The Anne

*C. J. Ingersoll* moved to dismiss the writ of error, as having been improvidently issued, under the 25th section of the judiciary act, the decision of state court not being a "final judgment," in the cause.

*Hopkins*, contrà.

Marshall, Ch. J., delivered the opinion of the court.—The appellate jurisdiction of this court, under the 25th section of the judiciary act, ch. 20, extends only to a final judgment or decree of the highest courts of law or equity in the cases specified. This is not a final judgment of the supreme court of Pennsylvania. The cause may yet be finally determined in favor of the plaintiff, in the state court.

Writ of error dismissed.

Judgment.—This cause came on to be heard, on the transcript of the record of the supreme court of the commonwealth of Pennsylvania for the Lancaster district. On examination whereof, it is adjudged and ordered that the writ of error in this cause be, and the same is hereby dismissed, this court not having *jurisdiction in said cause, there not having been a final judgment in said suit, in the said supreme court of the commonwealth of Pennsylvania.(a) [*435

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## The Anne: Barnabeu, Claimant.

*Captors as witnesses.—Claim by neutral consul.—Capture within neutral territories.*

The captors are competent witnesses, upon an order for further proof, where the benefit of it is extended to both parties.

The captors are always competent witnesses, as to the circumstances of the capture, whether it be joint, collusive, or within neutral territory.

It is not competent for a neutral consul, without the special authority of his government, to interpose a claim, on account of the violation of the territorial jurisdiction of his country.[1]

*Quære?* Whether such a claim can be interposed, even by a public minister, without the sanction of the government in whose tribunals the cause is pending?

A capture, made within neutral territory, is, as between the belligerents, rightful; and its validity can only be questioned by the neutral state.[2]

If the captured vessel commence hostilities upon the captor, she forfeits the neutral protection, and the capture is not an injury for which redress can be sought from the neutral sovereign.

Irregularities on the part of the captors, originating from mere mistake or negligence, which work no irreparable mischief, and are consistent with good faith, will not forfeit their rights of prize.[3]

Appeal to the Circuit Court for the district of Maryland. *The British ship Anne, with a cargo belonging to a British subject, was captured by the privateer Ultor, while lying at anchor, near the Spanish part of the island of St. Domingo, on the 13th of March 1815, and carried into New York for adjudication. The master and supercargo were put on [*436

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(a) Costs are not given, where the writ of error is dismissed for want of jurisdiction. Inglee *v.* Coolidge, 2 Wheat. 368.

[1] See The Bello Corrunes, 6 Wheat. 152; The London Packet, 1 Mason 14; The Adolph, 1 Curt. 87; The Huntress, 2 Wall. Jr. C. C. 59.

[2] The Sir William Peel, 5 Wall. 517.

[3] The Arabella, 2 Gallis. 368.

shore at St. Domingo, and all the rest of the crew, except the mate, carpenter and cook, were put on board the capturing ship. After arrival at New York, the deposition of the cook only was taken, before a commissioner of prize, and that, together with the ship's papers, was transmitted, by the commissioner, under seal, to the district judge of Maryland district, to which district the Anne was removed, by virtue of the provisions of the act of congress of the 27th of January 1813, ch. 478.

Prize proceedings were duly instituted against the ship and cargo, and a claim was afterwards interposed, in behalf of the Spanish consul, claiming restitution of the property, on account of an asserted violation of the neutral territory of Spain. The testimony of the carpenter was thereupon taken by the claimant, and the captors were also admitted to give testimony as to the circumstances of the capture; and upon the whole evidence, the district court rejected the claim, and pronounced a sentence of condemnation to the captors. Upon appeal to the circuit court, peace having taken place, the British owner, Mr. Richard Scott, interposed a claim for the property, and the decree of the district court was affirmed, *pro formâ*, to bring the cause for a final adjudication before this court.

*437] *March 5th. *Harper*, for the appellant and claimant, argued, that the captors were incompetent witnesses, on the ground of interest, except when further proof was imparted to them (*The Adriana*, 1 Rob. 34; *The Haabet*, 6 Ibid. 54; *L'Amitie*, Ibid. 269 n., and that they were not entitled to the benefit of further proof in this case, being *in delicto*. The irregularity of their proceedings, and the violation of the neutral territory, would not only exclude them from further proof, but forfeit their rights of prize. The testimony being irregular, it must appear, affirmatively, that it was taken by consent, where the irregularity consists, not in a mere omission of form, but in the incompetency or irrelevancy of the evidence. The testimony of the captors being excluded from the case, the violation of the neutral territory would appear uncontradicted. The text-writers affirm the immunity of the neutral territory from hostle operations in its ports, bays and harbors, and within the range of cannon-shot along its coasts. Vattel, lib. 3, ch. 7, § 132; Ibid. lib. 1, ch. 23, § 289; Bynk. Q. J. Pub. lib. 1, ch. 8; Martens, lib. 8, ch. 6, § 6; Azuni, pt. 2, ch. 5, art. 1, § 15. Nor can it be used as a station from which to exercise hostilities. *The Twee Gebroeders*, 3 Rob. 162; *The Anna*, 5 Ibid. 332.

As to the authority by which the claim was interposed, the Spanish consul's was sufficient for that purpose; especially, under the peculiar circumstances of the times, when, on account of the unsettled state of the government in Spain, no minister from that country was received by our government, *but the former consuls were continued in the exercise of their functions by its permission. In one of the cases in the English books, the Portuguese consul was allowed to claim on account of violated territory, although it does not appear that he had any special instructions from his sovereign for that purpose. *The Vrow Anna Catharina*, 5 Rob. 15. But even supposing the powers of a consul not adequate to this function, whence arises the necessity that the neutral government should interfere in general? Because the enemy proprietor is absolutely incapable of interposing a claim

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on this, or any other ground. But here the incapacity of the claimant is removed, his *persona standi in judicio* being restored by the intervention of peace. He may, consequently, assert his claim upon every ground which shows that the capture, though of enemy's property, was originally unlawful and void.

*D. B. Ogden* and *Winder*, contrà, contended, that the captors were admissible witnesses in this case, as they are in all cases respecting the circumstances of the capture; such as collusive and joint captures, where the usual simplicity of the prize proceedings is necessarily departed from. So also, their testimony is generally admitted on further proof. *The Maria*, 1 Rob. 340. *The Resolution*, 6 Ibid. 13; *The Grotius*, 9 Cranch 368; *The Sally*, 1 Gallis. 401; *The George*, 1 Wheat. 408. A claim founded merely upon the allegation of a violation of neutral territory, is a case peculiarly requiring the *introduction of evidence from all quarters, the captors being as much necessary witnesses of the transaction as are the captured persons. [*439 Every capture of enemy's property, wheresoever made, is valid, *primâ facie;* and it rests with the neutral government to interfere, where the capture is made within neutral jurisdiction. The enemy proprietor has no *persona standi in judicio* for this or any other purpose. But here, the suggestion of a violation of the neutral territory is not made by proper authority. All the cases show that a claim for this purpose can only be interposed by authority of the government whose territorial rights have been violated. *The Twee Gebroeders*, 3 Rob. 162, n.; *The Diligentia*, 1 Dods. 412; *The Eliza Ann*, Ibid. 244. The public ministers of that government may make the claim, because they are presumed to be fully empowered for that purpose: but a consul is a mere commercial agent, and has none of the diplomatic attributes or privileges of an ambassador; he must, therefore, be specially empowered to interpose the claim, in order that the court may be satisfied that it comes from the offended government. A consul may, indeed, claim for the property of his fellow-subjects, but not for the alleged violation of the rights of his sovereign; because it is for the sovereign alone to judge when those rights are violated, and how far policy may induce him silently to acquiesce in those acts of the belligerent by which they are supposed to be infringed. There is only one case in the English books where a claim of this sort appears to have been made *by a consul; and from the report of that case, it may be fairly inferred, that he was specially directed [*440 by his government to interpose the claim. *The Vrow Anna Catharina*, 5 Rob. 15. But even the Spanish government itself has not conducted with that impartiality between the belligerents, which entitles it to set up this exemption. *The Eliza Ann*, 1 Dods. 244, 245. Its territory was, during the late war, permitted to be made the theatre of British hostility, and in various instances, was violated with impunity. Spain was incapable, or unwilling, at that time, to maintain her neutrality, in any part of her immense dominions. In this very case, the captured vessel was not attacked; she was the aggressor: and in self-defence, the privateer had not only a right to resist, but to capture. The local circumstances alone would have prevented the Spanish government from protecting the inviolability of its territory, on a desert coast, and out of the reach of the guns of any fortress. Bynkers-

hoek (*a*) and Sir WILLIAM SCOTT hold, that a flying enemy *may lawfully be pursued and taken in such places, if the battle has been commenced on the high seas. *The Anna*, 5 Rob. 345. *A fortiori*, may an enemy, who commences the first attack within neutral jurisdiction, be resisted and captured.

But should all these grounds fail, the captors may stand upon the effect of the treaty of peace, in quieting all titles of possession arising out of the war. Wheat. on Capt. 307, and the authorities there cited. As between the American captors and the British claimant, the proprietary interest of *442] the *latter was completely divested by the capture. The title of the captors acquired in war was confirmed by bringing the captured property *infra præsidia*. The neutral government has no right to interpose, in order to prevent the execution of the treaty of peace in this respect by compelling restitution to British subjects, contrary to the treaty to which they are parties. The neutral government may, perhaps, require some atonement for the violation of its territory, but it has no right to require that this atonement shall include any sacrifice to the British claimant.

*Harper*, in reply, insisted, that the claim of neutral territory, as invalidating the capture, might be set up by a consul as well as any other public minister. He may be presumed to have been authorized to interpose it by his government; and in the case of *The Vrow Anna Catharina*, 5 Rob. 15, it does not appear, that any proof was given to the court, that the Portuguese consul was specially instructed to make the suggestion. However partial and unjustifiable may have been the conduct of Spain, in the late war, it has not yet been considered by the executive government and the legislature (who are exclusively charged with the care of our foreign relations), as forfeiting her right, still to be considered, in courts of justice, as a neutral state. In the case of *The Eliza Ann*, 1 Dods. 241, Sir W. SCOTT

(*a*) Q. J. Pub. lib. 1, ch. 8. *Uno verbo: territorium communis amici valet ad prohibendum vim quæ ibi inchoatur, non valet ad inhibendam, quæ, extra territorium inchoata, dum fervet opus, in ipso territorio continuatur.*" This opinion of Bynkershoek, in which Casaregis seems to concur (Disc. 24, n. 11), is reprobated by several writers. De Habreu, part 1, ch. 4, § 15; Azuni, part 2, c. 4, art. 1; Valin, Traité des Prises, ch. 4, § 3, n. 4, art. 1; Emerigon, Des Assurances, tom. 1, p. 449. Azuni observes "Di fatti dacchè il nemico perseguitato si trova sotto il cannone, o nel mare territoriale della potenza amica e neutrale, egli si considera tosto sotto l'asilo, e protezione della nazione pacifica ed amica: laonde se fosse permesso di continuare il corso fino alle spiagge neutrali, potrebbe anche continuarsi nel porto medesimo ed incendiare perfino la città ove l'inseguita nave si fosse rifugiata. Lo stesso Casaregi connobe in appresso lo sbaglio preso su di questa materia o scordò questia sua dottrina, giacchè sostenne di poi l'opinione in altro discorso posteriormente scritto da lui." "Aut naves inimicæ (et hæc est secunda pars distinctionis principalis) reperiuntur intra portus, vel sub præsidiis, vel arcibus maritimis alicujus principis alieni, aut in mari ita vicino, ut tela tormentave muralia maritimae arcis illuc adigi possint, tunc citra omne dubium dictae naves hostiles, eoque minus naves communis amici principis recognosci, visitari, et depraedari sub quovis praetextu minime valent, quia dictae naves non minus sunt sub custodia et protectione talis principis, quam sunt illius subditi intra civitatis muros existentes." Optimus textus est in lege 3, § fin. ff.; *de adquir. rer. dom.* Ibid. "Quidquid autem eorum coeperimus, eo usque nostrum esse intelligitur, donec nostra custodia coercetur. Casaregis, Disc. 174, n. 11, Ibid."

went on the ground of the *legal existence of a war between Great Britain and Sweden, although declared by Sweden only; and that the place where the capture was made, was in the hostile possession of the British arms. The observations thrown out by him, in delivering his judgment, as to the necessity of the neutral state maintaining a perfect impartiality between the belligerents, in order to support a claim of this sort, in the prize court, were superfluous; because the facts showed that Sweden was in no respect to be considered as neutral, having openly declared war against Great Britain, and a counter-declaration being unnecessary to constitute a state of hostilities.

As to the alleged resistance of the captured vessel, it was a premature defence only, commenced in consequence of apprehensions from Carthagenian rovers, which frequented those seas; and being the result of misapprehension, could confer no right to capture, where none previously existed. Being in a neutral place, the vessel was entitled to the privileges of a neutral. Resistance to search does not always forfeit the privileges of neutrality; it may be excused, under circumstances of misapprehension, accident or mistake. *The St. Juan Baptista*, 5 Rob. 36. But resistance to search by a neutral on the high seas is generally unjustifiable. Here, the right of search could not exist, and consequently, an attempt to exercise it might lawfully be resisted. Finding the neutral territory no protection, the captured vessel resumed her rights as an enemy, and attempted to defend herself.

The titles of possession, which are said *to be confirmed by a treaty of peace, are those which arise from sentences of condemnation, [*444 valid or invalid; but the principle cannot be applied to a mere tortious possession, unconfirmed by any sentence of condemnation, like the present. The capture being invalid *ab initio*, and the former proprietor being rehabilitated in his rights, by the intervention of peace, may interpose his claim, at any time before a final sentence of condemnation.

March 7th, 1818. Story, Justice, delivered the opinion of the court.—The first question which is presented to the court is, whether the capture was made within the territorial limits of Spanish St. Domingo. The testimony of the carpenter and cook of the captured vessel distinctly asserts, that the ship, at the time of the capture, was lying at anchor, about a mile from the shore of the island. The testimony of the captors as distinctly asserts, that the ship then lay at a distance of from four to five miles from the shore.

It is contended by the counsel for the claimants, that captors are in no cases admissible witnesses in prize causes, being rendered incompetent by reason of their interest. It is certainly true, that, upon the original hearing, no other evidence is admissible than that of the ship's papers, and the preparatory examinations of the captured crew. But upon an order for further proof, where the benefit of it is allowed to the captors, their attestations are clearly admissible evidence. This is the ordinary course of prize courts, especially, where it becomes material to ascertain the circumstances of the capture; for in such cases, the *facts lie as much within the knowledge of the captors as the captured; and the objection of in- [*445 terest generally applies as strongly to the one party as to the other. It is a mistake, to suppose that the common-law doctrine, as to competency, is

applicable to prize proceedings. In courts of prize, no person is incompetent, merely on the ground of interest. His testimony is admissible, subject to all exceptions as to its credibility. The cases cited at the argument distinctly support this position; and they are perfectly consistent with the principles by which courts of prize profess to regulate their proceedings. We are, therefore, of opinion, that the attestations of the captors are legal evidence in the case, and it remains to examine their credit. And without entering into a minute examination, in this conflict of testimony, we are of opinion, that the weight of evidence is, decidedly, that the capture was made within the territorial limits of Spanish St. Domingo.

And this brings us to the second question in the cause; and that is, whether it was competent for the Spanish consul, merely by virtue of his office, and without the special authority of his government, to interpose a claim in this case for the assertion of the violated rights of his sovereign? We are of opinion, that his office confers on him no such legal competency. A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or diplomatic agent of his
*446] sovereign, *intrusted, by virtue of his office, with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives. There is no doubt, that his sovereign may specially entrust him with such authority; but in such case, his diplomatic character is superadded to his ordinary powers, and ought to be recognised by the government within whose dominions he assumes to exercise it. There is no suggestion or proof of any such delegation of special authority in this case; and therefore, we consider this claim as asserted by an incompetent person, and on that ground, it ought to be dismissed. It is admitted, that a claim by a public minister, or, in his absence, by a *chargè d'affaires*, in behalf of his sovereign, would be good. But in making this admission, it is not to be understood, that it can be made in a court of justice, without the assent or sanction of the government in whose courts the cause is depending. That is a question of great importance, upon which this court expressly reserve their opinion, until the point shall come directly in judgment.(*a*)

The claim of the Spanish government for the violation of its neutral territory being thus disposed of, it is next to be considered, whether the British claimant can assert any title founded upon that circumstance? By the return of peace, the claimant became rehabilitated with the capacity to sustain a suit in the courts of this country; and the argument is, that a capture
*447] made in a neutral territory is void; and *therefore, the title by capture being invalid, the British owner has a right to restitution. The difficulty of this argument rests in the incorrectness of the premises. A capture made within neutral waters is, as between enemies, deemed, to all intents and purposes, rightful; it is only by the neutral sovereign that its legal validity can be called in question; and as to him and him only, is it to be considered void. The enemy has no rights whatsoever; and if the netural

(*a*) See Viveash *v.* Becker, 3 Maule & Selwyn 284, as to the extent of the powers and privileges of consuls.

sovereign omits or declines to interpose a claim, the property is condemnable, *jure belli*, to the captors. This is the clear result of the authorities; and the doctrine rests on well established principles of public law.(*a*)

There is one other point in the case which, if all other difficulties were removed, would be decisive against the claimant. It is a fact, that the captured ship first commenced hostilities against the privateer. This is admitted on all sides; and it is no excuse, to assert that it was done under a mistake of the national character of the privateer, even if this were entirely made out in the evidence. While the ship was lying in neutral waters, she was bound to abstain from all hostilities, except in self-defence. The privateer had an equal title with herself to the neutral protection, and was in no default, and approaching the *coast, without showing her national character. It was a violation of that neutrality which the captured [*448 ship was bound to observe, to commence hostilities, for any purpose, in these waters; for no vessel coming thither was bound to submit to search, or to account to her for her conduct or character. When, therefore, she commenced hostilities, she forfeited the neutral protection, and the capture was no injury for which any redress could be rightfully sought from the neutral sovereign.

The conclusion from all these views of the case is, that the ship and cargo ought to be condemned as good prize of war. And the only remaining inquiry is, whether the captors have so conducted themselves as to have forfeited the rights given by their commission, so that the condemnation ought to be to the United States? There can be no doubt, that if captors are guilty of gross misconduct, or *laches*, in violation of their duty, courts of prize will visit upon them the penalty of a forfeiture of the rights of prize, especially, where the government chooses to interpose a claim to assert such forfeiture. Cases of gross irregularity, or fraud, may readily be imagined, in which it would become the duty of this court to enforce this principle in its utmost rigor. But it has never been supposed, that irregularities, which have arisen from mere mistake or negligence, when they work no irreparable mischief, and are consistent with good faith, have ordinarily induced such penal consequences. There were some irregularities in this case; but there is no evidence upon the record, from which we can infer, that there was any fraudulent *suppression, or any gross misconduct, inconsistent with good faith; and therefore, we are of opinion, that condemnation [*449 ought to be to the captors.

It is the unanimous opinion of the court, that the decree of the circuit court be affirmed, with costs.

Decree affirmed.

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(*a*) The same rule is adhered to, in the prize practice of France, and was acted on in the case of the Sancta Trinita, a Russian vessel, captured within a mile and a half of the coast of Spain; but the council of prizes refused restitution, because the Spanish government did not interpose a claim on account of its violated territory. Bonnemant's Translation of De Habreu, tom. 1, p. 117.