

CASES DETERMINED

IN THE
PROPERTY OF
FEDERAL COURT OF APPEALS.
UNITED STATES SENATE
COMMITTEE COPY

AUGUST SESSION, 1781.

THE RESOLUTION.

MILLER *et al.*, libellants and appellants, *v.* The SHIP RESOLUTION, and INGERSOLL, claimant and appellee.

MILLER *et al.*, libellants and appellees, *v.* The CARGO of the SHIP RESOLUTION, and O'BRIEN, claimant, appellant.

Prize.—Neutral property.—Recaptures.—Illegal contract.—Capitulation.—Allies.

The capture of neutral property, by one of the belligerent parties, and its retention for twenty-four hours, does not vest the property in the captors, so as to render it lawful prize to the other power.

The legality of a capture is open for question and examination, until a competent jurisdiction has decided the question, and a decree passes for condemnation as prize.

But the possession and occupation of the property, in such case, is evidence of title, which is conclusive upon all mankind, except the rightful owner.

On a surrender, by capitulation, the property of the inhabitants, protected by the articles, is considered neutral; and is not liable to capture by the belligerent, or his allies.

A subject cannot divest himself of the obligation of a citizen, and voluntarily make a contract with the enemy, stipulating to special neutrality; but he may enter into such contract, by capitulation, when it is out of the power of his government to protect him.

The compacts and agreements of allied nations with the common enemy, bind each other, when they tend to the accomplishment of the common object.

The United States, as allies of France, were bound by the capitulation between Great Britain and France, for the surrender of Dominica.

Miller *v.* The Resolution, Bee 404; s. c. 3 Hopk. 70, affirmed as to the ship, and reversed as to the cargo.¹

THESE were appeals from the Admiralty Court of Pennsylvania, where the ship had been acquitted and the cargo condemned.

¹ But see *infra*, p. 19, where the original exception of a certain portion thereof, condecree was modified, and the cargo, with the condemned.

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After argument, by *Wilcox, Lewis and Sergeant*, for the appellants, and *Morris and Wilson*, for the appellees, the opinion and judgment of the court (comprising a statement of all the facts and documents material to the case) were delivered by *CYRUS GRIFFIN*, the presiding Commissioner, in the following terms :

BY THE COURT.—We have considered these appeals, and are now ready to give our judgment.

It has been very truly observed, that this appeal is a case of importance, not only with regard to the subject in contest, but also with regard to the great questions of law, which the investigation and discussion of the merits necessarily introduced ; and being before this court for their determination, the judgment and decree of this court must be directed by the resolves and ordinances of congress, and, where they are silent, by the laws, usage and practice of nations. Upon these grounds, the case has been considered and argued by the counsel on both sides ; and considered so thoroughly, and argued so copiously, fully and ably, that we have now every possible light of which the subject admits.

*The general question is, “whether, on all the circumstances of *2] this case, the ship or cargo, or both, or any part of the cargo, be a prize; and as such ought to be condemned and confiscated?” The libellants contend, that both ship and cargo are prize—if not the ship, yet the cargo is prize; if not the whole of the cargo, yet the principal part of it must be condemned. Different grounds have been taken to support these several positions—one ground is taken to affect both ship and cargo; other and different grounds, to affect the cargo ; other and different grounds, to affect the principal part of it.

The argument directed against both ship and cargo is this : By the law of nations, after a capture and occupation for twenty-four hours, the property captured is transferred to the captors: but the ship and cargo in question were captured and occupied twenty-four hours ; therefore, the property was transferred to the captors; and as the captors were British subjects, the property was British property, and therefore, legally attacked and captured by the American privateer *Ariel*.

There is no doubt, but that a capture, authorised by the rights of war, transfers the property to the captor; but the question is, whether a capture, not authorised by the rights of war, can have that legal operation : for the claimant says, “that the ship was not originally British, but Dutch and neutral property, and that the cargo also was not originally British, but neutral property, in consequence of articles of capitulation, stipulated on the conquest of *Dominica*, by the arms of his most Christian Majesty.”

All the authorities cited on cases of capture authorised by the rights of war, are, where the property captured was the property of an enemy: not an instance has been produced, where a capture, not authorised by the rights of war, has been held to change the property; but many authorities have been brought to show, that no change is effected by such capture. To say, that a capture, which is out of the sanction and protection of the rights of war, can nevertheless derive a validity from the rights of war, is surely a contradiction in terms. The rights of war can only take place among enemies, and therefore, a capture can give no right, unless the property captured be

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the property of an enemy. But it is stated, that both ship and cargo, in the present case, were originally (that is antecedently to the British capture) in the predicament of neutral property: no property then was transferred by the capture, and, of consequence, the property in question was not, upon the ground it has been considered, British property.

But it is said, "the fact cannot be ascertained, that the capture in this case was not authorised by the rights of war; for it depends upon the will of the sovereign, whether an outrage, *and capture *supra altum mare*, [*3 be an illegal and piratical act, or an act of hostility: that the sovereign is not obliged to promulge his will, on the moment he makes war, and that as the human will has no physical existence, it cannot be ascertained, but by a declaration of it by the sovereign himself, and, therefore, *non constat*, but that the capture in the present case, was authorised by the British crown and so a fair act of hostility, authorised by the rights of war."

This argument is ingenious and plausible, but not solid. As the state of nature was a state of peace, and not a state of war, the natural state of nations is a state of peace and society, and hence, it is a maxim of the law of nations, founded on every principle of reason, justice and morality, that one nation ought not to do an injury to another. As the natural state (that of nations) is a state of peace and benevolence, nations are morally bound to preserve it. Peace and friendship must always be presumed to subsist among nations; and therefore, he who founds a claim upon the rights of war, must prove that the peace was broken by some national hostility, and war commenced: but mere conjecture, supposition and possibility can render no competent evidence of the fact.

But it is said, "here was a national hostility, viz., the capture by the British privateer; and the act of the subject is the act of the sovereign." The act of the subject can never be the act of the sovereign; unless the subject has been commissioned by the sovereign to do it: but in this case, there is no evidence that the commission of the British privateer extended to property, under the circumstances of the property captured.

But it is asked, "what private or public mischief can be apprehended from considering property, under the circumstances of this case, as prize: for the wrong was committed by the British privateer, and therefore, the British nation is chargeable with it, and bound to make compensation." We are inclined to think, that were the claimants to apply to the British crown for compensation, they would be told "that although satisfaction were done, yet it would be in proportion only to the wrong done by the British privateer, which consisted only in the seizure and detention. But if compensation was expected for ship and cargo, they must look to that nation for it, whose courts declared a condemnation, and whose subjects reaped the fruits of it."

But it is alleged, that "the late ordinance of congress is express and decided, that after a capture and occupation for twenty-four hours, the property captured shall be prize." The ordinance of congress certainly speaks of a legal capture; to admit a different construction would be a violence both to the *terms and spirit or intention of it. Prize is [*4 generally used as a technical term, to express a legal capture; and congress having adopted it, in framing of the ordinance, the general sense

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or acceptance of it, must determine its import and signification. But, suppose, the term *prize* merely imported a capture, without any reference to its legality, and that it was the spirit and intention of the ordinance, to subject to *prize* all captures, both legal and illegal, after twenty-four hours ; it does not follow, that it would affect the present case. The municipal laws of a country cannot change the law of nations, so as to bind the subjects of another nation ; and by the law of nations, a neutral subject, whose property has been illegally captured, may pursue and recover that property, in whatever country it is found, unless a competent jurisdiction has adjudged it prize. The municipal laws of a country can only bind its own subjects.

The ordinance of congress is, in truth, a new regulation of the *jus post liminii*, and limits it to a recapture within twenty-four hours, and therefore, can only relate to the subjects of the United States : it adopts the ordinance of France, and that ordinance relates only to the subjects of France. In both cases, with regard to the owner, a subject, the property captured is not passed away, before the expiration of twenty-four hours. But, put the case of a capture and the sale of it, before twenty-four hours, to a neutral subject ; the sale is certainly good and conclusive upon the owner ; for the question must be decided by the law of nations, and by the law of nations, the property captured is transferred to the captor, as soon as it is taken. Both the ordinances, therefore, of congress and of France, in our opinion, relate only to property captured from a subject and re-captured ; and not to property captured from a neutral and re-captured.

It is said, "that arguments drawn from the law of nations with regard to pirates, do not apply to the present case, because pirates have not the rights of war." If the principal fact was properly attended to, the present case could not be questioned. Whence is it, that pirates have not the rights of war ? Is it not, because they act without authority and commission from their sovereign ? And is it not objected and proved, that the British privateer, with regard to the property captured, acted without commission and authority from the British crown ? So far from there being any dissimilarity in the cases, it is, in fact, the very case in judgment, considering it on the first ground of argument.

But it is alleged, "that the capture by the British privateer must be considered as legal : for, after a capture and occupation for twenty-four hours, the legality of the capture is not open for question and examination."

*5] *This doctrine must never be suffered ; there is no example or precedent for it to be found in any of our books ; it breaks down and destroys the distinction between right and wrong ; it gives a sanction to injustice, robbery and piracy, and it is reprobated by the laws, usage and practice of nations. Lord Mansfield, in the case so often quoted (*Goss v. Withers*), 2 Burr. 693, says, "The question, whether the property is transferred by the capture, can only happen between the owner and vendee, and between the owner and the re-captor." But the question could never happen between the owner and the re-captor, if the legality of the capture was not examinable on every libel for condemnation as prize. The question is—*prize or no prize ?* This is, whether the capture be legal or not.

The legality of a capture is open for question and examination, until a competent jurisdiction has decided the question, and a decree passes for condemnation as prize ; then, and not before, all further questions and

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examinations are precluded ; then, all parties, and all foreign courts, are stopped to say, "the capture is not legal;" and if the decree be erroneous or iniquitous, the party injured must apply for redress to that nation, whose courts have committed the error or iniquity.

"Great difficulties," it is said, "will arise, if capture and occupation for twenty-four hours should not be considered as conclusive evidence of property in the captor, and that the capture was legal." And it is asked, "must a regular title be deduced from the first proprietor to the captor, as in case of an ejectment at the common law?" And "must common-law strictness, in making out titles, be adopted in admiralty courts?"

Every libel states a title to the thing captured ; the title must not only be stated, but it must also be proved. It is stated in the libel, in this case, that the property captured was British property, and the evidence to prove it is, "possession and occupation of it by the British privateer." A title thus traced, is a good one, in a court of common law, except in a single case : it is a good title against all the world, *except the right owner*. This exception is founded on every principle of reason and justice ; it ought not only to be adopted in courts of common law, but in every court, where the distinction between right and wrong is preserved, and justice regarded. Possession and occupation ought, upon a question of property, to have the same influence in courts of admiralty, as in courts of common law ; it ought to be considered as a good title, and conclusive upon all mankind, except the *right owner*. Such a title is clear of all difficulties in the proof of it ; it excludes the necessity of a regular deduction of title from the first proprietor down to the captor ; it is disengaged from those entanglements, which result from a variety of possible changes and mutations of the *property ; and it cannot be shaken, except when every honest man will say, it ought to be shaken—when the right owner appears and proves his property. We have now done with the observations and reasoning, that relate to the first ground of argument: and are of opinion, that if the ship and cargo were originally neutral property, the capture and occupation for twenty-four hours did not change it into British property, and make it prize.

But another ground has been taken, to affect the cargo : The libellants say, "that the cargo is the produce and growth of Dominica ; that the said cargo is the property of British subjects of that island ; that therefore, it was not neutral property, but British, and originally prize." To this the claimants reply, "that after the declaration of independence, and after the alliance of the States with France, the British Island of Dominica was taken by the arms of his most Christian Majesty ; that before the reduction of it, articles of capitulation took place, by which the owners and possessors of estates in the island were secured in the possession and enjoyment of them, and indulged with carrying on trade and commerce, upon an equal footing with subjects of France ; that the said island, since the conquest, has been under the protection and government of France ; that before the sailing of the ship, a passport was obtained from the French government, requiring all commanders of French armed vessels, and all commanders of Spanish and American armed vessels, the allies of France, not to impede or obstruct the passage of said ship, the cargo on board being property of capitulants ; that the said articles of capitulation bind America, as the ally of France ; that, therefore, the cargo, although the property of British subjects, yet it is

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British property, protected from capture, by the articles of capitulation; and that it is in the predicament of neutral property, and therefore, was not originally prize."

Upon these facts and allegations two capital questions arise:—1st. Whether the cargo was British property, protected by the articles of capitulation against French and British captures? 2d. Whether America, as the ally of France, is bound by the articles of capitulation?

With regard to the first question, it is contended, on a variety of grounds, that this cargo is not protected from capture by the articles of capitulation.

1. Because the capitulation does not extend to property shipped and on passage at sea.

2. Because the owners were principally non-residents, at the time of capitulation, and therefore, although owning estates at Dominica, cannot be considered as capitulants.

*3. Because the proceeds of this cargo were to be remitted from
*7] Holland, to the owners residents in Great Britain.

4. Because the voyage was in fact calculated for Great Britain and for Amsterdam, in Holland, and therein was a breach of the articles of capitulation, and a forfeiture of its protection.

5. Because the cargo on board was the property of British subjects, not residents, nor owning estates, in Dominica, and therefore, not within the protection of the capitulation.

The first, fourth and fifth grounds apply to the whole cargo, and the second and third to the principal part of it.

Whether the articles of capitulation extend protection to property, after being shipped and on its passage at sea, depends on the 13th article, and the general tendency and scope of the capitulation itself. The main design of the capitulants was, to obtain a perfect security for their estates and property; and a full exercise of all the rights of property and ownership: and one great object with the French general was, to secure to France the commerce of the island, and all its advantages, emoluments and revenues; but it was inconsistent with the design and object which both had in view, to open to French and British capture, the produce of the island, and property of the capitulants, as soon as afloat at sea. This would have injured the rights of property, discouraged the labor and agriculture of the island, lessened its exports, and diminished the revenues of its government.

But the thirteenth article seems decisive: it stipulates, "that the merchants and inhabitants of this island, included in the present capitulation, shall enjoy all the privileges of trade, and on the same conditions as are granted to the subjects of his most Christian Majesty, throughout the extent of his dominions." By this article, the capitulants are placed, with regard to their trade and commerce, on an equal footing with the subjects of France; every commercial privilege which the subjects of France enjoy, is conceded to the capitulants; but it is certainly one privilege which a subject of France enjoys, that his property at sea, in the line of a fair trade and commerce, shall not be captured as prize, by French subjects; consequently, the cargo, in this case, which is the property of capitulants, cannot be subject as prize to French captures.

But it is asked, "was it not subject to British capture?" The article, it

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is said, stipulates, that the trade shall be carried on upon the like condition with the French trade, and the French trade is subject to interruption by British capture. Had the capitulation stipulated, generally, that the capitulants should exercise all the rights and privileges of trade exercised by *the subjects of France, the case would have been a clear one; the capitulation then might have been fairly considered as a compact between the French and British crowns, that a trade should have been carried on by the capitulants, in the extent of the French trades, and consequently, that neither crown could interrupt it by captures, without a breach of faith. The difficulty arises upon the provision in the article, that the privileges of trade shall be considered upon the conditions of the French trade, which it is said implies, "that as the French trade is exposed to British captures, so must be the trade of the capitulants." It is observable, that this article is propounded on the part of the capitulants, and the conditions stipulated must have been, in their ideas, productive of some benefit and advantage: Was it for the benefit and advantage of the capitulants, that their property, so captured, should become the property of the captors, and liable to confiscation? Certainly not. [*8

But admit, that this article was propounded on the part of the French general; what beneficial object could he have in stipulating, that this trade should be exposed to British capture? Was it for the interest and advantage of the French crown, that this fresh accession to its commerce should be harassed and discouraged by British capture? Certainly not. A construction then so pointedly against the interest of both parties can never be the right one: the truth is, the condition expressed in the article refers only to the duties, imposts and regulations of commerce.

But if the construction was admissible, that it was for the interest of the British capitulants, that this trade should be liable to such interruption by British captures, what must we think of the opinion of the eminent lawyers of Great Britain which have been cited? They say, that this trade is protected by the capitulation against British captures. Deciding, then, against the contended interest of the capitulants, do not their opinions, from such a circumstance, acquire a great additional force? The British crown, by its proclamation, gives incontestable evidence, that the property of the capitulants is not exposed to British capture; for it refers to the capitulation, asserts the protection it gives, and confirms it.

With regard then to the question, "whether the capitulation extends protection to property, when shipped from the island, and afloat at sea?" we are of opinion, that it does.

But it is objected, on the second ground of argument, that the cargo was principally the property of residents in Great Britain at the time of the capitulation, and therefore, although owning estates in the island, yet not entitled to the benefit of the capitulation.

*It will be proper, in the consideration of this objection, to attend to the 9th, 12th and 13th articles of capitulation. [*9

The 9th article says: "The absent inhabitants, and such as are in the service of Great Britain, shall be maintained in the possession and enjoyment of their estates; which shall be managed for them, by their attorneys." The 12th article says: "That widows and other inhabitants, who, through illness, absence or any other impediment, cannot immediately sign the capit-

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ulation, shall have a limited time to accede to it." And the 13th article says: "The inhabitants and merchants of this island, included within the present capitulation, shall enjoy all the privileges," &c.

The fact is admitted, that the cargo is the produce and growth of Dominica, and that the principal part of it belongs to British subjects; possessing estates in the island, but non-residents at the time of the capitulation. It is objected, "that with regard to such non-residents, the operation of the 9th article extends no further than to protect the estates of such persons from seizure and confiscation by the rights of conquest; that the 12th article extends only to those who have acceded to the capitulation, within the time limited, and that the 13th article extends only to such inhabitants and merchants as are included at the time of capitulation, and not to non-residents. To this, it is replied, "that by the 12th article, absentees may come in, within a limited time, and accede to the capitulation, and that then they fall within the description of the 13th article, which says, "the inhabitants and merchants of this island, included within the capitulation, &c."

Upon these allegations and facts, two questions arise: 1st. Whether the claimants, who were non-residents and absentees, at the time of capitulation, have acceded to it? 2d. Whether, having acceded to it, they come within the description of the 13th article, and are entitled to the rights and privileges of trade there conceded?

We have carefully examined all the bills of lading and the depositions annexed, and find that the property mentioned in each bill is proved, by the respective depositions, to be the property of a British capitulant. Whether he, personally, or by attorney, representatively, subscribed the capitulation, does not appear; nor do we think it material, for the maxim is a true one, *qui facit per alium, facit per se*. It is proved by the deposition of Mr. Fitzgerald, that the general sense and opinion of the people of the island, the subscription of an attorney, for his principal was sufficient, and Mr. Fitzgerald mentions an instance, where a principal was refused by *the
*10] French governor the benefit of the capitulation, because his attorney had neglected to subscribe for him. He also proves, that it was the uniform and uninterrupted practice of the island, for principals, non-residents, to subscribe by attorney; which would not have been the case, unless such mode had been agreeable to the spirit and intention of the capitulation.

But it is said, "that none could accede to this capitulation, but such as were in a capacity to stipulate a neutrality, and that non-residents, in Great Britain, although owning estates in Dominica, could not, consistently with their allegiance, engage a neutrality of conduct." It must be admitted, that where the supreme authority is competent to protect the rights of subjects, a subject cannot divest himself of the obligation of a citizen, and wantonly make a compact with the enemy of his country, stipulating a neutrality of conduct; but, certainly, he may enter into such an agreement, when it is no longer able to give him protection. In the present case, the British crown was not able to secure to the owners their estates in Dominica, and therefore, they had a natural right to make the best terms they could, for the preservation of their property; for, it is a general maxim of the law of nations, "that although a private compact with an enemy may be prejudicial to a state in some degree, yet if it tends to avoid a greater evil, it shall bind the states, and ought to be considered as a public good." The owners, therefore,

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of the cargo in question, though non-residents, at the time of the capitulation, and out of the reach of personal injury, yet having estates in the island, in danger of confiscation by conquest, had a right to avail themselves of the terms proffered by the capitulation, and engage a neutrality of conduct, by acceding to it.

But it is said, "that, very possibly, some of these non-residents are at this day in the military service of Great Britain." Our opinion is, that the 9th article, with regard to all absentees, and such as are in the service of Great Britain, only exempted their estates from forfeiture by the rights of conquest. The rights and privileges of trade are considered only by the 13th article. No one can bring himself within the 13th article, that has not signed the capitulation, and every one who signs the capitulation engages a neutrality of conduct. If any one subscribing the capitulation should afterwards go into the service of Great Britain and commit acts of hostility against France and America, he would break his engagement of neutrality, and forfeit all the rights and privileges of trade, and his property captured at sea would become prize.

It is a rational construction, to consider neutrality as the great basis of the capitulation. The estates, indeed, of absentees, and such as were engaged in the service of Great Britain, appear to *have been secured, [*11 at all events, from forfeiture, without a stipulation for neutrality; but with regard to the rights and privileges of trade, they can be only exercised by those who have acceded to the capitulation and engaged a neutrality. Admitting, then, that the owners of estates in the Island of Dominica, and non-residents and claimants in the cause, have properly acceded to the capitulation; the mere question is, whether they come within the 13th article, and are entitled to the rights and privileges of trade there conceded? As we conceive that this article was conceded as a liberal compensation for the stipulation of neutrality, we have no doubt, but that these non-residents, who owned estates in Dominica, and have acceded to the capitulation and neutrality, come within the description of the 13th article, and are entitled to all the rights and privileges of trade, which it provides for and stipulates.

The third ground of argument, on which it is contended, that this cargo is not protected by the capitulation against capture, is this: that the proceeds of the cargo were to be principally remitted to Great Britain, on the order of the owners resident there, and therefore, that this cargo was in a line of trade, not within the protection of the capitulation. We have already given it as our opinion, that the 13th article gives the capitulants a protected trade to every port, where the trade and commerce of France extends. And we have given it as our opinion, that with regard to the rights and privileges of trade, there is no difference between the inhabitants, and those absentees, non-residents, who have acceded to the capitulation and neutrality. The only circumstance, then, to take this cargo out of the protection of the capitulation, must be the letters of advice of the agents at Dominica, advising the consignees at Amsterdam, to whom the cargo belonged, and that the proceeds of the principal part of it were to be at the disposal and order of the owners, residents in Great Britain. We cannot see the force of this circumstance in the extent contended for, if the agents rightfully exported the produce of the estates of those non-residents, in conformity to the capitulation. The letters of advice cannot give this commercial act a different com-

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plexion; the agents could not ship this property, in their own right, without taking upon themselves a risk of the voyage; and the bills of lading necessarily allowed that the proceeds were at the disposal of the owners. Could agents have acted with more propriety? Every step they took was the natural result of the rights of trade conceded by the capitulation.

But it is objected, "that the 20th article shows, that no remittance was to be made, but for education and support of children." The article is this: "The inhabitants of the island shall have liberty to send their children to *12] England, to be there educated, *and to send them back again, and to make remittances to them, while in England." This article by no means proves, that no remittances were to be made of proceeds on sales in a neutral country; though the children might have had remittances in that train of intercourse, yet the mode might have been thought too circuitous and dilatory. A remittance in a direct line was more eligible. Besides, remittances on sales abroad could only be in money or bills; but by this article, there is no limitation of the species of remittance, and it may be in produce.

The capitulation must receive a liberal construction. It was the fabric of a great, enlightened general, and every part of the structure exhibits a liberality and grandeur of spirit, that does honor to human nature. It is said, that if the property of the capitulants is thus protected from capture, it is in a better situation than French, American or British property; it is precisely in the situation of neutral property. It was far from being the wish of the capitulants, to have had their property placed in such a predicament, upon the terms it was done. They were reduced and obliged to submit to it, by force of arms. But the situation of those people is mentioned as a happy one: if to be a conquered people, and enforced to all the contingent consequences of a conquest, be a pleasing condition, these people may then boast of their being in an happy one.

It is said, the British crown must be benefited by this condition of their subjects. The British crown may indeed be benefited in some degree; it was not meant to deprive Great Britain of every benefit; she draws some benefit, from having a few remittances made from sales abroad, to a few of her subjects in England, owning estates in Dominica. But then to gain the advantage, she yields up the personal service of those subjects, for they are bound to observe a neutrality. But has Great Britain lost nothing by the conquest? Who possesses the Island of Dominica? Who possesses all the advantages and benefits of its trade? Who has obtained its commercial revenues? It is true, she is not at the expense of the government of that island. But it is true, she has lost island, government and revenues. When the consignees disposed of the cargo, they became debtors for the moneys received. The making of remittances, in satisfaction of debts, although to subjects of a nation at war, is no violation of the duties of a citizen. Nor will the usage and practice of civilized nations forbid it. Tobacco shipped to France, with an avowed intent to remit the proceeds to England for the payment of debts, would not be prize on an American capture.

*13] We come now to the fourth ground of argument, on which it *is contended, that this cargo is not within the protection of the articles of capitulation; that is, that the voyage was calculated for Great Britain, and not for Amsterdam, in Holland, and therefore, in breach and out of the protection of the capitulation. This argument is grounded upon several cir-

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cumstances, and upon evidence that point at some latent object, but do not speak decisively upon it : they prove a secrecy and concealment, with regard to the voyage to Dominica, and the taking a cargo there ; but all these circumstances are easily explained, without adopting the idea that the voyage was intended for Great Britain. What is suggested in Capt. Waterburgh's letter, was a mere precautionary measure, to avoid British cruisers, that perpetually harassed the Dutch trade, by capturing their vessels. In the same letter, he mentions the capture of a Holland ship, which had been carried into St. Kitts and released ; the letter is dated Eustatius ; and the manœuvres he mentioned were to secure the voyage to Dominica.

The voyage from Dominica to Amsterdam, we have no doubt, was planned in London, between the capitulants there, owning estates in Dominica, and Daniel Heshuysen, agent for Brantlight & Son. The letter addressed to Moreson, at Dominica, was dated at Amsterdam, though written in London, because Brantlight & Son lived at Amsterdam, and because the cargo was to be consigned to them, at Amsterdam, and it was dated the day of the date of his own letter, which inclosed it, because it was then written. As for the secrecy enjoined in Brantlight & Son's letter to Captain Waterburgh, while at Eustatius, with regard to the voyage to Dominica ; and the taking a cargo there, we cannot think they had any other motive for it, than such as often influences merchants, in the conduct of a fair trade, to keep to themselves their commercial plans. But what force can these circumstances have, when opposed by the positive evidence that is produced ? The bill of lading, and a variety of letters from the shippers and attorneys for the owners in London, some addressed to Brantlight & Son, and others to the owners, prove that the voyage was for Amsterdam ; all the ship-papers also prove it. But the depositions of Waterburgh and Moreson, to whom the ship was consigned, and by whom the ship was loaded, are conclusive : they, upon clearing out of the ship, swear expressly that she was destined for Amsterdam.

We are now come to the last ground, which has been taken to prove the cargo not to be protected by the articles of capitulation, which is : That the property of the cargo on board, was the property of British subjects not residents or owning estates in Dominica. But what is the evidence produced to prove this ? It is a letter from Moreson to Brantlight & Son, in which he mentions the alarm occasioned by the rupture between Great Britain and the States General, and the fears and *apprehensions the merchants and shippers were under, relative to putting property on [*14 board a Holland vessel ; he afterwards mentions the arrival of the king's proclamation, protecting Holland vessels from capture, and says " even then, no one but Mr. Kender Mason and myself would put a hogshead on board your ship, as the king's proclamation laid so much blame on your city ; but we have agreed, &c.;" and then says, they have agreed to ship, and assigns the reasons.

The fact does not appear, that Kender Mason had any property at all in Dominica, nor that he had any attorney or agent ; it appears, he lived in London, and was a correspondent of Moreson's house, in Dominica. It appears, Daniel Hesuysen, as agent for Brantlight & Son, obtained a letter from this Kender Mason, addressed to Moreson, which he inclosed to Captain Waterburgh, at St. Eustatius, and in consequence of which, Captain Water

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burgh was ordered to Dominica. This letter was probably delivered by Waterburgh, as it is not to be found among the ship's papers. We have no evidence of the contents of this letter, but it appears to us, to have been a letter recommending Brantlight & Son to Moreson's house. The plan of the voyage being settled in London, it was natural, to obtain letters of introduction from thence.

But Moreson's letter, it is objected, speaks expressly of Kender Mason having shipped property on board, and there is no proof that he is a British capitulant, and therefore, here was property on board belonging to a British subject, who was neither a resident in Dominica, nor an owner of estate there, and consequently, it was British property, not protected by the capitulation. Moreson's letter, if good evidence, to prove the fact with regard to Kender Mason, must be taken as good evidence to prove every fact stated in it; for it must be taken altogether and admitted, or rejected *in toto*. He says, then, "no one but Kender Mason and myself would put a hogshead on board, &c." Moreson, then, as well as Kender Mason, had property on board. Moreson also mentions in his letter, that afterwards, there was an agreement to ship, generally, and assigns the reasons. The shippers must be other persons besides Mason and Moreson: so that even upon the evidence of Moreson's letter, Kender Mason could have but a part of the cargo, the *quantum* of which is not at all ascertained.

But we are inclined to think, that this letter of Moreson's, with regard to Kender Mason shipping property on board, is a mistake. Kender Mason was certainly not at Dominica, and yet the letter conveys that idea: "A general panic had seized the merchants, they would not ship, until the arrival of the king's proclamation, and even then Kender Mason and myself were the only persons who would ship a hogshead." The person Moreson *meant to speak of, must have been on the spot. He was one whom *15] the panic had not taken hold of; he was one who, with Moreson, took the resolution to ship, notwithstanding the alarming rupture between Great Britain and the States General; he was one who was led to ship from a confidence in the king's proclamation. We have it in evidence, that Captain Waterburgh had letters of recommendation both to Moreson and a Mr. Alexander Henderson. These letters were inclosed to the captain, in a letter from Brantlight & Sons. It appears, that on the captain's application to Moreson, nothing could be done, without Henderson; Moreson and Henderson were the persons who were consulted, and the first who moved to provide a loading for the ship. It appears from the bills of lading, that Henderson was a principal shipper. These circumstances considered, the supposition which was made by the counsel for the claimants, is not altogether without foundation, that Kender Mason, was by mistake, inserted for Henderson.

But, be the fact as it may, we must determine according to the weight of evidence. The bills of lading show, that Kender Mason had no property on board; for every bill mentions the person to whom the property belongs, and each bill has a deposition annexed to it, proving the property mentioned to be the property of the persons mentioned, and it appears, that there was no other property than what was mentioned in the bills of lading, and nowhere in those bills is the name of Kender Mason to be found. To say, then, that Kender Mason had property on board, is to say, that upwards of twenty

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persons have committed perjury, for there is that number of bills of lading and depositions: A mere assertion in a letter can never be suffered to weigh down such a powerful combination of positive proof, on oath.

Having now considered all the grounds, on which it was objected that the cargo was, in this case, not protected by the articles of capitulation, we are of opinion, that this cargo was protected by the articles against all French and British captures, and if America is bound by the articles, protected also from American captures. But the question is, whether the articles of capitulation bind America? Vattel, a celebrated writer on the laws of nations, says, "when two nations make war a common cause, they act as one body, and the war is called a society of war; they are so clearly and intimately connected, that the *jus postliminii* takes place among them, as among fellow-subjects." It appears from the established form of ransom bills, that a compact of that nature binds the ally, and it appears by the passport granted by the French governor of Dominica, that he considers the capitulation as obligatory upon America; for he requires all commanders of French vessels, and all commanders *of Spanish vessels, and American vessels, the allies of France, not to impede the navigation [*16 of said ship, in her passage to Amsterdam; for that the shippers of the cargo were capitulants, under the protection of the French crown. From the very nature of the connection between allies, their compacts and agreements with the common enemy must bind each other, when they tend to accomplish the objects of the allies. Both nations have one common interest and one common object. If such agreements, when correspondent to the terms upon which the alliance is formed, and calculated for the attainment of the views and designs which gave birth to it, do not bind the ally, then the consequence would be, that the ally would reap all the fruit and advantages of the compact, without being subject to the terms and conditions of it; while the enemy with whom the compact is made, is exposed, with regard to the ally, to all the disadvantages of it, without participating of all the benefits stipulated; an inequality of obligation reprobated by every principle of reason and justice.

If America is not bound by the capitulation, then it can give no security to the capitulants, nor can they, with safety, exercise the rights and privileges of trade conceded to them. America being in alliance with France, the ports of France are open to our armed vessels; and an American privateer might post herself in the ports of Dominica, watch the sailing of the ships from that port, pursue and capture them. Under such circumstances, the trade and commerce of the island would be totally annihilated. But not only the capitulants would suffer; France would equally suffer; for, if exportation ceases, the commercial revenue of the island must cease with it.

The conquest of Dominica was productive of great advantages to the common cause. It was a considerable reduction of the power and resources of Great Britain; it placed a great body of her subjects in a state of neutrality; it lessened the commerce and revenues of her government, and eventually deprives her of a part of her dominions.

But if America is not bound by the capitulation, neither can the capitulants be bound with regard to America; for no engagement can be a valid one, which ties up the hands of one party, and leaves the other party at full liberty to exercise, on the party bound, all the rights of war. Then, what

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should we think of the French governor of *Dominica*, were he to suffer the capitulants to fit out armed vessels, to cruise against *America*. But it is said, that the capitulation, so far as it is contended to bind *America*, is unequal; for *American* property exported from *Dominica* would be liable to *British* capture, which *British* property would not.

*17] *This argument is not a fair one; it blends together what ought to be distinguished; a difference ought to be observed between the property of *British* subjects and *British* capitulants. *British* subjects, not capitulants, may rightfully capture *American* property: *Americans* may rightfully capture their property; but *British* capitulants cannot capture *American* property; and therefore, it is a perfect equality, that *Americans* shall not capture the property of capitulants.

But it is thought strange, that while *French*, *Spanish*, *American* and *British* property should be liable to capture, the property of the capitulants should be exempted from it. Let us advert for a moment to the peculiar situation of those capitulants. They are a conquered people, and reduced to the government of *France*; they are, by compact, a neutral body; they have neither the power of war nor peace; they commit hostilities against no nation; neither against *France*, nor *Spain*, nor *America*, nor *Britain*; where then is the strangeness in the doctrine, that the property of a people thus reduced, thus defenceless, and thus acting in the line of neutrality, should be protected from capture?

But the resolutions of congress with regard to *Bermudas* and other islands, have been objected, and it is said, that *Count d'Estaing* captured the vessels belonging to those islands, though, by the resolve of congress, they were exempted from capture; which, it is contended, shows that the agreement of one ally does not bind the other. The resolutions of congress cannot be considered as a compact with the people of *Bermudas* and the other islands; for those people were not in a capacity to make a compact; they were under subjection to the *British* Crown, and had no authority from the crown to enter into engagements with *America*. The resolutions, therefore, of congress were a mere voluntary suspension of the rights of war, with regard to those people, the continuance of which was perfectly optional with *America*.

If *France* was bound by these resolutions of congress, she would only be bound in the extent that *America* was. *America* might say, when she pleased, that those resolutions should not exist, and so might *France*. But if *France* was bound to a neutrality with regard to *Bermudas* and those other islands; then *Bermudas* and those other islands were bound to a neutrality with regard to *France*: but those islands were not bound, therefore, *France* was not bound; and *Count d'Estaing* was well justified in the captures he made.

With regard then to the question, "whether the articles of capitulation bind *America*," we are of opinion, that they do.

*18] *But the claimants take a ground which, they say, will save the cargo at all events; and this ground is the ordinance of congress, which relates to the rights of neutrality. Congress, October 1786, taking into consideration the declaration of her Imperial Majesty of *Russia*, with regard to the rights of neutrality, adopt the principles of the declaration,

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and appoint a committee to report resolutions conformable to them. Resolutions are reported, and on the 7th of April 1781, before the capture in the present case, congress pass an ordinance ascertaining a set of instructions for commanders of armed vessels, the 3d and 4th of which are as follows: 3d. "You shall permit all neutral vessels freely to navigate on the high seas or coast of America, except such as are employed in carrying contraband goods, or soldiers, to the enemies of these United States." 4th. "You shall not seize or capture effects belonging to the subjects of the belligerent powers on board of neutral vessels, excepting contraband goods, &c."

Great Britain, before the capture, had commenced hostilities against the States General; but, by proclamation, exempted from capture, for a limited time, all ships and vessels belonging to the States General of the United Provinces, carrying the produce or manufactures of Dominica, according to the articles of capitulation. The ship in this case was the property of Brantlight & Son, subjects of the States General, carrying the produce of Dominica, according to the capitulation. She was captured by a British privateer, within the limited time; and on a supposition that America is not bound by the articles of capitulation, her cargo was the property of British subjects at war with America. This case comes expressly within the fourth instruction; the ship is certainly within the predicament of neutral property, and the cargo is the property of subjects of a belligerent power.

But it is said, that the rights of neutrality were broken by the British capture. The British capture was illegal; it was without authority from the British crown. It was directly against the articles of capitulation, and in opposition to the British proclamation; it was a piratical act, in legal strictness, and only excusable on the circumstances of the case. But shall America violate rights of neutrality, because another nation has done it? Or, which is the present case, because a subject, without authority from his nation, has done it? Did the ship cease to be a neutral ship by the capture, and did the cargo cease to be British property? If not; then, at the time of the re-capture, the ship was a neutral ship, and the cargo, effects belonging to the subjects of a belligerent power, and so expressly within the 4th instruction.

But it is objected, "that Great Britain has not acceded to the rights of *neutrality, and therefore, the property on board a neutral vessel ought not to be protected." The ordinance of congress makes no [*19 exception of Great Britain; for it says, you shall not seize or capture effects belonging to the belligerent powers, on board of neutral vessels. Great Britain is here beyond a doubt comprehended; for she was a belligerent power, when the ordinance passed.

But it is said, this ordinance of congress is obligatory only on commanders of vessels, but not in the courts of admiralty and appeal. We cannot think that this objection was seriously made. Upon the whole, we are of opinion, that the decree below with regard to the ship, be confirmed; and with regard to the cargo, that it be reversed, and the cargo be charged with the stipulated freight.¹

¹ This decree was modified, on a rehearing, *infra*, except as to a portion of the cargo; the residue being condemned.