet, in that case, a reasonable time ought to be allowed him to remove ; and if he made every reasonable exertion to return to the United States, and especially, if he did actually return, in less than a year after being informed of the existence of the war, which is the fact, he must be considered as having retained his American character.

The domicil of the owner, at the time of capture, is not the criterion whereby to determine the character of the property captured, in all cases. If it be so generally, this case ought to be an exception. Gillespie was lawfully in England, at the breaking out of the war : he cannot be presumed to have known that war would take place ; it is impossible that he should have known it ; such a presumption is unreasonable. *Whitehill's Case* has been cited on the other side ; but the counsel for the captors is mistaken as to the facts of that case. Whitehill knew of the war, and that St. Eustatius was hostile, at the time he went there ; which essentially distinguishes it from the case now before the court.

**Pinkney* referred to the history of the times, to show that Whitehill had no knowledge of the war, when he went to St. Eustatius. [*371

Harper.—If Whitehill did not know that war had actually been declared, he knew that measures had been taken which may be considered as equivalent to a declaration. The capture took place in February. He knew that

letters of marque had been issued in December preceding, and that a long irritation had existed between the two governments. He knew also, that the trade in which he was engaged, was a trade frowned upon by his own government. In the present case, the circumstances were entirely different. 5 Rob. 220, 247.

Saturday, March 12th, 1814. (Absent, Livingston, J.) MARSHALL, Ch. J., delivered the opinion of the court, as follows:—Colin Gillespie, a naturalized American citizen, residing in Glasgow, claimed sundry goods, shipped on his own account, as his property. This claim depends entirely on his national character, and is decided in the case of *The Venus* (*ante*, p. 253). The sentence of the circuit court, condemning the property of the claimant, is affirmed.

Sentence affirmed.

VOWLES and others *v.* CRAIG and others. (*a*)

Military land-warrant.

If a person who has obtained a survey, upon a military land-warrant, under the commonwealth of Virginia, for 2000 acres, sell and transfer, for a valuable consideration, his right to the survey, and assign the plat and certificate to the purchaser, whereupon, the latter obtains a patent for the land, in his own name; and if, upon a resurvey, it appear that the grant conveys 2700 acres, the vendor cannot, in equity, support a claim for the surplus, against the vendee.[1]

THIS case, as stated by TODD, J., in delivering the opinion of the court was as follows: This suit was instituted on the chancery side of the Circuit Court of the United States for the Kentucky district, by the complainants, *372] now appellants, as the heirs *and legal representatives of Mary Vowles, formerly Mary Frazer.

The bill alleges, that in the year 1774, a survey was made for Mary Frazer, as heir-at-law and only daughter of George Frazer, deceased, by virtue of the governor's warrant, and agreeable to the royal proclamation of 1763, for 2000 acres of land, in Fincastle county, on Elkhorn creek, the waters of Ohio river. That according to usual and customary allowance, made in this, as well as other military surveys, at that time, a considerable quantity of land, over and above 2000 acres, is contained within the actual boundaries. That in the year 1778, whilst the said Mary was a minor, Michael Robinson, as guardian of the said Mary, and who had intermarried with her mother, made a contract with the defendants Lewis, Joseph and Benjamin Craig, for the sale of the said 2000 acres of land surveyed as aforesaid for the said Mary, at the price of 30*s.* per acre, amounting to 3000*l.* which was paid in the depreciated paper currency of Virginia, and was of little or no value. That the said Mary was induced to affix her signature to an assignment of the said plat and certificate of survey, which was post-dated so as to bear the appearance of its being executed when she was of full age; in consequence of which, Lewis Craig obtained a patent for the said land, in his

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(*a*) March 14th, 1814. Absent, MARSHALL, Ch. J.

[1] See Livingston *v.* Barringer, 15 Johns. 471; Van Wyck *v.* Wright, 18 Wend. 157; Mackentell *v.* Savoy, 17 S. & R. 104; Murphy *v.* Campbell, 4 Penn. St. 480; Davison *v.* Mills, 32 Id. 302.