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was, in due time, given to the indorser. This is all that was necessary to be done, no protest being required of a note or inland bill of exchange. *Stacum v. Pomey*, 6 Cranch 221, was the case of a foreign bill.

MARSHALL, Ch. J., delivered the opinion of the court, that a suit may be brought in the circuit court, by the indorsee against the indorser, whether a suit could be there brought against the maker or not. In such a case, the indorser does not claim through an assignment. It is a new contract, *entered into by the indorser and indorsee, upon which the suit is brought; and if the indorsee is a citizen of a different state, he may [*152 bring an action against the indorser in the circuit court.

As to the other objection insisted upon by the plaintiff in error, all that was incumbent upon the holder, was, to give due notice to the indorser. No protest of a promissory note or inland bill of exchange is necessary.

Judgment affirmed.

The BELLO CORRUNES : The SPANISH CONSUL, Claimant.

Powers of foreign consuls.—Illegal capture.—Forfeiture.—Salvage.

A foreign consul has a right to claim, or institute a proceeding *in rem*, where the rights of property of his fellow-citizens are in question, without a special procuration from those for whose benefit he acts.¹

But a consul cannot receive actual restitution of the *res* in controversy, without a special authority from the particular individuals who are entitled.

A capture, made by citizens of the United States, of property belonging to subjects of a country in amity with the United States, is unlawful, wheresoever the capturing vessel may have been equipped, or by whomsoever commissioned; and the property thus captured, if brought within the neutral limits of this country, will be restored to the original owners.²

Whatever difficulty there may be, under our municipal institutions, in punishing as pirates, citizens of the United States, who take from a state at war with Spain, a commission to cruise against that power, contrary *to the 14th article of the Spanish treaty, yet, there is no doubt, that such acts are to be considered as piratical acts, for all civil purposes, and the offending parties cannot appear and claim in our courts the property thus taken. [*153

It seems, that the terms, "a state with which the king shall be at war," in the 14th article of the treaty, include the South American provinces which have revolted against Spain.

But however this may be, the neutrality act of June 1797, extends the same prohibition, with all its consequences, to a colony revolting, and making war against its parent country.

In the case of such an illegal capture, the property of the lawful owners cannot be forfeited, for a violation of the revenue laws of the country, by the captors or by persons who have rescued the property from their possession.

The rights of salvage may be forfeited by spoliation, smuggling or other gross misconduct of the salvors.³

APPEAL from the Circuit Court of Rhode Island. This was the case of a Spanish vessel and cargo, stranded on Block Island, and there seized by the officers of the customs.

An information on behalf of the United States was filed in the district court, against the property, as forfeited, for an alleged breach of the revenue

¹ The London Packet, 1 Mason 14; The Adolph, 1 Curt. 87; The Huntress, 2 Wall. Jr. C. C. 59.

Fanny, 9 Wheat. 658.

³ The John Perkins, 3 Ware 89; The Sarah A. Boice, 2 Int. R. Rec. 45.

² The Conception, *post*, p. 239. And see The

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laws. His Catholic Majesty's vice-consul for the district of Rhode Island, interposed a claim, on behalf of "certain subjects of the king of Spain," the original owners of the ship and cargo, which was bound on a voyage from the port of Tarragona, in Spain, to La Vera Cruz, and was taken off Cape St. Antonio, on the west end of the island of Cuba, on the 21st of March 1818, by an armed vessel called the Puyerrredon, commanded by one James Barnes, sailing under Buenos Ayres colors, and asserting a right to make captures under the authority of the government of that place. Restitution *154] to the original Spanish owners was claimed, *upon the ground, that the capturing vessel had been equipped in the ports of this country, in violation of our neutrality.

An allegation was also filed by Barnes, demanding restitution of the property to the captors, as having been taken, *jure belli*, on the high seas.

Another claim was also filed by certain persons, part of the original crew of the Bello Corrunes, left on board, after the capture, who asserted a claim for salvage, in case the property should be restored to the original Spanish owners, under the following circumstances. The master of the captured vessel, and all her crew, except four, were taken out, and a prize-master and crew put on board from the Puyerrredon. Thus equipped, the Bello Corrunes cruised in company with the Puyerrredon, nearly two months, during which period, another Spaniard, of the original crew of the Bello Corrunes, was returned to that vessel. The two vessels afterwards separated, and on the 8th of May, in lat. 32° 30' north, and longitude 74° W. from London, the prize-crew, assisted by the persons originally on board the Bello Corrunes, rose on the prize-master and other officers, and rescued the vessel from their possession. They then steered their course for the United States, and the vessel was by some means stranded upon Block Island, where the vessel and cargo were seized by the revenue officers.

A decree was entered in the district court, *pro formá*, and by consent of parties, restoring the property to the original Spanish owners as claimed, and dismissing the other allegations and claims. This decree was affirmed, *155] *pro formá*, and by consent, in *the circuit court, and the cause was brought by appeal to this court.

It appeared by the evidence in the courts below, and by the further proof taken under a commission from this court, that the capturing vessel was formerly owned by citizens of the United States, and called the Mangoree, and was originally armed, equipped and manned at Baltimore; and sailed from that port, in March 1817, under the command of Barnes, a citizen of the United States, domiciled in that city, under Buenos Ayres colors, on a cruise; and after capturing several Spanish vessels, proceeded to Buenos Ayres, where the vessel arrived in August 1817. (a) The vessel was then altered from a schooner into a brig, and her name changed to the Puyerrredon, an addition of one gun was made to her armament, some of the original crew were re-shipped, and other seamen recruited. An alleged sale of the vessel took place to one Higginbotham, a citizen of the United States, domiciled at Buenos Ayres; and a commission was issued by the supreme director of the United Provinces of South America, dated the 20th of November 1817, au-

(a) This was the same vessel which captured the *Divina Pastora*, in 1816. See 4 Wheat. 52.

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thorizing Barnes to capture Spanish property; with which the vessel sailed from Buenos Ayres, on the cruise, during which the present capture was made.

February 8th. The *Attorney-General*, for the United States, argued, that the officers of the government being in *possession of this property, would hold it as a *droit*, until some person appeared duly authorized to claim it. The consul of Spain has no authority to claim, in his own name, and in his official character, the property of persons to him unknown, and by whom he cannot, therefore, have been invested with a special procuration. He is not invested with a general authority for that purpose, *virtute officii*, nor is there evidence, in this particular case, that the consul is the agent, consignee or correspondent of the owners, who are sometimes permitted to claim for their principal, when the latter is absent from the country. (a) Great public inconveniences and mischief, *might follow from allowing foreign consuls, not specially authorized by their own government, or by this, nor by the parties, to receive restitution of property, for which they may interpose a claim as belonging to their fellow-subjects. [*156 [*157

Supposing the property here to be divested out of the original owners by the capture, and vested in the captors, *jure belli*, it must be forfeited to the United States, for violating the revenue laws, which was the original in-

(a) The *Anne*, 3 *Wheat*. 435; De *Steck*, *des Consuls*, 64; *Warden on Consuls* 116, and opinion of M. *Portalis*, there cited. This opinion of M. *Portalis*, in the case of the claim of the Danish consul before the French council of prizes, will be found in the appendix to the present volume of reports, Note V. The passage cited from De *Steck*, is as follows:

§ 27. Selon la règle par la plupart des traités de commerce et par l'usage presque généralement reçu les consuls sont les juges des gens de mer et des négocians et marchands de leur nation.¹

§ 28. Il leur est ordinairement attribuée la juridiction tant en matière civile que criminelle.

§ 29. Cette juridiction attribuée aux consuls n'émane point de la puissance et de l'autorité du souverain, qui les établit, qui n'a point de pouvoir sur ses sujets expatriés, démeurans, commerçans, établis en des pays étrangers. Elle depend et derive plutôt de la concession, de l'attribution du souverain de l'état où les consuls résident. Elle suppose donc toujours des traités par lesquels elle est stipulée, accordée, attribuée.

§ 30. Lorsque la juridiction est attribuée aux consuls par les traités de commerce, ils ont le pouvoir dans leur district, dans l'endroit de leur établissement et dans leur résidence, de juger les différens, contestations et procès qui surviennent entre les gens de mer, les négocians, les commerçans de leur nation, qui s'élevent entre les capitaines, patrons, l'équipage, et les passagers des vaisseaux et des batimens nationaux.

§ 31. Leur juridiction ne se borne pas alors aux affaires contentieuses des nationaux. Ils ont aussi la juridiction volontaire, c'est à dire la faculté de recevoir les déclarations des capitaines des vaisseaux, et tous les actes que leur nationaux veulent passer dans leur chancellerie, de les légaliser, de recevoir leur testamens, de régler leurs successions et leur tutelles, de faire l'inventaire de leur biens délaissés et naufragés, etc.

§ 32. Dans les procès que surviennent entre les nationaux et les habitans et sujets de de l'état où les consuls sont établis, ou entre les commerçans d'autres nations, ils assistent, protègent, défendent leurs nationaux. Dans les échelles du Levant les juges du lieu n'osent dans ce cas procéder sans la participation et l'intervention du consul, sans la présence des on interprète. De *Steck*, *des Consuls*, p. 64.

¹ Valin, *Com. sur l'Ordonn. de la Marine*, lib. 1, tit. 9, art. 12, p. 251.

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tention of the parties, and was partially accomplished at Block Island. Or, supposing the re-capture by the prize-crew to be valid, they must be *158] considered as the agents of the original proprietors, and their misconduct must be visited upon the original proprietors.

Winder, for the appellants and captors, insisted, that the present capture, being made on the high seas, *jure belli*, under a commission regularly issued by a government acknowledged to be entitled to exercise the rights of war against its enemy, could not be inquired into by the courts of this country; but that the captors, being entitled to the possession, having only been dispossessed by the criminal misconduct of the prize-crew which they had put on board to secure the prize, were entitled to restitution, in order to enable them to proceed against it as prize in the competent court. Whatever military means are directed, from within the territory of one of the belligerent states, against its enemy, are not subject to the review or control of any neutral or other foreign tribunal or authority, except in the single case of a direct violation of the neutral territory itself. This principle grows out of the perfect independence and equality of nations, existing, as it were, in a state of nature, in respect to each other. Their conduct in authorizing acts of war, is no more reviewable by other nations, than any other their acts of sovereignty. Vattel, *Droit des Gens*, Prelim. § 15-23; lib. 2, c. 4, § 54-5. It is this perfect independence and equality of sovereign states, which is the sole foundation of the exclusive jurisdiction of the prize courts of the cap- *159] tor's country over everything done under a prize *commission. *L'Invincible*, 1 Wheat. 238, 254. In the celebrated case of *The Exchange*, 7 Cranch 116, this court held, that the commission of a sovereign protected that vessel from all inquiry, notwithstanding the flagrantly unjust conduct of the French emperor in appropriating the property of an American citizen to his own use, without the form of a trial, and incorporating it into his military marine. It must be shown, that the act of the government of Buenos Ayres, in granting this commission, is unlawful, before it can be shown that any of the effects of that act are invalid. Suppose, the *Exchange*, on her voyage, had made a capture, could this court have restored it to the former owners? Or, could it inquire into the validity of such a capture, consistently with the principles laid down in that case? The enlistment of men, in neutral countries, to serve the belligerent powers, is lawful, unless there be some express prohibition of the neutral state. Such a municipal prohibition would certainly make it unlawful, in respect to the neutral state whose laws are violated; but it does not, therefore, follow, that all the acts of such persons in war would be unlawful, or that they are not entitled to the rights of lawful war. Vattel, lib. 3, c. 2, § 13-15; Bynk. Q. J. Pub. pp. 175, 177, Du Ponceau's Trans. The carrying of contraband is prohibited by the law of nations, under the penalty of confiscation, and the exportation of contraband articles may be prohibited by the municipal code, under other penalties; but such prohibition would not invalidate a *160] capture made with the munitions of war thus exported. The govern- ment of this country naturalizes all foreigners indiscriminately, in peace and in war, and employs them in its land and naval service; and it is not for us to question the right of a citizen of the United States to enter into the military service of a foreign state. It is insisted, that not only the

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court has no authority, by the law of nations, to restore to the original owners a prize thus captured, but that the law of nations gives the congress no power to authorize the court to restore. The legislature may prohibit our citizens from enlisting in the service of the belligerents, or from fitting out ships, to be employed in cruising, under ever so severe penalties ; but those penalties cannot extend to a forfeiture of the rights of prize, acquired under the commission of an independent sovereign state. Nor are Spain and the United States competent to regulate, by their mutual treaty stipulations, the sovereign rights of the South American provinces, though they may stipulate to inflict penalties *in personam*, for what they deem the criminal conduct of their subjects or citizens. As to the claim of the United States for a forfeiture, on account of the alleged violation of the revenue laws, it is already settled by this court, that the property of foreigners cannot be forfeited for the misconduct of those who are tortiously in possession, as was the case here with the rescuers. *The Josefa Segunda*, 5 Wheat. 338.

* *Webster and Wheaton*, for the respondent and claimant, the Spanish consul, contended : 1. That the consul, from the necessity of the [*161 case, had a right to interpose a claim for the property of his fellow-subjects, brought into our ports in this manner. He does not claim as attorney in fact, but his character is more like an attorney-at-law. There is no necessity of a special procuration from those for whom he claims, because it does not follow, that the property will be actually delivered into his hands, until the respective rights of the owners are determined, and a special authority produced from them to receive distribution. There is the more necessity for permitting the consul, as the official protector of the commercial rights and interests of his fellow-subjects, in a foreign country, to interpose a claim, in a case of this nature, because the usual term of a year and a day, allowed in prize causes, where there is no claim, would not be allowed here, since the property is demanded by the captors, under their pretended commission, and if the subjects of Spain, residing at a distance, and ignorant even of the fact of the capture, were not allowed to be represented by their consul, the property would be taken away by the captors, and irrecoverably lost to the original owners. It will also frequently be impossible for the consul to specify the owners for whom he claims, and he ought, therefore, to be allowed to file allegations claiming it for Spanish subjects generally. The opinion of M. Portalis in the case of the Danish consul, (a) proceeds entirely upon the peculiar *regulation of France, which makes the [*162 *procuréur-general*, the official attorney of all persons who are not represented before the tribunals by any special procuration ; which would, of course, render unnecessary the interposition of foreign consuls, in cases where the rights of their countrymen were involved.

2. They argued, that the vessel by which the present capture was made, having been fitted out in the ports of the United States, and the capture having been made by our citizens, in violation of the law of nations, the acts of congress, and the treaty with Spain, the property must be restored to the original owners, according to the uniform decisions of this court. *The Alerta*, 9 Cranch 359 ; *Talbot v. Jansen*, 3 Dall. 133 ; *L'Invincible*,

(a) See Appendix, Note V.

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1 Wheat. 238 ; *The Divina Pastora*, 4 Ibid. 52, note to that case, p. 62 ; Sir L. Jenkins' Works, there cited ; *The Estrella*, 4 Wheat. 298. Under our municipal constitution, the treaty is the supreme law of the land ; and it would be so by the law of nations, without that constitutional provision. "Every treaty," says Sir W. SCOTT, "is a part of the private law of the country which has entered into that treaty, and is as binding on the subjects as any part of their municipal laws." *The Eenroom*, 2 Rob. 6. The 9th article of the Spanish treaty declares, that goods taken from pirates shall be restored to the lawful owners ; and the 14th article declares the captors, in the present case, to be pirates, as it provides, that they shall be punished as such, for taking a commission to cruise against Spain. And yet we are *163] inquiring, whether they are entitled to have restitution *of the very property which they have thus piratically taken. It may be admitted, that in some cases, citizens of one country may lawfully engage in the wars of another ; we may take the doctrine cited from Bynkershoek, that they may enlist, where there is no prohibition. It may also safely be admitted, that so far as the other belligerents are concerned in their hostile relations with each other, it is lawful war. Spain cannot justly complain of the South American provinces for employing foreigners in their service. And if the capturing ship were a national vessel, like the *Exchange* (7 Cranch 116), no doubt, her commission would estop all judicial inquiry into her conduct. But this is a private claim. The original Spanish owners claim nothing against the government of Buenos Ayres ; that government claims nothing of the Spanish owners. Our own citizens assert a claim to this property acquired in war, which can only be maintained, upon the supposition, that they may be at war, whilst their country is at peace ; that they are not bound by the laws and treaties of their own country ; that they may expatriate themselves, *flagrante bello*, for the purpose of committing hostilities against nations in amity with the United States. If the doctrine contended for on the part of the captors, that the commission is conclusive, be correct, then the court can never look behind it, and the belligerents may dispense with our laws, and the allegiance of our citizens, at their pleasure. *164] The case of *Talbot v. Jansen*, 3 Dall. 133, whatever may be thought *of it in other respects, has never been overruled, as to the principle, that the neutral tribunals have a right to inquire into the validity of a captor's commission, to see whether it was obtained and used in violation of the laws of the neutral country. That case has been made the basis of a series of decisions, which have become the settled law of this court, and which it is now too late to question. The court has uniformly treated it as a necessary consequence of the personal illegality of the act of taking the commission, that the property captured under it should be restored to the lawful owner. It is, therefore, immaterial, where, or by whom, the capturing vessel was equipped. It is sufficient, that the capturing persons are citizens of the United States, and cannot assert a right of property founded on their own illegal conduct.

3. But even admitting that the original capture was legal, the prize cannot now be reclaimed by the captors. An interest acquired in war by possession, is lost with the possession. The rights of capture are completely divested by re-capture, escape or rescue. *The Astrea*, 1 Wheat. 125 ; *The Invincible*, 2 Gallis. 35 ; *Hudson v. Guestier*, 4 Cranch 293 ; s. c. 6 Ibid.

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281; *The Diligentia*, 1 Dods. 404. Here, the property has been divested out of the possession of the captors, by the rescuers, for the benefit of the original owners, and the rescuers hold it in trust for their benefit.

Wheaton, for the salvors, stated, that the original *owners being [*165 thus shown to be entitled to restitution, the next question would be, whether the salvors were entitled to any, and what salvage. Unless the property were thus restored to the Spanish owners, the rescuers could not claim any salvage; for, certainly, the captors would not admit, that any meritorious service had been rendered them by the rescue. But as against the former owners, the rescuers have a just claim, having saved the property from the grasp of their enemy: and it would be idle, to send the salvors to the courts of Spain, to prosecute their claim, since the possession of the property enables this court to do complete justice between all the parties. *The Two Friends*, 1 Rob. 281. And this court has already determined, that in a case of derelict, by one belligerent, a neutral is entitled to salvage, and the courts of the neutral country into which the property is brought, have authority to award it. *The Mary Ford*, 3 Dall. 198. As to the *quantum* of salvage: one-third was allowed in that case; and it was doubted, whether more ought not to have been allowed, if the salvors had appealed. The case of *The Adventure*, 8 Cranch 221, which was a donation as sea by the belligerent captor to a neutral, who brought the property into a port of his own country, was held to be a lawful salvage, and a moiety was allowed. In the case of *Rowe v. The Brig*——, 1 Mason 372, which was a Spanish vessel captured by a South American cruiser, one of the learned judges of [*166 this *court allowed a moiety of the net value. And in general, it may be affirmed that there is no inflexible rule, either in cases of derelict, or of rescue; a reasonable salvage, proportioned to the meritorious exertions of the salvors, is to be decreed; but never less than a third, unless the property is very valuable, or the services rendered very inconsiderable.(a)

Webster, contra, upon the claim for salvage, insisted, that it appeared by the evidence, that there had been a partial embezzlement of the property by the alleged salvors, and that it was a fixed rule, that such misconduct, or any circumstance of fraud, forfeited the rights of salvage. *The Blaireau*, 2 Cranch 240.

February 26th, 1821. JOHNSON, Justice, delivered the opinion of the court.—This vessel was stranded on Block Island, in an alleged effort to reach a port of the United States. The vessel and cargo have been seized by the collector of Newport, for supposed violations of the trade laws of this country, and an information was accordingly filed, to subject the whole to condemnation, in the district court for Rhode Island district.

This claim of the United States has been opposed by three classes of competitors. The vessel and *cargo, it appears, are Spanish property, [*167 and were captured on the south-western coast of Cuba, by the Puyer-

(a) Abbott on Ship. 451, Story's ed. note 1; *The Favorite*, 4 Cranch 347; *The Jonge Bastiann*, 5 Rob. 322; *The Lord Nelson*, Edw. 79; *L'Esperance*, 1 Dods. 49; *The Blendenhall*, Ibid. 421; *Barrels of Flour v. Prior*, 1 Gallis. 133.

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redon, a private armed brig, bearing the flag of the Buenos Ayrean republic and commanded by Captain James Barnes. Being armed, and well calculated for a privateer, she was manned with a complement of the privateer's men, about thirty in number, and her original commander, and all except four of the Spanish crew, removed. Thus equipped, it appears, that she cruised, as a tender to the Puyeredon, for about two months, during which time, another Spaniard was added to her crew, and on the 8th of May, when in lat. $32^{\circ} 30'$, N., and long. 74° W., from London, the crew rose upon the officers, subdued them, put them on board the first vessel they met with, and steered their course for this continent.

Thus circumstanced, Capt. Barnes has libelled in behalf of the captors, the Spanish vice-consul, in behalf of the original Spanish owners, and the crew of the Bello Corrunes have libelled for a compenssion by way of salvage, to which they suppose themselves entitled, in the event of restitution being decreed to the original owners. To these several claims, it is objected on behalf of the United States, that restitution cannot be decreed to the Spanish vice-consul, because he is not in that capacity a competent party in court, to assert the rights of individual subjects; nor in favor of the captors, because the privateer was originally fitted out in the United States, and is still owned by American citizens; nor in favor of the salvors, because *168] *they have forfeited their claim to salvage, by spoliation, and an attempt to smuggle.

As these suggestions open the whole case, it shall be disposed of, by considering them severally in their order, only remarking *en passant*, that though they were all sustained, it would avail the United States nothing; since, without evidence sufficient to sustain the criminal charge, it would only follow, that the proceeds of the property libelled, must lie in the registry of the court, until a proper claimant shall make his appearance.

On the first point made by the attorney-general, this court feels no difficulty in deciding, that a vice-consul, duly recognised by our government, is a competent party to assert or defend the rights of property of the individuals of his nation, in any court having jurisdiction of causes affected by the application of international law. To watch over the rights and interests of their subjects, wherever the pursuits of commerce may draw them, or the vicissitudes of human affairs may force them, is the great object for which consuls are deputed by their sovereigns; and in a country where laws govern, and justice is sought for in courts only, it would be a mockery, to preclude them from the only avenue through which their course lies to the end of their mission. The long and universal usage of the courts of the United States, has sanctioned the exercise of this right, and it is impossible, that any evil or inconvenience can flow from it. Whether the powers of the vice-consul shall, in any instance, extend to the right to receive, in his *169] national character, *the proceeds of property libelled and transferred into the registry of a court, is a question resting on other principles. In the absence of specific powers given him by competent authority, such a right would certainly not be recognised. Much, in this respect, must ever depend upon the laws of the country from which, and to which, he is deputed. And this view of the subject will be found to reconcile the difficulties supposed to have been presented by the authorities quoted on this point. Considering, then, the original Spanish interest as legally represented, the

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questions are, whether that interest is not forfeited to the United States, or superseded by the superior claims of the capturing vessel?

This is not the ordinary case of a capture made under the taint of an illegal outfit. The decision of this court must rest upon a very different principle. In those cases, the national character of the claimant is immaterial. He has violated the neutrality of this country, and cannot shelter himself under his commission, or his allegiance, however unquestionable his right, individual or national, would have been, otherwise. But can a citizen of this country, who has violated its laws, ever be recognised in our courts, as a legal claimant of the fruits of his own wrong? We are of opinion, he cannot, and it, therefore, becomes material to determine, what is the national character of the claimants, under the capture made by the Puyerrédon?

At the time of this vessel's first sailing from Baltimore, she was, unquestionably, American owned and commanded. During the time of her cruising *under the name of the Mangoree, it is not pretended, that she changed owners. The legality of her conduct, at that period, has [*170 been defended altogether on the ground of her taking the flag of Buenos Ayres, being commissioned in a foreign state, and her commander, Barnes, assuming the character of a citizen of the power that had commissioned him. It is not until her arrival at Buenos Ayres, in 1817, that any change of property in the vessel has been set up in proof. At that time, it is contended, she was set up at auction, and changed owners, passing into the hands of a Mr. Higginbotham, a citizen of the United States, married and domiciled at Buenos Ayres. If this fact had been satisfactorily made out in evidence, it would have drawn this court into the consideration of some questions of great nicety, which have never yet received a solemn adjudication in this court. But the evidence to support this pretended change of property, is so wholly unsatisfactory, that the court rejects it; for the ordinary solemnities of such transfers are too well known, to admit the belief that, in this instance, the change of property, had it been real, would not have been effected or commemorated by written documents.

This court, then, proceeds upon the assumption that the Puyerrédon is still, in reality, American owned, and they are also of opinion, that she must be held to be American commanded; since, even if the doctrine could be admitted, that a man's allegiance may be put off with his coat, it is very clear, that Mr. Barnes's citizenship is altogether in fraud of the laws of his own country. His family has never *been removed from Baltimore, [*171 and his home has been always either there, or upon the ocean.

The question then is, whether thus circumstanced, the claim in behalf of the owners and mariners of the Puyerrédon, can be sustained. We are decidedly of opinion, it cannot. By the 2d section of the 14th article of the treaty with Spain, "citizens, subjects or inhabitants" of the United States, are strictly prohibited from taking "any commission or letter of marque, for arming any ship or vessel, to act as privateers against the subjects of his Catholic majesty, or the property of any of them, from any prince or state with which the said king shall be at war." And it is further provided, "that if any person of either nation shall take such commissions or letters of marque, he shall be punished as a pirate." Whatever difficulties there may exist, under the free institutions of this country, in giving full efficacy

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to the provisions of this treaty, by punishing such aggressions, as acts of piracy, it is not to be questioned, that they are prohibited acts, and intended to be stamped with the character of piracy : and to permit the persons engaged in the open prosecution of such a course of conduct, to appear and claim of this court, the prizes they have seized, would be to countenance a palpable infraction of a rule of conduct, declared to be the supreme law of the land.

Some doubts have been suggested on the use of the words "state at war" with Spain. This court would not readily lean to favor a restricted construction *of language, as applied to the provisions of a treaty, which *172] always combines the characteristics of a contract, as well as a law ; but it is not necessary to examine the grounds of these doubts, as applied to the present case : because this treaty has been enforced by the provisions of the act of congress of the 14th June 1797, so as to leave no doubt of its extension to the case of cruising against Spain, under a commission from the new states formed in her colonies. Citizens of the United States, therefore, present themselves to this court, to demand restitution of a prize which they had made in violation of the most solemn stipulations of a treaty, and provisions of a law of their own country, and of which they have been dispossessed by their own associates in guilt. Under such circumstances, this court cannot hesitate to reject the claim, and adjudge the property to the original proprietors.

This view of the subject obviates the necessity of examining the reality and effect of the alleged rescue, on behalf of the original owners, with a view to the question of restitution ; but it still becomes necessary, with a view to the question of forfeiture, and the merit of the alleged salvors. With regard to the former, it is very clear, that supposing the rescue to have been real and complete, the Spanish consul ought not to be precluded from his election, whether to put his claim upon the ground, that the interest of those whom he represents was never legally divested, or that it was afterwards legally recovered. In the one case, there is no ground for *affect- *173] ing it with the forfeiture, because of the conduct of the crew ; and in the other, some question may be made, how far the property was affected by the illegal acts of those who, at that time, held in the right of the owners. But even in this latter view of the state of the property, we are of opinion, that the forfeiture was not incurred ; since, although it be supposed, that the property was in custody of those who held for the Spanish owners, it was not held by those to whom the Spanish owners had intrusted the vessel and cargo. And this is the only ground upon which the acts of the ship's company are made to produce forfeitures of the interest of shippers or ship-owners. For, besides the considerations drawn from the great predominance of the force detached from the privateer, in the effort to re-capture, the few men of her own crew were gratuitous actors. Their contract with the owners had ceased, and they assumed the character of voluntary agents, whose conduct the owners might or might not adopt, according to their own views or interests.

As to the claims of the salvors, it may be remarked, that maritime courts always approach them with great benignity and favor. Yet, in proportion to the inclination to favor where there is merit, is the indignation with which they view every indication of a disposition to take advantage of the

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unfortunate. Spoliation, and even gross neglect, may forfeit all the pretensions of salvors to compensation. In the case before us, it is not too much to pronounce the claim of those of the crew of the Puyerrdon *who libel for salvage, to be not only groundless, but impudent; for, besides [*174 spoliation, smuggling and the grossest irregularities, it is perfectly clear, from the pilot's evidence, that they ran the vessel on shore purposely. So that, whatever may have been the reality of their benevolent designs towards the Spanish owners originally, their subsequent conduct not only casts a doubt over their candor, but divests them of all pretensions to compensation.

Nor do the five Spaniards who composed a part of the crew of the Bello Corrunes, at the time she was stranded, and who were not of the capturing crew, escape being involved in the suspicions which fasten on their associates. It is a melancholy truth, too well known to this court, that the instruments used in the predatory voyages carried on under the colors of the South American States, are among the most abandoned and profligate of men. Under the influence of strong interests or fears, the mind of man too often yields, even where the moral sense still exerts its influence; but hold out to one of these practised adventurers in a course of plunder, the hope of gain on the one hand, and the fear of imprisonment for piracy on the other, and what are the chances for truth!

That these men were selected from the Spanish crew, to associate with those of the capturing vessel, is a circumstance not very favorable to their characters and conduct, and it would require some strong evidence of their innocence, to remove from them the suspicion of a voluntary association with the enemies of their king. Joining in, or even setting on *foot [*175 or promoting the re-capture (facts which rest wholly on their own veracity), can prove very little in their favor, since such mutinies are become every-day occurrences, whenever such a crew find themselves in possession of a valuable cargo. Nor will the inference in their favor be very strong from their resorting to the consul of their country, since it was the only course which held out a chance of gain, or of escape from the imputation both of piracy and smuggling. There is no evidence to separate their conduct from a complete identification with the rest of the crew, except what is obtained from their own testimony. Yet it is suggested, that they may still make their innocence and merits to appear; and as the parties have signified their consent that the case may be opened in the court below, as to this class of salvors, the case will be remanded to the circuit court, for further proceedings, so far as the claim for salvage is concerned.

Decree accordingly.

DECREE.—This cause came on to be heard, on the transcript of the record of the circuit court for the district of Rhode Island, and was argued by counsel: on consideration whereof, it is ordered and decreed, that the decree of the said circuit court in this case be and the same is hereby affirmed, with costs, against Barnes and others, except so far as relates to the libel for salvage of Emanuel Rodriguez, Emanuel Josef, Emanuel Barbarus, Antonio *Josef and Josef Isnages, who formed no part of the crew of the private armed brig Puyerrdon: and as to so much of the said decree as [*176 relates to the said libellants, Emanuel Rodrigues and others, it is further

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decreed and ordered, by consent of parties, by their counsel, that the decree of the said circuit court be and the same is hereby reversed and annulled. And it is further ordered, that the said cause be remanded to the said circuit court for further inquiry; and that the proceeds of the said Bello Corrunes and the cargo lie in the registry of the said circuit court, to be paid over, under the order of that court, to the Spanish owners, as interest shall be made to appear.

SMITH *et al.* v. UNIVERSAL INSURANCE COMPANY.*Marine insurance.—Total loss.*

Where, in a policy of insurance, a technical total loss is asserted, as the ground of recovery, the loss must be occasioned by the immediate operation of some of the perils insured against, and it is not sufficient, that the voyage be abandoned for fear of the operation of the peril.¹

The insurers do not undertake, that the voyage shall be performed, without delay, or that the perils insured against shall not occur; they undertake only for losses sustained by those perils; and if any peril does begin to act upon the subject, yet, if it be removed, before any loss takes place, and the voyage is not thereby broken up, but is, or may be, resumed, the insured cannot abandon for a total loss.

*177] Insurance on munitions of war, laden on board a neutral vessel, on *a voyage from New York, to and at a port or ports, place or places in the gulf of Mexico, from the Balize to Campeachy, both inclusive, and from either, back to New York, &c., with a memorandum, that the insurers should be free from any loss arising from illicit or prohibited trade: the goods insured were prohibited from being imported into the ports of New Spain, in possession of the royalists, by the laws of Old Spain, but were permitted to be introduced into such ports as were in possession of the insurgents: the vessel and cargo arrived off a place, in possession of the patriot general Mina, and the master made an agreement to sell the cargo to him, deliverable, from time to time, as he should want it, at St. Ander; but before the cargo could be delivered, the vessel was chased off by Spanish armed ships, and after making several attempts to return, was compelled to proceed to the Balize for repairs; after which, she again approached the coast, but found it still in possession of the royalists, General Mina having retired into the interior; the objects of the voyage being thus defeated, the vessel returned to New York, with the original cargo on board; and the insured then abandoned to the underwriters, not having before had information of the breaking up of the voyage: *Held*, that the insured were not entitled to recover as for a total loss of the voyage.

ERROR to the Circuit Court of Maryland. This was an action of covenant, on a policy of insurance, underwritten by the defendants, for the plaintiffs, on the 4th of February 1817, on a voyage at and from New York, to and at a port or ports, place or places, in the gulf of Mexico, from the Balize to Campeachy, both inclusive, and from either, back to New York, or a port of discharge in the United States, upon all kinds of lawful goods and merchandises laden, or to be laden, on board the schooner Ellen Tooker. In another part of the policy, it was stated to be "on cargo, consisting chiefly *178] of munitions *of war." There was a memorandum also in the policy, whereby the underwriters are warranted by the assured free from any charge, damage or loss which might arise, in consequence of a seizure or detention of the property for or on account of any illicit or prohibited trade. The declaration alleged, that the vessel, with the cargo, proceeded on the voyage, and asserted as a loss, within the contract, that while on the voyage, the schooner, with her cargo, was restrained and detained by certain per-

¹ See note to *Swan v. Union Ins. Co.*, 3 Wheat. 168.