her husband resided in this country, both before and after that period, she was entitled to dower out of those lands of which he was seised before the revolution, but not of those of which he was subsequently seised. Kelly *v.* Harrison, 2 Johns. Cas. 29. The same court has also determined, that where a British subject died seised of lands in the state, in 1752, leaving daughters in England, who married British subjects, and neither they nor their wives were citizens of the United States; even if the marriages were subsequent to the revolution, such marriages would not impair the rights of the wives, nor prevent the full enjoyment of the property, according to the laws of the marriage state, especially, after the provision in the 9th article of the treaty of 1794. The court seemed also to think, that where the title to land in the state was acquired by a British subject, prior to the revolution, the right of such British subject, to transmit the same by descent, to an heir *in esse* at the time of the revolution, continued unaltered and impaired; the case of a revolution or division of an empire being an exception to the general rule of law, that an alien cannot take by descent. Jackson *v.* Lunn, 3 Johns. Cas. 109. See also Jackson *v.* Wright, 4 Johns. 75. The treaty of 1794, relates only to lands then *held by British subjects, and not to any after-acquired lands. Jackson *v.* Decker, 11 Johns. 418, 422. [*14

In the case of Fairfax's Devisee *v.* Hunter's Lessee, 7 Cr. 603, and 1 Wheat. 304, it was adjudged, 1st. That an alien enemy may take by purchase, though not by descent; and that, whether the purchase be by grant or by devise. 2d. That the title thus acquired by an alien enemy, is not divested, until office found. 3d. That whether the treaty of peace of 1783, declaring that no future confiscations should be made, protects from forfeiture, under the municipal laws respecting alienage, lands held by British subjects at the time of its ratification, or not, yet that the 9th article of treaty of 1794 completely protected the title of a British devisee, whose estate had not been previously divested by an inquest of office, or some equivalent proceeding.

The Friendschaft: Winn *et al.*, Claimants.

Prize.—Proprietary interest.—Domicil.

Informal and imperfect proceedings in the district court, corrected and explained in the circuit court.

A bill of lading consigning the goods to a neutral, but unaccompanied by an invoice or letter of advice, is not sufficient evidence, to entitle the claimant to restitution; but is sufficient to lay a foundation for the introduction of further proof.

The fact of invoices and letters of advice not being found on board, may induce a suspicion that papers have been spoliated; but even if it were proved, that an enemy master, carrying a cargo chiefly hostile, had thrown papers overboard, a neutral claimant, to whom no fraud is imputable, ought not thereby to be precluded from further proof.

*The native character does not revert, by the mere return to his native country, of a merchant who is domiciled in a neutral country, at the time of capture; who afterwards leaves his commercial establishment in the neutral country to be conducted by his clerks, in his absence; who visits his native country merely on mercantile business, and intends to return to his adopted country: under these circumstances, the neutral domicil still continues. [*15

British subjects, resident in Portugal (though entitled to great privileges) do not retain their native character, but acquire that of the country where they reside and carry on their trade.

Appeal from the Circuit Court for the district of North Carolina. The brig Friendschaft was captured, on a voyage from London to Lisbon, by the privateer Herald, and brought into Cape Fear, in North Carolina, where the vessel and cargo were libelled, in July 1814, as prize of war.

The commercial agent of his royal highness the Prince Regent of Portugal, interposed a claim to several packages, parts of the said cargo, on behalf of the respective owners, whom he averred to be Portuguese subjects, and

merchants residing in Portugal. The cargo consisted of many different shipments; most of them were accompanied with bills of lading, directing a delivery to shipper, or order; of these, a few were specially indorsed; generally, however, they were without indorsements, or with blank indorsements only. A few shipments were accompanied with bills of lading, deliverable to persons in Lisbon, specially named in the bills. Very few were accompanied with lettters or invoices; these, it was alleged in the claim, had probably been sent by the regular packet.

*16] In August 1814, the district court pronounced its *sentence, condemning as prize of war, "all that part of the cargo for which no claim had been put in," and "all that part of the cargo which was shipped, as evidenced by bills of lading, either without indorsement, or with blank indorsements, and not accompanied by letter or invoice, viz: —— and that part appearing by the bill of lading to consist of forty bales of goods shipped by Moreira, Vieira & Machado. Further proof was ordered with respect to the residue of the cargo and the vessel.

From this sentence, the claimants appealed to the circuit court. That court, in May 1815, dismissed so much of the appeal as respected the brig, and that part of the cargo in respect to which further proof was ordered, as having been improvidently allowed, before a final sentence, and affirmed the residue of the decree, except in regard to the forty bales shipped by Moreira, Vieira & Machado, with respect to which, further proof was directed, to establish the right of Francis Jose Moreira to restitution of one-third part therof.

In April 1816, further proof was exhibited to the district court, in support of the claim for the parts of the cargo comprehended in the bills of lading numbered 108, 109, 141, 122 and 118, which bills, being deliverable to merchants residing in Lisbon, whose names were expressed therein, were not indorsed. The further proof was deemed sufficient, and restitution was ordered. The vessel, and the residue of the cargo, were condemned as prize of war.

*17] From so much of this sentence as awarded restitution, *the captors appealed; and in May 1816, the circuit court decreed as follows: "This court being of opinion, that the former sentence of the district court, affirmed by the sentence of this court, rendered in May term, in the year 1815, having been left imperfect, by omitting to recite the particular claims intended to be involved in the condemnation pronounced in the district court, in terms of general description; and being also of opinion, that the words 'all that part of the cargo which was shipped, as evidenced by bills of lading, either without indorsement, or with blank indorsements, and not accompanied with letter or invoice,' could be intended for those bills only which were to shipper, or order, and not to those addressed to consignees named in the bill itself—is of opinion, that there is no error in the sentence of the district court, and doth affirm the same."

From this decree, the captors appealed to this court. On the interposition of this appeal, the circuit court ordered that Joseph Winn, a British born subject, resident in Portugal, in whose behalf a claim was filed to No. 118, should be permitted to offer further proof to the supreme court, to be admitted or rejected by that court.

The Friendschaft.

Wheaton, for the appellants and captors.—1. The decrees of the district court of August 1814, and of the circuit court of May 1815, were final and conclusive, and ought to have precluded the district court from subsequently allowing further proof as to these five claims. The terms of general description *which are used by the judge of the district court, are equivalent to a particular designation of the claims intended to be [*18 condemned. "All that part of the cargo which was shipped, as evidence by bills of lading, either without indorsement, or with blank indorsements, and not accompanied with letter or invoice"—is as effectually condemned by the sentence, as if the particular portions of the cargo, thus documented, had been specifically enumerated. The portions now claimed were shipped, as evidenced by bills of lading, either without indorsement, or with blank indorsements, and not accompanied with letter or invoice. Consequently, they were included in the condemnation by the district court, which became final and conclusive upon the parties, by the decree of the circuit court, rendered at May term 1815, affirming that of the district court, and from which no appeal was entered. The subsequent proceedings, by which the district court admitted the claimants to further proof, were, therefore, *coram non judice*, and utterly null and void. These branches of the cause were completely extinct, and could not be revived in any court.

2. And can this court have the least doubt of the justice and legality of this decree of the district court, as thus understood and explained? Is it possible, that it is come to this, that in a court of prize, a mere bill of lading to A. B., or assigns, unsupported by any other documentary evidence found on board, or by the oath of the master, shall he regarded as sufficient, even to entitle the party to further proof? If goods, shipped in the enemy's country, can pass *the seas under so thin a veil as this, the defects of [*19 which may afterwards be supplied by fabricated proofs, what security is there for belligerent rights? To what cause are we to attribute a transaction so unusual and irregular in commerce, but to the desire of the British shippers and owners, to retain in their own hands the double power of stopping the goods *in transitu*, and of enabling the consignees to claim them in the prize court, in case of capture? If this practice be tolerated by the court, the enemy shipper need resort to no complicated machinery of fraud, in order to cover his property. He need do no more than put on board a bill of lading, unaccompanied by any invoice of the goods, or letter of advice showing in whom the property vests. In case of capture, nothing more will be necessary, than to enter a claim in the name of the neutral consignee, and to demand an order for further proof, and under that order, to ransack the great *officina fraudis*, to find the instruments of forgery and perjury; the aid of which will not become necessary, in case the shipment, thus made, escapes the vigilance and activity of the belligerent cruisers. Should they thus escape, the goods will be sold on account of the enemy's shipper, and the proceeds of the sale will be remitted to him again, by the same process; and thus the whole of the enemy's trade may be effectually screened from the perils of war. A bill of lading is an instrument too easily fabricated, to permit a court of prize to consider it alone as furnishing any proof (even presumptive) of property in the consignee. Whether the goods had been previously ordered by the Portuguese *consignee, or sent by the British shipper, for sale on his own account, [*20

they would equally have been accompanied by the same document, which is equivalent to no evidence whatever of proprietary interest, found on board. Unless some such evidence be found on board, or a foundation be laid by the preparatory examinations of the captured crew, to let the claimants into further proof, the necessary simplicity of the prize proceedings forbids a resort to extraneous testimony; and as that originally before the court is insufficient to entitle the party to restitution, condemnation must ensue. Not only are the bills of lading unaccompanied by invoices and letters of advice, but they do not express the shipment to be "for account and risk" of the consignees; and the freight is payable in London, and (of course) by the consignors. These circumstances distinguish this case from all those cases in which it has been determined (under the municipal law), that a bill of lading, expressing the shipment to be for account and risk of the consignee, or his assigns, vests the property in him, subject only to the right of stoppage *in transitu;* and the same circumstances liken it to those where the obligation on the part of the consignor to pay the freight, was held to authorize him to bring an action against the carrier master, for the goods, notwithstanding the form of the bill of lading. *Davis* v. *James*, 5 Burr. 2680; *Moore* v. *Wilson*, 1 T. R. 659. It is wholly incredible, that the letters and invoices which ought to have accompanied these shipments, were sent by the Lisbon packet (as suggested), since, *though duplicates *21] of such papers may be sent, and frequently are sent, by conveyances, other than that of the ship in which the goods are transported, yet it is unusual, and mercantilely irregular, not to send the originals with the goods. The invoices are, by the revenue laws of most, if not all, countries, indispensably necessary, to enter the goods at the custom-house, avoiding the inconvenience of unpacking and valuing them. These papers are required, by the law of nations, and the prize code of every country, to accompany the bill of lading, in order to fortify and confirm it. The absence of them does not, indeed, in all cases, furnish a substantive ground of condemnation, and exclude the party from further proof; but in order to avoid this consequence, there must be some favorable presumption raised by the circumstances of the case, and the nature of the documentary evidence found on board. This presumption cannot exist, in the case of a shipment in the enemy's country, of goods, the growth or manufacture of that country, under a bill of lading, unsupported by the oath of the master, and unaccompanied by any invoice, letter of advice, or other document whatever. The privilege of further proof is imparted under the sound discretion of the court, where a foundation is laid for it, by the papers found on board, and the depositions of the captured persons. Neither the documentary evidence, nor the examinations *in præparatorio*, afford any foundation for it, in the present case; since they do not furnish any, the slightest, reason for believ- *22] ing, that it belongs as claimed. The court would be *opening a wide door for fraud, were it to extend the privilege of further proof to such a case, which is neither one of honest ignorance nor mistake. It is impossible, that the parties should have been ignorant of what both the usage of trade, and the practice of prize courts, require. It is impossible, that they should have omitted, by mistake, what could not have been omitted but by design. The ancient French prize law, and the prize regulations of many other countries, do absolutely exclude further proof, and condemn, or

restore, upon the original evidence only. If, by the more mitigated practice, which this court has adopted, further proof be sometimes allowed, it is not as of strict right, but of equitable indulgence, where the circumstances of the case lay a foundation for it, and the claimants do not forfeit the privilege by their own misconduct.

3. No additional further proof ought to be admitted in this court, under the special orders of the circuit court, in the claim of Mr. Winn, giving him liberty to produce still further proof (in addition to the further proof exhibited to the district court), in this court, to be admitted, or rejected, at the discretion of the court. It is a settled principle of practice, that further proof cannot be introduced in this court, unless, under the circumstances of the case, it ought to have been ordered in the court below. Such is the limitation to the admission of further proof in the appellate tribunal, which has been established by the Lords of Appeal, in England, and adopted by this court. If, as has been contended, further proof ought not to *have [*23
been admitted in the district court, the consequence follows, that it ought not to be admitted here. But the lapse of time alone ought to preclude the claimants from this indulgence. They were fully apprised of the nature of the proof which their case required; they had it in their power to produce it; and after two years have elapsed, the necessity of suppressing the frauds which might be consequent upon such excess of indulgence, demands that the court should reject the additional further proof now offered by them. *The Dos Hermanos*, 2 Wheat. 96, 98.

4. Mr. Winn's claim ought to be rejected, because, supposing his proprietary interest to be made out ever so clearly, he is a British born subject, who offers a claim, upon the ground of his being a resident merchant of Portugal, although, at the time of the first adjudication, he was not domiciled in that country. The claimant makes an affidavit, at London, in June 1815, in which he describes himself, as "of the city of Lisbon, in Portugal, now in London on mercantile business," swears to the property in himself, and that at the time of the shipment and capture, he was a domiciled subject of Portugal, and had resided in Lisbon for several years preceding the capture, and until the 12th of June 1814," when he left Lisbon for Bordeaux, and "has since arrived" (without saying when) "in this city on mercantile business;" that he still is a domiciled subject of Portugal, &c. "The native character easily reverts," says Sir W. Scott (*La Virginie*, 5 Rob. 93); and it is so, not merely because *he says it, but from the [*24
very nature of things, and the gravitating tendency (if the expression may be allowed) which every person has towards his native country. Here, Mr. Winn was returning to his native country, shortly after the capture, and we may safely conclude, arrived there, long before the first adjudication. There he continued, until long after the peace, without resuming his acquired domicil in Portugal; and more than a year afterwards, we find him still resident in his native country. He was not *in transitu* to regain his neutral character, like Mr. Pinto in the case of *The Nereide*, 9 Cranch 388; but he was *in transitu* to regain his native hostile character. He did regain it, and became a redintegrated British subject. That the party must be in a capacity to claim, at the time of adjudication, as well as entitled to restitution, at the time of sailing and capture, is an elementary principle, which lies at the very foundation of the law of

prize. It is alluded to by Sir W. Scott, in a leading case on this subject (*The Hertselder*, 1 Rob. 97); it is evinced by the anciently established *formular* of the test-affidavit, and sentence of condemnation, both of which point to the national character of the party, at the time of adjudication, as an essential ingredient in determining the fate of his claim. Mr. Winn had no *persona standi in judicio*, at the time of the first adjudication; and unless he has been rehabilitated by the subsequent intervention of peace, and restored to his capacity to claim, by a species of the *jus posliminii*, his native character still remains fixed upon him, and his property must be con-
*25] demned, by relation back to the time of the first *adjudication, to which period everything must be referred.

5. But even the Portuguese domicil of Mr. Winn will not avail, to avert the condemnation of his property, because his native character is preserved, notwithstanding his residence and trade in Portugal. As the native domicil easily reverts, so also, it may, with truth, be affirmed, that it is with difficulty shaken off. Every native subject of a belligerent power is, *primâ facie*, an enemy of the other belligerent. To repel this presumption, he must show, not merely that he has acquired a personal domicil in a neutral country, but that, under all the circumstances of the case, he is unaffected with the hostile character of his native domicil. The political relations between Great Britain and Portugal completely recognise the privileged national character of British subjects in Portugal, which is preserved to them, in a manner analogous to that of European merchants in the East, who are held to take their national character from the factory to which they are attached, and from the European government under whose protection they carry on their trade. *The Indian Chief*, 3 Rob. 25. Thus, also, Sir W. Scott states, in *The Henrick and Maria*, 2 Rob. 50, that British subjects, resident in Portugal, retain their native national character, in spite of their Portuguese domicil, even in the estimation of the enemy himself (France), and that they exercise an active jurisdiction over their own countrymen settled there. This peculiar immiscible character of British subjects in Portu-
*26] gal, is strengthened *by the circumstance of that country having been, from the earliest periods of her national existence, the ally of Great Britain; and something more than a mere common ally, as Sir W. Scott observes, in *The Flad Oyen*, 1 Rob. 135. The case of *The Danaos*, cited in a note to *The Nayade*, 4 Rob. 210, in which the Lords of Appeal allowed a British born subject, resident in the English factory at Lisbon, the benefit of a Portuguese character, so far as to legalize his trade with Holland, then at war with England, but not with Portugal, must be considered as a departure from principle, and imputed to some motive of national or commercial policy, operating on the Lords at the time. Certain it is, that the reasons on which Sir W. Scott grounds the opinion expressed by him, are entitled to much more weight than is the mere authority of the Lords, unsupported by any reasons whatever. This court, which is the supreme appellate prize tribunal of this country, will scrutinize carefully all the precedents settled in the British prize courts (since the United States ceased to be a portion of the British empire), and will regard rather the reason than the authority on which they are founded. Trace the treaties between Great Britain and Portugal, and it will be found, that they impress something like a provincial dependence on Portugal, and an independent character on British subjects

resident in that country. It is to the lights of history that we must resort, to account for compacts so singularly unequal. Before the subjugation of Portugal by Spain, the ancient *Portuguese kings granted special immunities to English merchants settled in their dominions. The [*27 want of capital, in a poor and comparatively barbarous country, made it necessary to encourage the establishment of foreign merchants in factories, which were essential to their protection, on account of the difference of language, manners, religion and laws, almost (if not quite) as great as between Christendom and the countries of the East.(*a*) On the restoration of the monarchy by the house of Braganza, in 1640, John IV. was supported by Charles I. of England, who was the first prince that acknowledged the new Portuguese monarch, and entered into a treaty with him. Under the English commonwealth, this treaty was renewed by Oliver Cromwell, whose energy in maintaining the foreign influence and commercial interests of his country is so well known. Charles II. married the Infanta of Portugal; confirmed all former treaties; and made a new and perpetual one with Alfonzo VI. Under his mediation and guarantee, Spain acknowledged the independence of Portugal; which Great Britain has since constantly maintained, by succoring Portugal against her enemies. In return for a friendship so ancient, so unalterable, and so beneficial, Portugal has lavished upon the subjects of Great Britain the most precious commercial privileges: and for them has even relaxed her commercial monoply, and opened to them the *sanctum sanctorum* of her possessions in the two Indies.

These privileges have been uniformly *revived and renewed in [*28 every successive treaty which has been formed between the two countries, and may be enumerated under the following heads. 1st. Prizes made by British subjects, from nations at peace with Portugal, may be carried into the Portuguese ports for adjudication, and condemned whilst lying there. *The Henrick and Maria*, 4 Rob. 50. If the ports of Portugal can be so far considered as British, as that British prizes may be carried into them, and condemned, surely they must be considered such in respect to British subjects residing and trading there. The rule of reciprocity or amicable retaliation may be extended to them (being enemies) though it may not be extended by the court to the subjects of Portugal (because they are friends) and the judicial department cannot reciprocate to, or retaliate on them, the unjust proceedings of their nation. 2d. Portugal is bound, by treaty, to deliver up British vessels captured and brought into her ports by the enemies of Great Britain, but her friends. 2 Chalmers' Coll. Treat. 279. 3d. British subjects, resident in Portugal, are exempt from the ordinary jurisdiction of the country; and are amenable only to the judge conservator appointed by themselves, who has cognisance of all civil causes in which they are concerned; and the ordinary authorities of the country cannot proceed against them in criminal cases, without a permission in writing from the judge conservator, except only where the offender is taken *flagrante delicto*. 2 Chalmers 271, Treaty of 1674, art. 7, 13, Treaty of 1810, art. 10. 4th. *The Portuguese courts of probate, or orphans' courts, have no [*29 authority whatever, in the distribution of the effects of British sub-

(*a*) 2 Posthelwaite's Dict. of Trade and Commerce, art. Treaties

jects, deceased, in Portugal, but the same is referred to the judge conservator, under whose superintendence, administrators, are appointed by a majority of the British merchants resident in the place. 2 Chalmers 271, 281. 5th. British subjects, in Portugal, have the privilege of being paid their debts due to them by Portuguese subjects, whose property may be seized by the inquisition, or the king's exchequer. 2 Chalmers 260. 6th. They are exempted from the operation of the fundamental law of the Portuguese monarchy, which has immemorially excluded every other religion from Portugal, except the Roman Catholic; and they are permitted to enjoy their own religious principles and worship as Protestants. 2 Chalmers 265. 7th. This favored nation are also exempted from all the monoplies, and other exclusive privileges, with which the internal and external commerce of Portugal and her colonies are cramped and restrained, and to which Portuguese subjects are exposed. The only exception to this immunity is the crown farm, for the exclusive sale of certain precious productions. Treaty of 1810, art. 3. The treaty of 1810, now subsisting, confirms and renews all the privileges and immunities granted by former treaties, or municipal regulations, except only the stipulation that free ships should make free goods. These
*30] privileges and immunities segregate British residents in *Portugal from the general society, and from the commercial, political and ecclesiastical regulations of the country. They distinguish those residents from the other inhabitants, as much as the merchants of Christendom are distinguished from the natives in the oriental countries. The privileged character of Christians, established in those countries, depends as much upon the conventional law, as does that of British subjects settled in Portugal. The treaties and capitulations between the powers of Christendom and the Porte, secure to the subjects of the former, privileges not more extensive than those which are now enjoyed, and have been enjoyed from time immemorial, by the British in Portugal. Valin, *Sur l' Ordon.* 234–35; 2 Chalmers 436. It is true, that by the treaty of 1810, art. 26, his Britannic majesty renounces the right of establishing factories or corporations of merchants in the Portuguese dominions, but there is a proviso, that this concession "shall not deprive the subjects of his Britannic majesty, residing within the dominions of Portugal, of the full enjoyment, as individuals engaged in commerce, of any of those rights and privileges which they did or might possess, as members of incorporated commercial bodies; and also, that the trade and commerce carried on by British subjects shall not be restricted, annoyed, or otherwise affected, by any favors within the dominions of Portugal;" and in the case of *Mr. Fremeaux*, the Lords of Appeal, in England, decided, that the claimant was to be considered as a Dutchman,
*31] because he carried on trade at Smyrna, under *the protection of the Dutch consul, although it was proved in that gentleman's case, that there was no Dutch factory at Smyrna, and that the Dutch merchants there are not incorporated. Cited in *The Indian Chief*, 3 Rob. 32; Ibid. app'x, Note I. 295.

Gaston, for the respondents and claimants.—1. On the first point, the claimants have to encounter a difficulty purely technical, which cannot pretend to a foundation in justice, and which, indeed, aims to prevent a decision upon the merits of the controversy. If this difficulty can neither be sur-

mounted nor escaped, without a violation of the established principles and rules of jurisprudence, the claimants must submit, without repining. But it will be impossible for the friends to the repose of nations, and to the impartial administration of justice in the courts of belligerents, not to regret, that the highest tribunal in our land should find itself so fettered with forms, as to be unable to do what shall appear to them to be right; as to be compelled to condemn as prize of war, what the inferior tribunals shall have restored (in their opinion, justly) as neutral property. The captors' objection is founded on a literal exposition of the decree of August 1814, inconsistent with its obvious meaning. However desirable it may be, that precision should be used in drawing up the decrees of judicial tribunals, yet the infirmity of human nature, and the imperfection of human language, alike demand that these decisions should not be perverted, by verbal criticism, from their substantial import. No one can doubt the *meaning of the sentence of August 1814; no one can hesitate to say, that it [*32 designed not to condemn such parts of the cargo as were evidenced by bills of lading, addressed to consignees, specially named in them. This design appears as distinctly as though it had been expressed in the most formal terms. The court exempts from condemnation, and reserves for further proof, all the cases of bills of lading, deliverable to shipper or order, which are specially indorsed to consignees; *à fortiori*, it could not but exempt from condemnation, those where the bills of lading are addressed to consignees specially named in the bills of lading. It is the order of the English shipper for the delivery of the goods to the Portuguese consignee, that raises the doubt where resides the proprietary interest; whether in the shipper or in the consignee. And, unquestionably, the probability that such interest in the consignee is, at least, as strong, where the consignment is original, and on the face of the bill of lading, as where it is made by an indorsement of the bill. The sentence of August 1814, which is insisted on as condemning the property in question, could not have that effect, until it was completed. A blank was purposely left for the insertion of the parts of the cargo intended to be condemned. Until this blank was filled up, or something done by the court, equally definitive and precise, the sentence was necessarily imperfect, both in substance and in form. This imperfection continued as to the district court, until August term 1816, and then the property in question was not only not condemned, but ordered to be restored. The affirmance of the sentence of August 1814, by *the circuit court, was in general terms. It cannot, therefore, have any [*33 other effect than if the sentence affirmed had been repeated *in totidem verbis*. The sentence of condemnation, therefore, of the circuit court, of May 1815, was incomplete; and remained so until November term 1816, when, in direct terms, it was declared, that it should not apply to the present claims. Whatever informalities or errors of proceeding may have been had below, yet, as the property to which the claims apply is still in the custody of the law, and the whole case in relation to it is now before this court, all these errors and irregularities will be so corrected, as to make the final decision of the controversy, and disposition of the property, conform to the rights of the parties litigant. Whether the district court, in August 1814, did or did not condemn this part of the cargo; whether it did or did not decree that further proof should be heard in relation to it; yet, if it ought

not to have been condemned—if further proof ought to have been received in relation to it—this court will receive such further proof.

2. But it is contended, that whatever might have been the meaning of the sentence of the district court of August 1814, affirmed in the circuit court in May 1815, it ought to have condemned the goods in question, and not to have let in the claimants to further proof. And this position is founded on the assertion that the bills of lading, No. 108, 109, 141, 122 and 118, furnish no evidence whatever of proprietary interest in the consignees, and on the apprehension that the admission of further proof, in cases so circumstanced, might destroy all security for belligerent *rights. And does a bill of lading furnish no evidence, not even presumptive, of proprietary interest in the consignee? It is understood, and such was the language of this court, in the case of *The St. Joze Indiano*, 1 Wheat. 212, that in general, the rules of the prize court, as to the vesting of property, are the same with those of the common law. Now, "every authority which can be adduced, from the earliest period of time down to the present hour, agree, that at law, the property does pass as absolutely and as effectually (by a bill of lading), as if the goods had been actually delivered into the hands of the consignee." *Per* BULLER, J., in Dom. Proc., *Lickbarrow* v. *Mason*, 6 East 23 n. "If, upon a bill of lading" (says Lord HARDWICKE, in *Snee* v. *Prescott*, 1 Atk. 245), "between merchants residing in different countries, the goods be shipped and consigned to the principal, expressly, in the body of the bill of lading, that vests the property in the consignee." The right of the consignor to stop goods *in transitu* is not founded on any presumed property in the consignor, but necessarily supposes the property to be in the consignee; for, "it is a contradiction in terms, to say a man has a right to stop his own goods *in transitu*." It is a right founded wholly on equitable principles, "which owes its origin to courts of equity—and the question is not whether the property has vested under the bill of lading, for that is clear; but whether, on the insolvency of the consignee, who has not paid for the goods, the consignor can countermand the consignment, *or, in other words, divest the property which was vested in the consignee." 6 East 28 n. Unless, therefore, a totally different rule, as to the vesting of property, is to be asserted in a court of prize from that which is established at law, a bill of lading absolutely vests the property in the consignee, and of course, is the appropriate and definite evidence of his proprietary interest. But it is said, these bills of lading do not express the shipment to be for the account and risk of the consignees, and state that the freight has been paid in London, and, "of course, by the consignors." Surely, it is not seriously contended, that the omission to declare the shipment to be on account of the consignees, and the declaration that the freight has been paid in London, and "of course, by the consignors," could have been designed to secure to the consignors the right of stopping *in transitu?* This right is founded on principles of equity, which give it a direct application to shipments made on account of the consignees, and which have no connection whatever with the legal consequences of the payment of freight.

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Let us see, however, what inferences may be fairly drawn from the peculiarities which are noticed in the bills of lading: they omit to state that the shipment is on account and risk of the consignees. Shall we thence infer, that the shipment is on account and risk of the consignors? This is not the

inference of the law. If the bill of lading vests the property in the consignee, he, of course, sustains the peril of the shipment, unless there be an agreement to the contrary. It would be a singular *absurdity, [*36
indeed, if the law, upon the instrument, presumed, that the consignee was the owner, and, at the same time, inferred, that he did not bear the ordinary risks of ownership. Where the shipment is on account and at the risk of the consignor, and not of the consignee, there it may be proper to express the fact, because it is opposed to the legal presumption; but that an omission to state, what, without statement, is presumed, can be converted into an argument against the presumption, will be an instance of intellectual dexterity, rather fitted to surprise, than to satisfy the inquirer after truth. A bill of lading evidences an agreement made by the master with the shipper for the delivery of the goods to the consignee. His undertaking is simply to carry the goods for the stipulated price to the consignee; he knows not that the consignee is to sustain the risk of the shipment; he cannot, therefore, with propriety, aver it in his contract. If, indeed, the consignor is to sustain the risk, and wishes this fact to be stated in the master's undertaking, then has he the full evidence which warrants the insertion of such a clause in the bill of lading. And accordingly, such is the mercantile usage; bills of lading ordinarily express account and risk, when they are not the account and risk of the consignee. But it is otherwise with invoices; these are documents passing between the parties to the shipment, and contain the declaration of the consignor to the consignee. These, therefore, declare, however it may be, at whose account and hazard the shipment is made. The other peculiarity noticed in the bills of lading is, that the *freight is paid in London, and "of course, by the consignors." If [*37
this corollary, thus summarily deduced, of a payment by the shippers, mean no more than a payment by the consignees, through the shippers, as their immediate agents at London, it may be admitted, as probable, and, at all events, as harmless. But if it mean a payment by the shippers, as principals, or on their own account, then it is denied to follow from the proposition which it claims as its premises. But the peculiarities, thus examined, are relied on as constituting a support on which to rest the doctrine contained in the cases of *Davis* v. *James*, 5 Burr. 2680, and *Moore* v. *Wilson*, 1 T. R. 659, which are cited (as it would seem), to prove, that where the consignor pays the freight, the bill of lading does not vest the property in the consignee! It is not material to inquire, how far these cases would now stand the test of a strict scrutiny. It is but doing justice, however, to the great men who decided them, to say, that they establish no such doctrine. Lord MANSFIELD expressly declares, that he does not proceed at all on the ground of proprietorship, but simply on the agreement of the carrier. And Lord KENYON, in *Dawes* v. *Peck*, 7 T. R. 330, states, that the doctrine which they furnish is no more than that the consignor may bring an action for breach of contract against the carrier, on his agreement, where the consignor is to be at the expense of the carriage, "where he stands in the character of an insurer to the consignee for the safe arrival of the goods."

It is alleged, that if the interest in these claims *were *bonâ fide* [*38
neutral, it is incredible, that the invoices and letters would not have accompanied the shipment. Is it not equally probable, where the shipment is not on neutral account, or partly on neutral and partly on hostile account,

and there is no attempt at deception, that it would have been accompanied with letters and invoices? Yet, in the vast multitude of the shipments, clearly on enemy account, made by this ship, and which have been condemned without a controversy, there is not one in ten thus accompanied. The packet sails between London and Lisbon, with a regularity, certainty and frequency, little short of what takes place in transmissions by mail. It is the great and established medium of conveyance, established by treaty stipulations, for passengers and letters. Is it strange, therefore, that all the communications between the shipper and the owner of the goods, except a copy of the bill of lading (which at once evidences the property, and is directory to the master), should have been sent by this certain and regular and official medium of conveyance? If duplicates of these communications had accompanied the shipments in question, this unusual caution might have been construed into a proof of guilt, and these additional evidences of neutral proprietorship stigmatized as the badges of fraud. But it is alleged also, that the bills of lading are not verified. The only individual of the crew, examined by the commissioners, is the master, and he supports the bill of lading so far as can be expected of a carrier-master. In answer to the 13th interrogatory, he declares, that the bills of lading are not false or colorable; and in answer to the 20th, *that he presumes the goods shipped belong to the respective consignees. The rights of belligerents are not the only rights deserving of the notice, and entitled to the protection of courts of prize. Though human testimony may sometimes be corrupt, and often fallacious, it is by human testimony alone, that human tribunals can hope to eviscerate the truth. Condemnation should take place only when the fact of enemy's property has been ascertained; and where that fact is doubted, proof should be resorted to. These principles have received the countenance of all those engaged in the administration of public law, whom the civilized world (cruisers excepted) regard with reverence. They will be found stated with simplicity and perspicuity, in the famous British answer to the Prussian memorial, and communicated to the American government in 1794, as the basis of the proceedings in British courts of admiralty; and which has been adopted by this court as the *substratum* of its own conduct in cases of prize.

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3. When it is recollected that the claimants have sought to furnish proof, both from the port of shipment and the port of destination, from London and from Lisbon; that during the war, the means of procuring such proof from Europe and bringing it to the United States, were unfrequent and uncertain; and that delay will not be occasioned by listening to the additional proof now tendered, it is believed, that the court will not refuse to hear it. The case of *The Bernon*, 1 Rob. 86, shows that the court, after receiving further proof, may order additional proof, if requisite to enlighten its judgment; *and the case of *The Frances*, 8 Cranch 308, 353, is an authority in point, that the appellate court may order additional proof, if the further proof on which the cause has been heard below is defective. May not the appellate court then hear it, if to prevent injurious delays, it be prepared in anticipation?

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4. The only inquiries of fact, as to the character of the claimant, according to the rules laid down by Sir William Scott, in *The Herstelder*, 1 Rob. 97, are, was he, at the time of seizure, entitled to restitution; and is he, at

the time of adjudication, in a capacity to claim. The present capacity of the claimant, is without doubt; his right to restitution must be tested, by his national character at the time of seizure, on the 10th of May 1814. But the objection is founded entirely on a misconception of the meaning of the affidavits. Whether the facts testified be true or not, must depend on the veracity of the deponents. If they are to be believed, they prove a residence of the claimant, as an established merchant, at Lisbon, for several years preceding the seizure, and up to the 12th of June thereafter; the leaving of Lisbon, on mercantile business, *animo revertendi*, on the 12th of June 1814, and the continuance of his domicil, residence and establishment there, and a continued purpose of actually returning thither, up to the date of the affidavits.

5. It must be conceded, that for commercial purposes, among the civilized nations of Europe and the West, the national character of an individual is, ordinarily, that of the country in which he resides. No position is better established than this, that if a person goes to another country, and there engages in *trade, and takes up his residence, he is, by the law of nations, to be considered as a merchant of that country. This general rule applies to the case of British merchants domiciled in Portugal. [*41 They owe allegiance to the government, are protected by its laws, mingle intimately with the natives in all the social and domestic relations, cherish Portuguese industry, increase Portuguese capital, and contribute to the revenue of Portugal. It is true, that a very intimate commercial connection has long subsisted between Portugal and Britain, and that the subjects of the latter are encouraged to settle in the Portuguese dominions, by many advantageous regulations in favor of their traffic. But it is by no means true, that any British authority is exercised in Portugal, or that Portugal can be viewed as the dependent province of Britain. 1st. There is no authority for the assertion, that the ports of Portugal are open in war for adjudication of British captures, made from nations at peace with Portugal. An irregular practice formerly obtained to that effect, to which Sir WILLIAM SCOTT alludes, in *The Henrick and Maria;* but it was sanctioned neither by treaty nor decree. The treaty of 1810 is utterly silent on that head, and it is a matter of notoriety, that on the breaking out of the late war between the United States and Great Britain, a royal decree was issued, forbidding the cruisers of belligerents from bringing their prizes into the dominions of Portugal, which was enforced throughout the war. 2d. Portugal is not bound by treaty to deliver up British vessels, brought into her ports, which have been taken by the enemy of Britain. *The 30th article of the present treaty limits the obligation to the restitution of property [*42 plundered by pirates; and this obligation is reciprocal. 3d. British residents are not exempt from the jurisdiction of the Portuguese tribunals. They have the privilege, indeed, of choosing from among the commissioned judges of the realm, one who is to be presented to the king, for his approbation, as their judge conservator, and who, if approved, is so appointed. The authority of this judge (who is usually selected because of his knowledge of the English language) reaches only to the trial, in the first instance, of commercial disputes brought before him by British merchants, and is ever subordinate to the higher tribunals of justice, established in the realm, who, in all cases, possess over him an appellate jurisdiction. The privilege is not pecu-

liar to the British, but is extended to every friendly European nation. 4th. The provision of the treaty of 1654, relative to the appointment of administrators to British residents, dying intestate, is not renewed in the treaty of 1810. There is, in lieu of it, a reciprocal stipulation (Art. 7th), for the disposal, by the subjects of both nations, of their personal property by testament. 5th. The provision for applying the effects seized by the Inquisition to the payment of the debts due the British creditor, is but a dictate of justice, and probably places these creditors on the same footing with native creditors. It is not found in the treaty of 1810. 6th. There is nothing extraordinary in the mutual stipulation for the tolerance, by each, of the religion of the subjects of the other, so far as it may consist with the laws of
*43] their respective realms. 7th. Nor is it unusual, *to grant to the subjects of other nations, an exemption from monopolies obligatory on native merchants. It is perfectly familiar to the court, that under the British treaty of 1795, such an exemption was accorded to American merchants from the monopoly of the British East India company. And in the treaty of 1810, it will be seen, that the stipulations are reciprocal. There is much difficulty in ascertaining the precise nature of the immunities enjoyed by British merchants in Portugal, at the date of the treaty of 1810, because the practice had been to grant them occasionally by *alvaras*. These are temporary proclamations, which have effect only for a year and a day. It is very certain, that some privileges, heretofore granted, were not then possessed. For instance, the *alvara* of 1717 exempts Englishmen from certain taxes to which the natives are liable, while the 7th article of the treaty of 1810, provides that they shall be liable to the same taxes (and no other) as are imposed on the natives of Portugal. The probability is, that the most important of these immunities are especially enumerated in the treaty. It is unnecessary, however, to proceed further with this examination. Enough appears, to show that the attempt to take the case of British merchants, resident in Portugal, out of the general rule applied to domicil among civilized nations, whatever admiration may be due to its boldness, cannot receive the sanction of an enlightened court. The analogy between such merchants and Europeans in Turkey, who, there, neither sustain their original character, nor take the character of the people within whose territories they sojourn,
*44] but owe their name and political *existence to the factory and association under whose protection they carry on a precarious traffic—who are viewed as a people exempt from Turkish dominion,(*a*) and who never mix with the natives in any social or domestic concern—is too forced and unnatural, to afford a basis for any arguments applicable to them both. No authority is cited in support of this objection, other than a remark of Sir William Scott, in *The Henrick and Maria*, which must be understood *secundum subjectam materiam*. He is there speaking of the validity of a condemnation, in England, of an enemy's ship, carried into Lisbon or Leghorn—into the port of a very close and intimate ally. But in opposition to it, there are great authorities. The case of the Armenian merchants resident at Madras, under special privileges, who were, nevertheless, subjected to the general rule of domicil, bears directly upon it (*The Angelique*, 3 Rob. 294, app'x B); the case of *The Nayade*, which applies the com-

(*a*) See Consular Certificate in The Herman, 3 Rob. app'x I. 295.

mercial rule of domicil to Prussian merchants in Portugal, also bears upon it (4 Rob. 206); the case of *The Danous* (Ibid. 210), decided in March 1802, at a time when the objection was stronger than at present, is directly in point, and of the highest prize tribunal in England. In *The San Jose Indiano* (2 Gallis 268, 292), it was expressly decided by one of the learned judges of this court, that British residents, in the dominions of Portugal, take the character of their domicil, and as to all third parties, are to be deemed Portuguese subjects. This decision was acquiesced in by the counsel for the captors. In the case of *The Antonia Johanna*, such *was considered the settled rule; and accordingly, restitution was made by [*45 this court to Mr. Ivers, a resident British merchant, at St. Michael's, one of the firm of Burnet & Ivers, of the moiety claimed in his behalf as a Portuguese subject. (1 Wheat. 159). The counsel who now advances this objection, declined then to bring it forward.

February 6th, 1818. MARSHALL, Ch. J., delivered the opinion of the court, and after stating the facts, proceeded as follows:—The appellants contend: 1st. That the sentence pronounced by the district court, in August 1814, which was affirmed by the circuit court, in May 1815, condemned finally the packages for which a decree of restitution was afterwards made, and that the subsequent proceedings were irregular, and in a case not before the court. 2d. That upon the merits, further proof ought not to have been ordered, and a condemnation ought to have taken place.

On the first point, it is contended, that these goods, having been comprehended in invoices not indorsed, nor accompanied with letters of advice, are within the very terms of the sentence of condemnation, and must, consequently, be considered as condemned. The principle on which this argument was overruled in the court below, is to be found in its sentence. The district court, in its decree of 1814, did not intend to confine its description of the property condemned, to the general terms used in that decree, but did intend to enumerate the particular bills to *which those terms should [*46 apply. This is conclusively proved by reference to the subsequent intended enumeration, which is followed by a blank, obviously left for that enumeration. Had the enumeration been inserted, as was intended, the particular specification would undoubtedly have controlled the general description which refers to it. The unintentional and accidental omission to fill this blank, leaves the decree imperfect, in a very essential point; and if the case, and the whole context of the decree, can satisfactorily supply this defect, it ought to be supplied. This court is of opinion, that no doubt can be entertained respecting the bills with which the district court intended to fill up the blank. The condemnation of shipments, evidenced by bills of lading, with blank indorsements, or without indorsement, could apply to those only which required indorsement, or which were in a situation to admit of it. These were the bills which were made, deliverable to shipper, or to the order of the shipper. Bills addressed to a merchant, residing in Lisbon, could not be indorsed by such merchant, until the vessel carrying them should arrive at Lisbon. Consequently, such bills could not be in the view of the judge, when condemning goods, because the bills of lading were not indorsed; and had he completed his decree, such bills could not have been inserted in it. No conceivable reason exists, for admitting to further proof,

the case of a shipment, evidenced by a bill of lading, made deliverable to shipper, or order, and indorsed to a merchant, residing in Lisbon; and at the same time, condemning, without admitting to further proof, the same
*47] *shipment, if evidenced by a bill of lading, made deliverable, in the first instance, to the Lisbon merchant. No. 108, for example, is made deliverable at Lisbon, to Signor Jose Ramos de Fonseco, and is consequently not indorsed. It is contended, that these goods are condemned; but had the bill been made deliverable to shipper, or order, and indorsed to Signor Jose Ramos de Fonseco, further proof would have been admitted. Nothing but absolute necessity could sustain a construction, so obviously absurd. This court is unanimously of opinion, that justice ought not to be diverted from its plain course, by circumstances so susceptible of explanation, that error is impossible; and that when the decree was returned to the district court of North Carolina, with the blank unfilled, that court did right in considering the specification intended to have been inserted, and for which the blank was left, as a substantive and essential part of the decree, still capable of being supplied, and in acting upon, and explaining the decree, as if that specification had been originally inserted. This impediment being removed, the cause will be considered on its merits.

It is contended, with great earnestness, that further proof ought not to have been ordered, and that the goods which have been restored, ought to have been condemned as prize of war. In support of this proposition, the captors, by their counsel, insist, that the rights of belligerents would be sacrificed, should a mere bill of lading, consigning the goods to a neutral,
*48] *unaccompanied by letter of advice or invoice, let in the neutral claimant to further proof. It is not pretended, that such a bill would, of itself, justify an order for restitution; but it certainly gives the person to whom it is addressed, a right to receive the goods, and lays the foundation for proof, that the property is in him. It cannot be believed, that admitting further proof, in the absence of an invoice or letter of advice, endangers the fair rights of belligerents; these papers are so easily prepared, that no fraudulent case would be without them. It is not to be credited, that a shipper in London, consigning his own goods to a merchant in Lisbon, with the intention of passing them on a belligerent cruiser as neutral, would omit to furnish a letter of advice and invoice, adapted to the occasion. There might be double papers, but it is not to be imagined, that papers so easily framed, would not be prepared, in a case of intended deception.

It is, unquestionably, extraordinary, that the same vessel which carries the goods should not also carry invoices, and letters of advice. But the inference which the counsel for the captors, would draw from this fact, does not seem to be warranted by it. It might induce a suspicion, that papers had been thrown overboard; but in the total absence of evidence, that this fact had occurred, the court would not be justified in coming positively to such a conclusion. Between London and Lisbon, where the voyage is short and the packets regular, the bills of lading and invoices might be sent by the regular conveyances. But were it even admitted, that a belligerent
*49] master, carrying a *cargo, chiefly belligerent, had thrown papers overboard, this fact ought not to preclude a neutral claimant, to whom no fraud is imputable, from exhibiting proof of property. In the case before the court, no attempt was made to disguise any part of the cargo. By far

the greater portion of it was confessedly British, and was condemned, without a claim. The whole transaction, with respect to the cargo, is plain and open; and was, in the opinion of this court, a clear case for further proof.

The further proof in the claims 108, 109, 141 and 122, consists of affidavits to the proprietary interest of the claimants; of copies of letters, in some instances ordering the goods, and in others, advising of their shipment; and of copies of invoices—all properly authenticated. This proof was satisfactory, and the order for restitution made upon it was the necessary consequence of its admission. (*a*)

*In the claim to No. 118, made for Joseph Winn, the further proof was not so conclusive. It consisted of the affidavit of the claimant to his proprietary interest, and to his character as a domiciled Portuguese subject, residing and carrying on trade in Lisbon. The affidavit was made in London, on the 29th day of June 1815, but states the claimant to have been at his fixed place of residence in Lisbon, at the time of the capture, where he had resided for several years preceding that event, and where he continued until the 12th of June 1814, when he left *Lisbon for Bordeaux, and has since arrived in London on mercantile business. That he is still a domiciled subject of Portugal, intending to return to Lisbon, where his commercial establishment is maintained, and his business carried on by his clerks, until his return. To a copy of this affidavit is annexed that of Duncan McAndrew, his clerk, made in Lisbon, who verifies all the facts stated in it. [*50 [*51

This property was also restored by the sentence of the district court, and

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(*a*) M. Bonnemant, in his commentary upon De Habreu, makes the following remarks: "Parmi les pièces dont un navire doit être pourvu pour la régularité de sa navigation, il en est de deux sortes; les unes servent à prouver la neutralité du navaire, les autres celle de la cargaison. Celles relatives à la cargaison sont les connoissments, les polices de chargement, les factures. Toutes ces pièces font pleine et entière foi, si elles sont en bonne et due forme. Toute ne sont pas d'absolue nécessité; comme elles sont correlatives, elles se suppléent entre elle et peuvent être supplées par d'autres équivalentes. Mais si l'on en découvre d'autres qui les démentent, s'il se recontre des double expéditions on autres documens capable d'ebranler la confiance, la prèsomption de fraude se change dès-lors en certitude, on ne présume pas simplement le navaire ennemi, on le suppose. La preuvre de la neutralité est toujours á la charge du capture. Cette preuve ne peut et ne doit résulter que des paers trouvés á bord;[1] toute autre indirecte ne peut être reque ni pour ni contre, c'est la disposition de l'art. 11. du règlement du 26 Juillet, 1778, et des précédens qui veulent qu'on n'ait égard qu'aux pièces trouvées à bord, et non à celles qui pourroient être produites après la prise. C'est au capteur à prouver ensuite l'irregularité des pièces, à les discuter de la manière qu'il juge convenable pour en demontrer la fraude et la simulation. Quant aux irregularités que pouvent contenir certaine pièces de bord, ce n'est pas á des omissions de forme usitées que les tribunaux doivent s'attacher, c'est par l'ensemble des pièces, et sur tout par la vérité des choses qui en résulte, qu'ils doivent se déterminer; l'expérience n'a que trop démontré que la plus grande régularité dans les papiers mas quoit souvent la fraude et la simulation, *nimia precautio dolus.*" Bonnemant's Translation of De Habreu, tom. 1, p. 28.

[1] The French prize practice not allowing further proof, but acquitting or condemning upon the original evidence, consisting of the papers found on board, and the depositions of the captors and captured. The only exception to this rule is, where the papers have been spoliated by the captors, or lost by shipwreck, and other inevitable accidents. Valin, *Traité des Prises*, ch. 15, n. 7. But the Spanish law admits of further proof, in case of doubts arising upon the original evidence. De Habreu, part 2, ch. 15.

affirmed in the circuit court. On an appeal being prayed, the circuit court made an order, allowing this claimant to take further proof to be offered to this court. The proof offered under this order consists of a special affidavit of one of the shippers, of sworn copies of letters ordering the shipment, and of the invoice of the articles shipped. This claim, not having been attended, when the sentence of restitution was made, with any suspicious circumstances, other than the absence of papers which have since been supplied, and which was probably the result solely of inadvertence, this court is of opinion, that the further proof now offered, ought to be received. It certainly dissipates every doubt respecting the proprietary interest. The only question made upon it, respects the neutral character of the claimant.

It has been urged, that the native character easily reverts, and that by returning to his native country, the claimant has become a redintegrated British subject. *But his commercial establishment in Lisbon still remains; his mercantile affairs are conducted in his absence, by his clerks; he was himself in Lisbon, at the time of the capture; he has come to London, merely on mercantile business, and intends returning to Lisbon. Under these circumstances, his Portuguese domicil still continues.

*52]

But it is contended, that the connection between Britain and Portugal retains the British character, and the counsel for the captors has enumerated the privileges of Englishmen in that country. These privileges are certainly very great; but without giving them a minute and separate examination, it may be said, generally, that they do not confound the British and Portuguese character. They do not identify the two nations with each other, or affect those principles on which, in other cases, a merchant acquires the character of the nation in which he resides and carries on his trade. If a British merchant, residing in Portugal, retains his British character, when Britain is at war, and Portugal at peace, he would also retain that character, when Portugal is at war, and Britain at peace. This no belligerent could tolerate; its effect would be to neutralize the whole commerce of Portugal, and give it perfect security.

Sentence affirmed.[1]

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*53] McIver, Assignee, &c., *v.* Kyger *et al.*

Specific performance.

Bill for the specific performance of an agreement for the exchange of lands. The contract enforced.

February 4th, 1818. This cause was argued by *Taylor*, for the appellant, and by *Swann*, for the respondents.

February 10th. Marshall, Ch. J., delivered the opinion of the court.—On the 25th day of March 1789, George Kyger and Josiah Watson entered into articles for the exchange of a lot in Alexandria, estimated at $2200, for certain lands in Kentucky, the property of Watson. The lot was to be conveyed to Watson, within eighteen months from the date of the contract; in consideration of which, Watson stipulated to convey to Kyger, such lands, surveyed and patented for him, on the waters of Elkhorn, in Kentucky, as

[1] For a further decision, on Moreira's claim, see 4 Wheat. 105.