disturbance of the peace and harmony happily subsisting between the *United States and the French Republic: Wherefore, the said Samuel [*132
B. Davis, the aid of the said supreme court most respectfully requesting, hath prayed remedy by a writ of prohibition, to be issued out of the said supreme court, to you to be directed, to prohibit you from holding the plea aforesaid, the premises aforesaid any wise concerning, further before you: You, therefore, are hereby prohibited, that you no further hold the plea aforesaid, the premises aforesaid in any wise touching, before you, nor anything in the said district court attempt, nor procure to be done, which may be in any wise to the prejudice of the said Samuel B. Davis, or the said corvette or vessel of war, called the Cassius; or in contempt of the laws of the United States: And also, that from all proceedings thereon, you do, without delay, release the said Samuel B. Davis, and the said corvette or vessel of war, called the Cassius, at your peril. Witness the honorable John Rutledge, Esquire, chief justice of the said supreme court, at Philadelphia, this 24th day of August, in the year of our Lord, one thousand, seven hundred and ninety-five, and of the Independence of the United States, the twentieth. I. Wagner, D. C., Sup. Ct. U. S.(*a*)

Talbot, appellant, *v.* Jansen, appellee. [*133

Expatriation.—Prize.—Restitution.

If the right of expatriation exist, under our laws, not only a renunciation of citizenship, but an actual removal, for a lawful purpose, and the acquisition of a foreign domicil are necessary.[1]

The capture of a vessel of a friendly nation, by a privateer fitted out in one of our ports, and commanded by an American citizen, under a commission from a foreign belligerent power, is illegal; and if the captured vessel be brought within our jurisdiction, the district court may decree restitution and damages.

The granting of a commission to serve as a privateer, against the commerce of a nation at peace with the United States, by an officer of a foreign belligerent power, within our jurisdiction, is a flagrant violation of the sovereignty of the United States. Paterson, J.

War can alone be entered into by national authority; no hostilities of any kind, except in necessary self-defence, can lawfully be practised by an individual of a nation, against an individual of another nation, at enmity with it, but by virtue of some public authority.

Jansen *v.* The Vrow Christina Magdalena, Bee 11, affirmed.

This was a writ of error, in the nature of an appeal from the Circuit Court for the district of South Carolina; and the following circumstances appeared upon the pleadings:

(*a*) The proceedings on the libel for damages in the district court, were accordingly superseded; but an information, Ketland, *qui tam*, &c., was immediately afterwards filed in the circuit court, against the corvette, for the illegal outfit in violation of the act of congress, and the vessel being thereupon attached, an application was made to Judge Peters, to discharge her, on giving security, but the judge was of opinion, that he had no power, as district judge, to make such an order in a cause depending in the circuit court. The French minister then, deeming (as I have been informed), this prosecution to be a violation of the rights and property of the republic, delivered a remonstrance to our government; and converting the judicial inquiry into a matter of state, abandoned the corvette, and discharged the officers and crew. See Ketland *qui tam*, *v.* The Cassius, 2 Dall. 365.

[1] The right of expatriation is by no means a settled question in this country. It has been

Talbot v. Jansen.

A libel was filed against Edward Ballard, captain of an armed vessel, *L'Ami de la Liberte*, on the admiralty side of the district court of South Carolina, in June 1794, by Joost Jansen, late master of the brigantine Magdalena (then lying at Charleston, within the jurisdiction of the court), in which it was set forth, that the brigantine and her cargo were the property of citizens of the United Netherlands, a nation at peace, and in treaty with the United States of America; that the brigantine sailed from Curaçoa, on a voyage to Amsterdam; but, on the 16th of May 1794, being about fifteen miles N. W. of the Havana, on the west side of Cuba, she was taken possession of by *L'Ami de la Liberte;* that on the next day, the libellant met another armed schooner, called *L'Ami de la Point-a-Pitre*, commanded by Captain William Talbot, on board of which the mate and four of the crew of the brigantine Magdalena were placed; and that the two schooners, together with the brigantine, sailed for Charleston, where the last arrived on the 25th of May 1794. The libellant proceeded to aver, that Edward Ballard was a native of Virginia, a citizen and inhabitant of the United States, and a branch-pilot of the Chesapeake and Port Hampton; that *L'Ami de la Liberte* is an American built vessel, owned by citizens of the United States (particularly by John Sinclair, Solomon Wilson, &c.), and was armed and equipped in Chesapeake Bay and Charleston, by Edward Ballard and others, contrary to the president's proclamation, as well as the general law of neutrality, and the law of nations; that Edward Ballard had not, and could not legally have, any commission to capture Dutch vessels, or property; that the capture was in direct violation of the 13th and 19th articles of the treaty between *America and Holland; and that a capture without a commission, or with a void commission, or as pirates, could not divest the property of the original *bonâ fide* owners, in whose favor, therefore, a decree of restitution was prayed.

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On the 27th of June 1794, William Talbot filed a claim in this cause; and thereupon set forth, that he was admitted a citizen of the French Republic, on the 28th December 1793, by the municipality of Point-a-Pitre, at Guadaloupe; and on the 2d of January following, received a commission from the governor of that island, as captain of the schooner *L'Ami de la Point-a-Pitre*, which was owned by Samuel Redick, a French citizen, resident at Point-a-Pitre, since the 31st December 1793, and had been armed

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held, that an American citizen cannot dissolve the compact between himself and his country, without the consent or default of the community. United States *v.* Williams, 4 Hall's L. J. 461; s. c. 2 Cr. 82 n.; Shanks *v.* Dupont, 3 Pet. 246; United States *v.* Gillies, Peters' C. C. 159. Though the government may, undoubtedly, relieve a citizen from his allegiance. Inglis *v.* Sailors' Snug Harbor, 3 Pet. 101. But, on the other hand, expatriation is said to be a fundamental right; and it was held, that a naturalized American citizen, by emigrating to a foreign country, and entering into its military service, completely renounced his American citizenship, and was no longer held to its obligations. Stoughton *v.* Taylor, 2 Paine 652. So, a citizen domiciled in a foreign country, who takes an oath of allegiance to the foreign sovereign, is not under the protection of the United States. Murray *v.* The Charming Betsey, 2 Cr. 64. It is, however, agreed on all hands, that to effect a transfer of a citizen's allegiance, there must be a *bonâ fide* change of domicil, under circumstances of good faith; it can never be set up as a cover for fraud, or as a justification for the commission of a crime against the country, or for a violation of its laws, where this appears to be the intention of the act. The Santissima Trinidad, 7 Wheat. 348, Story, J.; s. c. 1 Brock. 478; Stoughton *v.* Taylor, 2 Paine 661. See notes to Sharswood's Blackstone, p. 370.

and equipped at that place, as a privateer, under the authority of the French republic. That the claimant, being on a cruise, boarded and took the brigantine, being the property of subjects of the United Netherlands, with whom the Republic of France was at war; and that although he found a party from *L'Ami de la Liberte* on board the brigantine, yet as they produced no commission, or authority for taking possession of her, the claimant sent her as his prize into Charleston, having put on board several of his crew to take charge of her, and particularly John Remsen, in the character of prize-master, to whom he gave a copy of his commission. The claimant, therefore, prayed that the libel should be dismissed with costs.

On the 3d of July 1794, the libellant filed a replication, in which he set forth, that William Talbot, the claimant, was an American citizen, a native and inhabitant of Virginia; that his vessel (formerly called the Fairplay) was American built, was armed and equipped in Virginia, and was owned in part, or in whole, by John Sinclair and Solomon Wilson, American citizens, and Samuel Redick, also an American citizen, though fraudulently removed to Point-a-Pitre, for the purpose of privateering. That J. Sinclair had received large sums as his share of prizes, and Captain Talbot had remitted to the other owners, their respective shares. That there was a collusion between Captains Talbot and Ballard, whose vessels were owned by the same persons, and sailed in company from Charleston, on the 5th of May 1794.

On the 5th July 1794, William Talbot added a duplicate to his claim, in which he protested against the jurisdiction of the court; insisted, that even if there had been a collusion between him and Capt. Ballard, it was lawful, as a stratagem of war; and averred, that John Sinclair was not the owner of the privateer, that Samuel Redick was sole owner, and that he never had paid any prize-money to John Sinclair.

On the 6th of August 1794, the district court decided in favor of its jurisdiction, dismissed the claim of Captain *Talbot, and decreed res- [*135
titution of the brigantine and her cargo to the libellant for the use of the Dutch owners. An appeal was instituted, but in October term 1794, the circuit court affirmed the decree of the district court; and allowed two guineas *per diem* for damages, and seven per cent. on the proceeds of the cargo (which had been sold under an order of the court), from the 6th of August 1794, with $82 costs. Upon this affirmance of the decree of the district court, the present writ of error was founded. It may be proper to add, that Captain Ballard had been indicted, in the district of Charleston, on a charge of piracy; but was acquitted, agreeable to the directions given to the jury by Mr. Justice Wilson, who presided at the trial.

From the material facts, which appeared upon the depositions and exhibits accompanying the record, the following circumstances were ascertained:

1st. In relation to the citizenship of Captain Talbot, and the property of the vessel which he commanded, it appeared, that he was a native of Virginia, that he sailed from America, in the close of November 1793, and arrived soon afterwards at Point-a-Pitre, in the island of Guadaloupe; that having taken an oath of allegiance to the French republic, he was there naturalized by the municipality, as a French citizen, on the 28th of December 1793; and that on the 2d of January 1794, authority was given by the governor of Guadaloupe to Samuel Redick, to fit out the schooner, *L'Ami*

de la Point-a-Pitre, under Captain Talbot's command, Redick having entered into the usual security, as owner of the privateer. This schooner was built in America, called the "Fairplay," and had been owned by John Sinclair and Solomon Wilson, American citizens; but she was carried to Point-a-Pitre, by Captain Talbot, and there, on the 31st December 1793, by virtue of a power of attorney from Sinclair & Wilson, dated the 24th of November 1793, he sold her for 26,400 livres, as the bill of sale set forth, to S. Redick, who was a native of the United States, but had also been naturalized (after an occasional residence for some time) as a citizen of the French republic, on the same 28th of December 1793. The bill of sale also stated, that certain cannon and ammunition on board the vessel were included in the sale. The schooner, commanded by Captain Talbot, sailed immediately after this transaction, on a cruise, and had taken several prizes, previously to the capture of the Magdalena. There was some slight evidence also, to sanction an allegation, that of these prizes, taken subsequent to the sale of the vessel to Redick, a part of the proceeds had been paid by Talbot to the original owners, Sinclair & Wilson.

*136] 2d. In relation to the citizenship of Captain Ballard, and the *property of the vessel which he commanded, it appeared, that he was a native of Virginia; but that in the court of Isle of Wight county, of April term 1794, he had renounced, upon record, his allegiance to that state, and to the United States, agreeable to the provisions of a law of Virginia;(*a*) though, previously to the capture of the Magdalena, he had not been naturalized in (nor, indeed, had he visited) any other country. *L'Ami de la Liberte* had been employed, but not armed, by the French Admiral, Vanstable, then lying with a fleet in the Chesapeake; and on the 13th Germinal 1794, he had given Sinclair a general commission to command her, as an advice, or packet-boat. This commission, however, was assigned by indorsement, from Sinclair to Capt. Ballard, the assignment was recognised by the French Consul, at Charleston, on the 11th of Floreal following; and a copy of it had been certified and delivered by Capt. Ballard to the prize-master of one of his prizes. There was full proof that *L'Ami de la Liberte* had received some guns from *L'Ami de la Point-a-Pitre*, when they first met, by appointment, in Savannah river, and that she had been supplied with ammunition, &c., within the jurisdiction of the United States. It did not appear, that she had gone into any other than an American port, though she had made repeated cruises, before the capture of the Magdalena; and there were strong circumstances to show, that she was still owned by Sinclair, though she had been employed by Admiral Vanstable.

3d. In relation to the concert of the two schooners, and the capture of the Magdalena, it appeared, that before Capt. Ballard's vessel was fit for

(*a*) The words of the law are these: "Whensoever any citizen of this commonwealth shall, by deed in writing, under his hand and seal, executed in the presence of, and subscribed by, three witnesses, and by them, or two of them, proved in the general court, any district court, or the court of the county or corporation where he resides, or by open verbal declaration made in either of the said courts, to be by them entered of record, declare that he relinquishes the character of a citizen, and shall depart out of this commonwealth, such person shall, from the time of his departure, be considered as having exercised his right of expatriation, and shall thenceforth be deemed no citizen. Passed 23d Dec. 1792.

sea, it had been generally reported and believed, and there was some evidence that Sinclair had declared, that she was destined, as a consort, to cruise with Capt. Talbot; that Capt. Talbot had received a letter from Sinclair, directing him to proceed to Savannah river, and there wait for Capt. Ballard, in whose vessel, Sinclair meant to sail; that, accordingly, some days afterwards, Capt. Ballard's vessel hove in sight off Savannah, when Capt. Talbot said, "there is our owner, let us give him three cheers;" that both vessels went *to Tybee Bar, and sailed more than a mile above the light-house, where four cannon and some swivels were [*137 taken from on board of Capt. Talbot's vessel, and mounted on board *L'Ami de la Liberte;* that Sinclair left the vessels in the river, and they soon after sailed together, as consorts, upon a cruise; and that, accordingly, before the capture of the Magdalena, they had jointly taken several prizes, and particularly, the Greenock, which was taken by them on the 15th of May, only two days before the capture of the Magdalena, and the Fortune der Zee, which was taken the very day after her capture. It appeared, that the Magdalena was first taken possession of by Capt. Ballard, who left a part of his crew on board of her; but Capt. Talbot was then in sight, and coming up in about an hour afterwards, he also took possession of the brigantine, and placed a prize-master and some of his men on board. The two privateers continued together for several days, making signals occasionally to each other; and finally, Capt. Ballard alone accompanied the prize into Charleston.

The cause was argued by *Ingersoll*, *Dallas* and *Du Ponceau*, for the appellant; and by *E. Tilghman*, *Lewis* and *Reed* (of South Carolina), for the appellee.

On the facts, the controversy was—whether the two schooners were, or were not, owned by American citizens? and were, or were not, illegally outfitted in the United States? The question of ownership turned upon the fairness and reality of the sale of *L'Ami de la Point-a-Pitre* to Samuel Redick; and the truth of the allegation, that *L'Ami de la Liberte* had been purchased and commissioned by Admiral Vanstable for the service of the French republic: and the question of illegal outfit being conceded, as to Captain Ballard's vessel, depended, as to Captain Talbot's vessel, upon the circumstances which have been recapitulated. On the law, the following positions were taken in favor of the appellant. (*a*)

(*a*) Before the principal argument commenced, the two following points occurred: 1. The counsel for the appellee offered to give in evidence a certificate of the collector of the customs of the port of Charleston, stating, that it appeared by his official books, that the duties on the cargo of the Magdalena had been paid by the appellee. But it was objected, for the appellant, that the collector's certificate could not be admitted to prove the fact; the entry itself, from the record, must be exemplified. Besides, the collector is not an officer appointed to certify a record; and as a witness, the opposite party should have had an opportunity to cross-examine him. Independently, therefore, of any question, whether new evidence can be received, on an appeal in this court, the certificate is inadmissible.

The Court rejected the certificate, on the general ground; and Wilson, Justice, added, that he thought, at all events, it was premature to offer the evidence in this stage

*I. That the courts of the United States have no jurisdiction of the cause, because the capture of the Magdalena as prize, and carrying her in for adjudication, were acts performed under the authority of the French republic; the subject of the capture is the property of an enemy of the French republic; and upon general principles, as well as by positive compact, the captor had a right to bring the prize into an American port.[1] The commission of Captain Talbot is granted by a regular organ of the government of France, and if France recognises him as a citizen (though America may have a right, in the abstract, to controvert with France, as a matter of state, the act of expatriation), no neutral power can contradict the fact, for the purpose of trying the validity of the prizes of the republic, by a test which is strictly municipal in every country, in substance, form and operation. 1 Com. Dig. 269. The courts of a neutral country may undertake to determine questions of piracy; or questions of restitution, where (as in the case of *Glass* v. *The Betsey*, ante, p. 6) the property of its own citizens, or of the citizens of another neutral nation, has been wrongfully seized and brought within its jurisdiction; or questions arising from a violation of the neutral jurisdiction of the country, as in the case of *The Grange*, which was captured in the bay of Delaware; but no neutral power can determine a question of prize, upon a capture on the high seas, by a belligerent power, from his enemy. 4 Inst. 154; 2 R. 3, fol. 2; Bynk. Q. J. p. l. 1, 17; 2 Wood. 454; Lee 211; Sir L. Jenk. 714. Thus, there is no *ius postliminium* in a neutral port; Vatt. lib. 3, c. 14, § 208, p. 84; and America, as a neutral power, cannot award restitution in this case, unless two things are established: 1st, that the plaintiff is in amity with America, and 2d, that France is in amity with Holland. 4 Inst. 154. Besides, France, by the 17th article of the treaty, has a right to bring into, and carry from, an American port, all the prizes that she takes from her enemies. That the Dutch owners of the vessel were enemies of France is notorious; but still,
*139] the vessel must *be a prize, according to the law of nations, excluding captures within a neutral boundary, &c. That question, however, when the capture is made on the high seas, by a belligerent power, of the property of his enemy, can only be decided by the courts of the country of the captors; and to examine the right of the French republic to issue a com-

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of the cause. The motion was renewed, after the court had affirmed the decree of the court below, but with no greater success.

2. It was objected by *Dallas*, for the appellant, that the record was not transmitted agreeable to the directions of the judicial act, the 19th section providing, that "it shall be the duty of circuit courts, in causes in equity and of admiralty and maritime jurisdiction, to cause the facts on which they found their sentence or decree, fully to appear upon the record, &c.;" which had not been done. It is true, that the pleadings exhibits, and sentences are certified by the clerk, not by the judges; and there may have been oral testimony in the inferior courts. *Reed* answered, that everything that had appeared below, now appeared here, under the seal of the circuit court. After some discussion, however, the desire of the parties to obtain a decision on the merits prevailed, and the objection was waived. The point has been since argued and decided in the case of Wiscart *v.* D'Auchy, *post*, p. 321.

[1] The exemption of foreign public ships, coming into our waters, under an express or implied license, from the local jurisdiction, does not extend to those prize-ships or goods, captured in violation of our neutrality. The Santissima Trinidad, 7 Wheat. 283.

mission, within her own dominions, to a person recognised and claimed by her as a citizen, is a direct attack upon the sovereignty and independence of France. It is urged, however, that Capt. Talbot's vessel was, in fact, an American privateer, illegally fitted out in an American port; the facts do not support either branch of the allegation; but even in that point of view, if there was a commission from the French republic, the capture cannot be deemed piracy: and since passing the act of the 5th of June 1794 (1 U. S. Stat. 381), there is a provision for punishing illegal outfits; but not for restitution of their prizes, taken under a foreign commission, by foreign subjects. Upon a capture, under a commission to a French citizen, indeed, whether he is a native citizen or naturalized, the thing must be the same in effect, to foreign neutral powers. Every writer supports this opinion, where the prize is carried *infra præsidia;* and the American ports are *infra præsidia* (a place of asylum and safety) for French prizes, by virtue of the treaty. But even if the commission had been given to an American citizen, it would have been consistent with the usage of nations—every nation (for instance, Russia and England) employing foreign officers and seamen in their privateers and ships of war; and America herself, it will be remembered, employed La Fayette, and a train of French officers, previous to her alliance with France. See 13 *Geo. II., c.* 3, § 1; 17 vol. Stat. at Large 358; Lex Mer. 318. Citizenship *de facto* is enough for the object contemplated; and England provides that she herself may navigate her privateers with three-fourths foreign seamen. 13 *Geo. II., c.* 3.

II. That Samuel Redick and Captain Talbot had expatriated themselves, and become French citizens; so that the former might lawfully own, and the latter might lawfully command, a French privateer, for the purpose of making prize of ships belonging to the enemies of France. The right of expatriation is antecedent and superior to the law of society. It is implied, likewise, in the nature and object of the social compact, which was formed to shield the weakness, and to supply the wants of individuals—to protect the acquisitions of human industry, and to promote the means of human happiness. Whenever these purposes fail, either the whole society is dissolved, or the suffering individuals are permitted to withdraw from it. There are two memorable instances of the expatriation of entire nations (independent of the general course of the patriarchal, or *pastoral life), the one in ancient, and the other in modern story. When the Persians ap- [*140 proached Athens, the whole Athenian nation embarked in the fleet of Themistocles, and left Attica, for a time, in possession of the Persians. Plut. in vit. Themist.; Trav. of Anachar. 1 vol. p. 268. In the year 1771, a whole nation of Tartars, called "Tourgouths," making 50,000 families, or 300,000 souls, emigrated from the banks of the Wolga, in Russia, and after a progress of inconceivable difficulty, settled in the dominions of the Emperor of China, who hospitably received them, and erected a monument on the spot, to commemorate the event. Col. Mag. for Feb. 1788. But the abstract right of individuals to withdraw from the society of which they are members, is recognised by an uncommon coincidence of opinion—by every writer, ancient and modern; by the civilian, as well as by the common-law lawyer; by the philosopher, as well as the poet: It is the law of nature and of nature's God, pointing to "the wide world before us, where to choose our place of rest, and Providence our guide." 2 Bynk. 125; Wickefort lib. 1, c.

2, p. 116 ; Grot. lib. 2, 5, § 24, par. 2, 3 ; Dig. de cap. et post. Law 12, § 9 ; Wick. lib. 1, § 11, p. 244 ; Puff. lib. 8, 1, c. 11, § 3, p. 862 ; 1 Fred. Code, 34–5, 2 vol. 10 ; 1 Gill. Hist. Greece. With this law, however, human institutions have often been at variance ; and no institutions more than the feudal system, which made the tyranny of arms, the basis of society; chained men to the soil on which they were born ; and converted the bulk of mankind into the villeins, or slaves of a lord, or superior. From the feudal system, sprung the law of allegiance ; which, pursuing the nature of its origin, rests on lands ; for when lands were all held of the crown, then the oath of allegiance became appropriate : It was the tenure of the tenant, or vassal. 1 Black. Com. 366. The oath of fealty, and the ancient oath of allegiance, were almost the same ; both resting on lands ; both designating the person to whom service should be rendered ; though the one makes an exception as to the superior lord, while the other is an obligation of fidelity against all men. 2 Bl. Com. 53; Palm. 140. Service, therefore, was also an inseparable comcomitant of fealty, as well as of allegiance. The oath of fealty could not be violated, without loss of lands ; and as all lands were held mediately or immediately of the sovereign, a violation of the oath of allegiance was, in fact, a voluntary submission to a state of outlawry. Hence arose the doctrine of perpetual and universal allegiance. When, however, the light of reason was shed upon the human mind, the intercourse of man became more general and more liberal ; the military was gradually changed for the commercial state ; and the laws were found a better protection for per-
*141] sons and property than arms. But *even while the practical administration of government was thus reformed, some portions of the ancient theory was preserved ; and, among other things, the doctrine of perpetual allegiance remained, with the fictitious tenure of all lands from the crown to support it. Yet, it is to be remembered, that whether in its real origin, or in its artificial state, allegiance, as well as fealty, rests upon lands, and it is due to persons. Not so, with respect to citizenship, which has arisen from the dissolution of the feudal system ; and is a substitute for allegiance, corresponding with the new order of things. Allegiance and citizenship differ, indeed, in almost every characteristic. Citizenship is the effect of compact ; allegiance is the offspring of power and necessity: citizenship is a political tie ; allegiance is a territorial tenure : citizenship is the charter of equality; allegiance is a badge of inferiority: citizenship is constitutional ; allegiance is personal : citizenship is freedom ; allegiance is servitude : citizenship is communicable ; allegiance is repulsive : citizenship may be relinquished ; allegiance is perpetnal. With such essential differences, the doctrine of allegiance is inapplicable to a system of citizenship; which it can neither serve to control nor to elucidate. And yet, even among the nations in which the law of allegiance is the most firmly established, the most pertinaciously enforced, there are striking deviations that demonstrate the invincible power of truth, and the homage which, under every modification of government, must be paid to the inherent rights of man. In Russia, the volunteers who supply the fleet with officers, or literary institutions with professors, are naturalized. In Poland, an American citizen has been made chancellor to the crown. In France, Mr. Colbert, who was minister of marine, and Mr. Necker, who was minister of finance, were adopted, not native subjects. In England, two years' service in the navy, *ipso facto* endows an alien with

all the rights of a native. These are tacit acknowledgments of the right of expatriation, vested in the individuals; for though they are instances of adopting, not of discharging subjects; yet, if Great Britain would (*ex gratia*) protect a Russian, naturalized by service in her fleet, it is obvious, that she cannot do so, without recognising his right of expatriation to be superior to the Empress's right of allegiance. But it is not only in a negative way, that these deviations in support of the general right appear. The doctrine is, that allegiance cannot be due to two sovereigns; and taking an oath of allegiance to a new, is the strongest evidence of withdrawing allegiance from a previous sovereign. Thus, Louis XIV. received his own *quondam* subjects, the two Fidlers, as ambassadors. Dr. Story, an Englishman, was sent to England, as the minister of Spain. And in many nations, the conditions *on which an expatriation may be affected (such as paying a tax, or leaving a portion of property behind) are actually prescribed. Independently, however, of these instances, in countries bound by the law of allegiance, it is to be considered, what are the rights of *citizenship* on the subject; and like every other question of citizenship, it depends on the terms and spirit of our social compact. The American confederation is a complex machine and *sui generis*. It creates joint federal powers; but it recognises separate state powers: it is confederate, to some purposes; but consolidated, to other purposes. The formation of every social compact is presumed, however, by elementary writers, to be a surrender of so much, and no more, of private rights, as are necessary to the preservation and operation of the government; but this principle is not left with us to mere implication; it is formally declared in many state constitutions, in favor of the people; and in the federal constitution, it is declared in favor of the states, as well as of the people. With respect, then, to the right of emigration, it has been under the consideration of the people and government of the Union, from the moment of their birth as an independent nation; insomuch that the refusal to pass laws for the encouragement of emigration to America, is charged as a proof of tyranny and oppression, in the enumeration of the grievances, which produced and justified the revolution. The articles of confederation contain not any clauses, expressly granting or restraining the power and right of naturalization and emigration; but they contain an express reservation of all powers in favor of the states individually, which are not, in terms, transferred to the Union. An inspection of the several state constitutions will prove, that in some form or other, the principle has been recognised by every member of the confederation; and the constitution of Pennsylvania explicitly provides, that no law shall be passed prohibiting emigration from the state. This is, perhaps, the only direct expression of the public sentiment on the subject; but the very silence that prevails, strengthens the argument. The power of naturalizing has been vested in several of the state governments, and it now exists in the general government; but the power to restrain or regulate the right of emigration, is nowhere surrendered by the people; and it must be repeated, that what has not been given, ought not to be assumed.

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It may be said, however, that such a power is necessary to the government, and that it is implied in the authority to regulate the business of naturalization. In considering these positions, it must be admitted, that although an individual has a right to expatriate himself, he has not a right

to seduce others from their country. Hence, those who forcibly or seduc-
*143] tively take away a citizen, commit an act which *forms a fair object of municipal police; and a conspiracy or combination to leave a country, might likewise be properly guarded against. Such laws would not be an infraction of the natural right of individuals; for the natural rights of man are personal; he has no right to will for others, and he does so, in effect, whenever he moves the mind of another to his purpose, by fear, by fraud or by persuasion. The English law and the law of Pennsylvania, therefore, punish kidnapping, and transporting or seducing artists to settle abroad, as crimes. 4 Bl. Com. 219, 160; 2 Dall. Laws. But this is all the power on the subject, which a government ought to possess for its preservation. The depopulation of a country by the spontaneous co-operating will of numbers, proves nothing more than that a bad government exists, or a bad soil is inhabited. Such an event, however, is too remote a possibility, to be anywhere a subject of apprehension; and with respect to America, it is visionary indeed! If then, the power of restraining emigration is not necessary to the existence of government, much may be urged to show that it is a power of too delicate a nature to be trusted by the people to the integrity of any government; since, by legislative regulations, the exercise of the right might be rendered so difficult, that the right itself would be put in everlasting abeyance. Nor is there any essential coincidence in a power to regulate naturalization, and in a power to regulate emigration; so that the grant of the former shall be deemed to include the latter. The idea of admitting, and the idea of excluding, are not analogous. As to the point of policy, if a man wishes to leave a country, he is not likely to remain in it, by force, beneficially to the state. The character of the migrating individual can have no influence on the right; his private motives of interest, or of pleasure, do not affect the community; and it is of no importance to what country he goes. The moment he has expatriated himself, the state is no longer interested, no longer responsible for his conduct; the ligature, which bound them, is severed, and can never again be united, without their mutual consent: the emigrant has become an alien. But in the act of naturalization, every community has a right totally to reject applications for admission; or to prescribe the terms; and then the character of the applicant, the motives of emigration from his old country, and the evidences of attachment to his new one, are all to be considered.

Let it, however, be supposed, for a moment, that the grant of the naturalization power embraces a power of regulating emigration, the question still remains, has the power of regulating emigration been exercised by congress? And if it has not been exercised by the department of government, to which alone, even by implication, it is granted, what authority has the
*144] *court to interfere upon the subject? That the power has not been exercised by congress is conceded; and if the court interferes, it will be a legislative, not a judicial act; for although it is contended, that the law of nations furnishes rules to supply the silence of the legislature, there is scarcely a subject to which the jurisdiction of congress extends, that might not, on the same doctrine, be regulated, without the interposition of that body. Thus, congress has power to define and punish piracies, felonies committed on the high seas, and offences against the law of nations; and yet, without the exercise of that power, the law of nations would supply rules as

applicable to those cases as to the case of expatriation. But naturalization and expatriation are matters of internal police; and must depend upon the municipal law, though they may be illustrated and explained by the principles of general jurisprudence. It is true, that the judicial power extends to a variety of objects; but the supreme court is only a branch of that power; and depends on congress for what portion it shall have, except in the cases of ambassadors, &c., particularly designated in the constitution.[1] The power of declaring whether a citizen shall be entitled in any form to expatriate himself, or, if entitled, to prescribe the form, is not given to the supreme court; and yet that power will be exercised by the court, if they shall decide against the expatriation of Captain Talbot. Let it not, after all, be understood, that the natural, locomotive right of a free citizen, is independent of every social obligation. In time of war, it would be treason to migrate to an enemy's country and join his forces, under the pretext of expatriation (1 Dall. 53); and, even in time of peace, it would be reprehensible (say the writers on the law of nature and nations) to desert a country laboring under great calamities. So, if a man acting under the obligations of an oath of office, withdraws to elude his responsibility, he changes his habitation, but not his citizenship. It is not, however, private relations, but public relations; not private responsibility, but public responsibility, that can affect the right: for where the reason of the law ceases, the law itself must also cease. There is not a private relation, for which a man is not as liable by local, as by natural, allegiance—after, as well as before his expatriation: he must take care of his family, he must pay his debts, wherever he resides; and there is no security in restraining emigration, as to those objects, since, with respect to them, withdrawing is as effectual as expatriating.

Nor is it enough to impair the right of expatriation, that other nations are at war; it must be the country of the emigrant. No nation has a right to interfere in the interior police of another: the rights and duties of citizenship to be conferred or released, are matter of interior police; and yet, if a foreign war could affect *the question, every time that a fresh power entered into a war, a new restraint would be imposed upon the natural rights of the citizens of a neutral country; which, considering the constant warfare that afflicts the world, would amount to a perpetual control. But the true distinction appears to be this: The citizens of the neutral country may still exercise the right of expatriation, but the belligerent power is entitled to say, "the act of joining our enemies, *flagrante bello*, shall not be a valid act of expatriation." By this construction, the duty a nation owes to itself, the sacred rights of the citizen, the law of nations, and the faith of treaties, will harmonize, though moving in distinct and separate courses. [*145

To pursue the subject one step further: A man cannot owe allegiance to two sovereigns (1 Bl. Com. 370); he cannot be citizen of two republics.

[1] The appellate power of the supreme court is conferred by the constitution, and not derived from acts of congress. Ex parte McCardle, 7 Wall. 506; Ex parte Yerger, 8 Id. 85; Smith *v.* Allyn, 1 Paine 453. But when congress enacts, that it shall have appellate jurisdiction, in certain cases; this is a negation of jurisdiction, in others. Id. And congress cannot confer original jurisdiction on the supreme court, in cases other than those mentioned in the constitution. Marbury *v.* Madison, 1 Cr. 137. Affirmative words in the constitution, declaring in what cases the supreme court shall have original jurisdiction, must be construed negatively as to all other cases. Ex parte Vallandigham, 1 Wall 252.

If a man has a right to expatriate, and another nation has a right and disposition to adopt him, it is a compact between the two parties, consummated by the oath of allegiance. A man's last will, as to his citizenship, may be likened to his last will, as to his estate; it supersedes every former disposition; and when either takes effect, the party, in one case, is naturally dead, in the other, he is civilly dead—but in both cases, as good christians and good republicans, it must be presumed, that he rises to another, if not to a better, life and country.

An act of expatriation, likewise, is susceptible of various kinds of proof. The Virginia law has selected one, when the state permits her citizens to depart; but it is not, perhaps, either the most authentic, or the most conclusive that the case admits. It may be done obscurely in a distant county court; and even after the emigrant is released from Virginia, to what nation does he belong? He may have entered no other country, nor incurred any obligation to any other sovereign. Not being a citizen of Virginia, he cannot be deemed a citizen of the United States. Shall he be called a citizen of the world; a human balloon, detached and buoyant in the political atmosphere, gazed at wherever he passes, and settled wherever he touches? But on the other hand, the act of swearing allegiance to another sovereign, is unequivocal and conclusive; extinguishing, at once, the claims of the deserted, and creating the right of the adopted, country. Sir William Blackstone, therefore, considers it as the strongest, though an ineffectual, effort to emancipate a British subject from his natural allegiance; and the existing constitution of France declares it expressly to be a criterion of expatriation. The same principle operates, when the naturalization law of the United States provides, that the whole ceremony of initiation shall be performed in the American courts; and if it is here considered as the proof of adoption, shall it not be considered also as the test of expatriation? If
*146] America *makes citizens in that way, shall we not allow to other nations, the privilege of the same process? In short, to admit that Frenchmen may be made citizens by an oath of allegiance to America, is virtually to admit, that Americans may be expatriated by an oath of allegiance to France.

After this discussion of principles, forming a necessary basis for the facts in this case, it is insisted: 1st. That Talbot was a naturalized citizen of the French republic, at the time of receiving a commission to command the privateer, and of capturing the Magdalena. He left this country with the design to emigrate; and the act of expatriation must be presumed to be regular, according to the laws of France, since it is certified by the municipality of Point-a-Pitre, by the French consul, and by the governor of Guadaloupe. 2d. That Redick was also a naturalized citizen of the French republic, when he purchased the vessel, and received a commission to employ her as a privateer. 3d. That Ballard's expatriation and commission, however doubtful, cannot affect Talbot and Redick. But still, it is objected, that these acts of expatriation, these commissions, are all fraudulent and void. In private contracts, in subjects of municipal regulation, in matters of *meum et tuum*, the rule is clear, that fraud vitiates everything, and the fraud may be collected from circumstances. But is fraud to be presumed, in a conflict of national rights? It is said, that a nation cannot be considered in the light of pirates; 1 Wood.; so, a nation cannot commit frauds. Let the matter be

turned as it may, it will rest on this ground—had France any authority to naturalize, or to commission, Talbot and Redick? America is deeply interested, at least, in withholding a concession, that any other nation but France can decide that question. The validity of her own naturalizations, the authenticity of her own commissions, and the claims of her impressed seamen are all involved. France, then, is exclusively to judge; she granted the authority, she can rescind it; she can punish any abuse of it; and to her government must be the appeal, if America, or any other nation, has sustained an injury by it. If, indeed, on the pretext of fraud in the persons who obtain a French commission, our courts may annul them, where will the inquisitorial censorship terminate? British patents of denization, as well as French acts of naturalization; and every commission of the officers of a public ship of war, as well as of a privateer, will be alike subject to our supreme control.

But even the allegation of fraud is unsupported by any reasonable degree of evidence. The first circumstance relied on is, that the acts of naturalization, bill of sale, and commission to cruise, were in the custody of Capt. Talbot, on board the privateer, and not held by Redick, at Point-a-Pitre. But, surely, every privateer must be always ready to prove her ownership and authority, *to rescue her from the imputation of piracy, and to entitle her to sell her prizes. Again, it is said, that Redick had no agent in America. But it is sufficient to answer, that the captain of a [*147 privateer is the natural agent for the owner; that it is idle to expect that the owner of a cruising vessel shall have an agent in every port, at which she may touch; and that, in fact, Redick had several agents in Charleston. It is added, as circumstances for suspicion, that Talbot had not proved that his vessel was not fitted out in the United States, whereas, the proof of the affirmative lay with the appellee; the articles on board Talbot's vessel, if not put on board at Guadaloupe, might have been for trade; and Redick, a *bonâ fide* purchaser, ought not to be affected by an illegal outfit: 2 Esp. 282; 3 Wood. 213; 1 Bl. Com. 262; 1 T. R. 260; 3 Ibid. 437; 2 Wood. 412; 431; Hard. 349; Cowp. 341; 2 T. R. 750. That proof is not made of notice of the sale to Redick, whereas, it appears, that Sinclair and Wilson were actually informed of the transaction; and that Sinclair and Wilson have not been produced as witnesses by the appellant, whereas, it was the duty of the appellee, if he thought their testimony material, to examine them, and he had the same means to compel their attendance.

III. That the capture being made by Captain Talbot, notwithstanding the participation of Captain Ballard, the vessel is a lawful prize. If, indeed, Talbot and Redick were regularly naturalized by France, if the vessel was regularly sold to Redick, and commissioned by the French government, it is obvious, that the validity of the capture can only be impeached, by the circumstance of Capt. Talbot's consorting with Capt. Ballard. That point may be considered in two ways: 1st. Considering Capt. Ballard as acting under color of a commission: 2d. Considering Captain Ballard as acting without any authority at all.

1. The commission which Ballard held, was, at least, sufficiently colorable, to justify Talbot, the commander of a French privateer, in associating with him against the enemies of France. A general order, indeed, is a sufficient commission, where there is evidence a person intended to act under it.

2 Vatt. §§ 224, 5, 6. But he not only held a commission, but he was employed by the French government itself, sailed under French colors, and in the character of a French vessel, had been permitted freely to leave and enter the American ports. It is true, that it is eventually discovered that he had clandestinely fitted out his vessel, in violation of the laws of the United States: but Talbot had no right to question the validity of the commission, nor the legality of the outfit; and even supposing Talbot did assist in the outfit of Ballard's vessel, that, as a substantive offence, might render him amenable to punishment in our courts, but it could not vacate his French commission, nor render him, as a French citizen, a pirate throughout the world. *The validity of the commission and the legality of the outfit are questioned, however, by a Dutch subject, before an American tribunal; and yet, such a plea would not be sustained in France, and could not be allowed even in Holland. With respect to America herself, whatever punishment she denounces, for a violation of her neutrality, she may inflict; but on principles of justice, she cannot convert one crime into another, an illegal outfit into piracy; she cannot punish for holding a commission, recognised by the authority that issued it; she cannot make an innocent man (for instance, Redick, the owner of the privateer), responsible for a guilty one; she cannot impair the right, or confiscate the property, of a man acting under a due authority, in order to punish a man acting without due authority; and she cannot punish a man for associating, out of her jurisdiction, with another, contrary to her laws, but consistently with the laws of the country to which he belongs.

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But what more did Talbot do, than is justifiable, on the principle of stratagem, by the laws of war? It is illegal, to fit out a vessel of war within the United States, under color of a French commission; and yet, after the vessel is outfitted, and on the high seas, may not an officer of France, without vacating his commission, employ her? Foreigners are often retained as spies, and sometimes pressed into the service of a belligerent power. Vatt. p. 593, 557; Grot.; Puff.; Heinec. 170. Why may they not be employed as consorts in cruising? A colorable commission was deemed sufficient to rescue Captain Ballard from a conviction for piracy; and if for that purpose, it ought surely to be sufficient to save Talbot, or rather, indeed, Redick, the party really interested, from a charge of piracy, the forfeiture of his commission, and the loss of the prize. Where there is a commission, there can be no piracy (2 Woodes. 425; 2 Sir L. Jenk. 754; Moll. 64); and capture by deputation, under color of a commission, is no piracy, though the ship is carried into the port of a friend. 2 Woodes. 426; Moll. lib. 1, c. 4, § 19, p. 65. The case in 2 Vern. 592, quoted for the appellee, is the case of Englishmen, acting as such, though under a Savoy commission, against friends of England; whereas, the present case is that of an American, having lawfully expatriated himself, and after becoming a French citizen, receiving as such a commission, and making prize, in a French vessel, of the property of the enemies of France. But even on the point of the commission, it is said in the case, that the prize might inure as a *droit* of admiralty, on the principle of capture from an enemy, by an uncommissioned vessel. 2 Woodes. 433. And there are some authorities that go the length of saying, that capture by a neutral, where there is a commission, is good. Lex Merc. 227; Com. Dig. 269.

*2d. But let it be supposed, in the second place, that Captain Ballard had no authority at all, this will not destroy Captain Talbot's right of capture. A piratical capture does not, it is agreed, alter the property (2 Wood. 428–31); and as Ballard, in that case, had no right to seize the vessel, it till remained the property of the Dutch owners, liable to be seized anywhere by the French, their public enemies. Vatt.; Burl. 219, 222, 225; Lee on Capt. 206; 2 Val. 261. If, indeed, a friend's property is retaken from a pirate, the friend shall only pay salvage; but if an enemy's property is so retaken, the right becomes entire and absolute in the recaptor. It would be war, in a neutral country, say the authorities, to secure, within her territory, the spoils of one of the belligerent parties; and is it not a greater partiality, a more striking aggression, to attempt to do so on the high seas? It can only be by an extension of her neutral jurisdiction, that the United States can pretend to invalidate the capture, because the property was in the possession of Ballard, an American citizen; and surely, the unlawful act of her own citizen can give no right or authority to the United States, at the expense of the right and authority of a foreign nation. If, upon the whole, Ballard had a colorable commission, it justified Talbot; if he had no commission, his misconduct on the high seas, cannot add to the safety of the property of the Dutch, nor enlarge the jurisdiction and power of the United States; and even if Talbot had consorted with Ballard, an avowed pirate, the prize would be good as a *droit* of the French admiralty, though, perhaps, neither of the captors acquired a property in it. Lex Merc. 246; Moll. lib. 1, § 10.

The facts, then, are briefly, that the two cruisers were in company, when they first saw the Magdalena; that, for their mutual interest, they afterwards separated, to pursue separate vessels, that both were again in sight, however, when the prize was captured, that both took possession of her, and that both were in possession, on her arrival in the port of Charleston. The force of one joint cruiser is the force of both; and, like joint-tenants, the possession of one is the possession of both. It cannot be said, that she was first captured by Ballard; for, when two ships are in sight, both are considered as captors; both entitled to share in the prize (2 Wood. 447; Moll. lib. 1, c. 2, § 22; 2 Leon. 182; Doug. 324, 328); and therefore, on that footing, if Ballard was not entitled, either the whole prize vested in Talbot, or Ballard's share was a *droit* of the admiralty of France; but America could have no pretence to hold or release any part of it. 2 Wood. 432–3, 441, 456; 2 Vern. 592.

The counsel for the *appellees* insisted upon the following points: 1st. That the capturing vessels were American property. *2d. That even if the vessels were French property, the instruments or agents used [*150 to effect the capture, were American citizens. 3d. That both vessels were of American outfit, and therefore, the capture was illegal. 4th. That, at all events, Ballard acquired no right by the capture, and that Talbot, coming in under him, could have no higher pretensions than Ballard himself. From this view, it will be perceived, that the course of their argument led principally to an investigation of the facts; whence, concluding that the whole transaction was collusive and fraudulent, on the part of the owners and captains of the vessels, they cited authorities to show, that fraud vitiates every

act, and that although fraud cannot be presumed, it may be proved by circumstances. 3 Chan. Cas. 85, 114; Wils. 230; 3 Co. 778, 81; 1 Burr. 391, 396; 4 T. R. 39.

On the points of law, the counsel for the appellee, held the following doctrines: 1. That Ballard and Talbot were Americans by birth, and had done nothing which could work a lawful expatriation. It is conceded, that birth gives no property in the man; but on the principles of the American government, he may leave his country when he pleases, provided it is done *bonâ fide*, with good cause, and under the regulations prescribed by law; 1 Vatt. lib. 1, c. 19, §§ 220, 221, 223, 224; Grot. lib. 2, c. 5, § 24; Puff. lib. 8, c. 11, p. 872; and provided also, that he goes to another country, and takes up his residence there, under an open and avowed declaration of his intention. Thus, the rule is fairly laid down in 2 Heinec. lib. 2, c. 10, § 230, p. 220; requiring from the emigrant not only an act of departure, with the design to expatriate, but the act of joining himself to another state. But a man may be entitled to the right of citizenship in two countries; and proving that he is received by a new country, is not sufficient to prove that his own country has surrendered him. If, indeed, it is lawful for one individual, any number of individuals may exercise the right of expatriation, under the circumstances contended for; and then, we might behold a political monster, all the citizens of a country at war, though the country itself is at peace. There must, therefore, from the nature of the case, be some restraint on this locomotive right: and it is a reasonable restraint, recognised by the best writers, that it shall not be exercised, either in contravention of a national compact, such as the American treaty with Holland, which declares that the citizens of either party shall not take commissions as privateers against the other (art. 19), or to the injury of the emigrant's country. Vatt. lib, 2, c. 6, § 71–6. Privateering by the subjects of a neutral nation, is considered as an infamous practice (Ibid. lib. 3, c. 15, § 229); and if an act *committed by a citizen is approved and ratified by his country, they adopt the offence as their own. Ibid. lib. 2, c. 6, § 74. The power of regulating emigration is an incident to the power of regulating naturalization. It is vested exclusively in congress; and the Virginia act, under which Ballard pretends to have renounced his allegiance, can have no effect on the political rights of the Union. With respect to Talbot, his pretended expatriation was in itself an offence, and therefore, cannot be a justification: he sailed from America in an armed vessel, illegally fitted out, with the design of becoming a privateer against a nation in peace and treaty with the United States; and the sale of his vessel to Redick, was merely a color to the general scheme of plunder and depredation, in which Redick was a partaker. If, then, Talbot is to be still considered as an American citizen, acting under a French commission, in capturing a Dutch prize, restitution must be awarded, upon the principle of the decision in 2 Vern. 592; Holland being at peace with America, though she is at war with France.

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2. That even supposing Talbot's expatriation, and the ownership of his vessel, to be sufficient to authorize his own privateering, the circumstances of consorting with Ballard, knowing the American character of Ballard and his vessel, were sufficient to invalidate the capture. Can it be reasonable or just, that a French privateer should associate with a pirate, or avail himself of the power of America, to seize the property of her allies, bring that prop-

erty into an American port, and yet, that an American court of justice should be incompetent to redress the grievance? But the actual capture was made by Ballard, whose right of capture is abandoned. The tortious act had been completed, before Talbot was admitted, by a fraudulent concert, into a share of the possession of the vessel; and even when admitted, he does not pretend to defeat the previous occupancy, or to controvert Ballard's claim of prize. Ballard (possessed by assignment of a commission, which did not authorize capture, and which was not, in its nature, assignable) had wrongfully seized the vessel of an American friend; and surely, if at the time of such seizure, and before Talbot boarded the vessel, the Dutch owners had a right to demand justice from the United States, as against Ballard, that right could not be destroyed by any immediate consequence of the wrong on which it was founded; such as Talbot's being admitted by the aggressor to a joint possession. Besides, Talbot assisted in arming Ballard's vessel, within the neutral jurisdiction of the United States; and this, together with the concert in capturing the Magdalena, amounted to a relinquishment or forfeiture of his commission.

3. That neither the law of nations, nor the treaty between *America and France, prevents the interference of the judicial authority of the [*152 United States, in this case; and it has already been adjudged, that the district court has admiralty jurisdiction, both as a prize and instance court. *Ante*, p. 6. It is enough to repel the argument founded on the law of nations, to state, that the question is not, whether the court will take cognisance of a capture, made on the high seas, by the citizens of France, of the property of the enemies of that republic, which is a question that can only be decided by the courts of the captor: but the gist of the controversy is—whether American citizens shall be permitted, under the color of a foreign commission, to make prize of the property of the friends of America, either by their own independent act, or in collusion and concert with a real French privateer? As to the 17th article of the treaty with France, giving it a fair and rational exposition, it cannot include prizes taken by privateers unlawfully equipped in the American ports: and the vessels taken as prize, must not only belong to the enemies of France, but be such as are taken *bonâ fide* by the citizens of France; which was not the fact in the present instance.

On the 22d of August 1795, the Judges delivered their opinions *seriatim*.

Paterson, Justice.—The libel in this cause was exhibited by Joost Jansen, master of the Vrouw Christiana Magdalena, a Dutch brigantine, owned by citizens of the United Netherlands; and its prayer is, that Edward Ballard, and all others having claim, may be compelled to make restitution. The district court directed restitution; the circuit court affirmed the decree; and the cause is now before this court for revision. The Magdalena was captured by Ballard, or by Ballard and Talbot, and brought into Charleston. The general question is, whether the decree of restitution was well awarded. In discussing the question, it will be necessary to consider the capture as made—1. By Ballard. 2. By Ballard and Talbot.

I. By Ballard. This ground not being tenable, has been almost abandoned in argument. It is, indeed, impossible to suggest any reason in favor of the capture on the part of Ballard. Who is he? A citizen of the United

States: for although he had renounced his allegiance to Virginia, or declared an intention of expatriation, and admitting the same to have been constitutionally done, and legally proved, yet he had not emigrated to, and become the subject or citizen of any foreign kingdom or republic. He was domiciliated within the United States, from whence he had not removed and joined himself to any other country, settling there his fortune and family. *153] *From Virginia, he passed into South Carolina, where he sailed on board the armed vessel called the *Ami de la Liberte.* He sailed from, and returned to, the United States, without so much as touching at any foreign port, during his absence. In short, it was a temporary absence, and not an entire departure from the United States; an absence with intention to return, as has been verified by his conduct and the event, and not a departure with intention to leave this country, and settle in another. Ballard was, and still is, a citizen of the United States; unless, perchance, he should be a citizen of the world. The latter is a creature of the imagination, and far too refined for any republic of ancient or modern times.[1] If however, he be a citizen of the world, the character bespeaks universal benevolence, and breathes peace on earth and good will to man; it forbids roving on the ocean in quest of plunder, and implies amenability to every tribunal. But what is conclusive on this head is, that Ballard sailed from this country with an iniquitous purpose, *cum dolo et culpa*, in the capacity of a cruiser against friendly powers. The thing itself was a crime. Now, it is an obvious principle, that an act of illegality can never be construed into an act of emigration or expatriation. At that rate, treason and emigration, or treason and expatriation, would, in certain cases, be synonymous terms. The cause of removal must be lawful; otherwise, the emigrant acts contrary to his duty, and is justly charged with a crime. Can that emigration be legal and justifiable, which commits or endangers the neutrality, peace or safety of the nation of which the emigrant is a member?

As we have no statute of the United States, on the subject of emigration, I have taken up the doctrine respecting it, as it stands on the broad basis of the law of nations, and have argued accordingly. That law is in no wise applicable to the present case; for, Ballard, at the time of his taking the command of the *Ami de la Liberte*, and of his capturing the Magdalena, was a citizen of the United States; he was domiciliated within the same, and not elsewhere; and besides, his cause of departure, supposing it to have been a total departure from and abandonment of his country, was unwarrantable, as he went from the United States, in the character of an illegal cruiser. The act of the legislature of Virginia does not apply. Ballard was a citizen of Virginia, and also of the United States. If the legislature of Virginia pass an act specifying the causes of expatriation, and prescribing the manner in which it is to be effected by the citizens of that state, what can be its operation on the citizens of the United States? If the act of Virginia affects Ballard's citizenship, so far as respects that state, can it touch his citizenship, so far as it regards the United States? Allegiance to a particular state is one thing; *allegiance to the United States is another. *154] Will it be said, that the renunciation of allegiance to the former, im-

[1] See Rabaud *v.* D'Wolf, 1 Paine 580; s. c. 1 Pet. 485.

plies or draws after it a renunciation of allegiance to the latter? The sovereignties are different; the allegiance is different; the right, too, may be different. Our situation being new, unavoidably creates new and intricate questions. We have sovereignties moving within a sovereignty. Of course, there is complexity and difficulty in the system, which requires a penetrating eye fully to explore, and steady and masterly hands to keep in unison and order. A slight collision may disturb the harmony of the parts, and endanger the machinery of the whole. A statute of the United States, relative to expatriation, is much wanted; especially, as the common law of England is, by the constitution of some of the states, expressly recognised and adopted. Besides, ascertaining by positive law the manner in which expatriation may be effected, would obviate doubts, render the subject notorious and easy of apprehension, and furnish the rule of civil conduct on a very interesting point.

But there is another ground, which renders the capture on the part of Ballard altogether unjustifiable. The *Ami de la Liberte* was built in Virginia, and is owned by citizens of that state; she was fitted out as an armed sloop of war, in, and as such, sailed from, the United States, under the command of Ballard, and cruised against and captured vessels belonging to the subjects of European powers, at peace with the said states. Such was her predicament, when she took the Magdalena. It is idle to talk of Ballard's commission; if he had any, it was not a commission to cruise as a privateer, and if so, it was of no validity, because granted to an American citizen, by a foreign officer, within the jurisdiction of the United States. We are not, however, to presume, that the French admiral or consul would have issued a commission of the latter kind, because it would have been a flagrant violation of the sovereignty of the United States; and of course, incompatible with his official duty. Therefore, it was not, and indeed, could not, have been a war commission. It is not necessary, at present, to determine, whether acting under color such a commission would be a piratical of offence. Every illegal act or transgression, committed on the high seas, will not amount to piracy. A capture, although not piratical, may be illegal, and of such a nature as to induce the court to award restitution.[1]

It has been urged in argument, that the *Ami de la Liberte* is the property of the French republic. The assertion is not warranted by the evidence; and if it was, would not, perhaps, be of any avail, so as to prevent restitution by the competent authority. The proof is clear and satisfactory, that she was an American vessel, owned by citizens of the United States, and *still continues to be so. The evidence in support of her being French property is extremely weak and futile; it makes no impression; it [*155 merits no attention. But if the *Ami de la Liberte* be the property of the French republic, it might admit of a doubt, whether it would be available, so as to legalize her captures and prevent restoration; because she was, after the sale (if any took place) to the republic, and before her departure from, and while she remained in, the United States, fitted out as an armed vessel of war; from whence, in such capacity, and commanded by Ballard, an Amer-

[1] So, a seizure as prize, is no trespass, though it may be wrongful; the authority and intention with which it is done, deprive the act of the character which would otherwise be impressed upon it; the tort is merged in the capture as prize. Stoughton *v.* Taylor, 2 Paine 655.

ican citizen, she set sail, and made capture of vessels belonging to citizens of the United Netherlands. The United States would, perhaps, be bound, both by the law of nations and an express stipulation in their treaty with the Dutch, to restore such captured vessels, when brought within their jurisdiction, especially, if they had not been proceeded upon to condemnation, in the admiralty of France. On this, however, I give no opinion. The United States are neutral in the present war; they take no part in it; they remain common friends to all the belligerent powers, not favoring the arms of one, to the detriment of the others. An exact impartiality must mark their conduct towards the parties at war; for if they favor one to the injury of the other, it would be a departure from pacific principles, and indicative of an hostile disposition. It would be a fraudulent neutrality. To this rule, there is no exception, but what arises from the obligation of antecedent treaties, which ought to be religiously observed. If, therefore, the capture of the Magdalena was effected by Ballard alone, it must be pronounced to be illegal, and of course, the decree of restitution is just and proper. This leads us—

II. To consider the capture as having been made by Ballard and Talbot. Talbot commanded the privateer *L'Ami de la Point-a-Pitre.* The question is, as the Magdalena struck to and was made prize of by Ballard, and as Talbot, who knew his situation, aided in his equipment, and acted in confederacy with him, afterwards had a sort of joint possession, whether Talbot can detain her as prize, by virtue of his French commission? To support the validity of Talbot's claim, it is contended, that Ballard had no commission, or an inadequate one, and therefore, his capture was illegal: that it was lawful for Talbot to take possession of the ship so captured, being a Dutch bottom, as the United Netherlands were at open war and enmity with the French republic, and Talbot was a naturalized French citizen, acting under a regular commission from the governor of Guadaloupe. It has been already observed, that Ballard was a citizen of the United States; that the *Ami de la Liberte*, of which he had the command, was fitted out and armed as a vessel of war in the United States; that as such she sailed from the United
*156] States, and cruised against *nations at peace and in amity with the said states. These acts were direct and daring violations of the principles of neutrality, and highly criminal by the law of nations. In effecting this state of things, how far was Talbot instrumental and active? What was his knowledge, his agency, his participation, his conduct in the business? It appears in evidence, that Talbot expected Ballard at Tybee; that he waited for him there several days; that he set sail without him, and in a short time, returned to his former station. This indicates contrivance and a previous communication of designs. At length, Ballard appeared; on his arrival, Talbot put on board the *Ami de la Liberte*, in Savannah river, and confessedly within the jurisdiction of the United States, four cannon, which he had brought for the purpose. Were these guns furnished by order of the French consul? The insinuation is equally unfounded and dishonorable. They also fired a salute, and hailed Sinclair, a citizen of the United States, as an owner: an incident of this kind, at such a moment, has the effect of illumination. Talbot knew Ballard's situation, and in particular, aided in fitting out the *Ami de la Liberte*, by furnishing her with guns. Without this assistance, she would not have been in a state for war.

An essential part of the outfit, therefore, was provided by Talbot. The equipment being thus completed, the two privateers went to sea. When on the ocean, they acted in concert; they cruised together, they fought together, they captured together. Talbot knew that Ballard had no commission; he so states it in his claim: the facts confirm the statement; for, about an hour after Ballard had captured the Magdalena, he came up, and took a joint possession, hoping to cover the capture by his commission, and thus to legalize Ballard's spoliation. How silly and contemptible is cunning—how vile and debasing is fraud! In furnishing Ballard with guns, in aiding him to arm and outfit, in co-operating with him on the high seas, and using him as the instrument and means of capturing vessels, Talbot assumed a new character, and instead of pursuing his commission, acting in opposition to it. If he was a French citizen, duly naturalized, and if, as such, he had a commission, fairly obtained, he was authorized to capture ships belonging to the enemies of the French republic, but not warranted in seducing the citizens of neutral nations from their duty, and assisting them in committing depredations upon friendly powers. His commission did not authorize him to abet the predatory schemes of an illegal cruiser on the high seas; and if he undertook to do so, he unquestionably deviated from the path of duty. Talbot was an original trespasser, for he was concerned in the illegal outfit of the *Ami de la Liberte.* Shall he then reap any benefit from her captures, when brought within *the United States? Besides, it is in evidence, that Ballard took possession first of the Magdalena, and put on board of her a prize-master [*157 and some hands; Talbot, in about an hour after, came up, and also put on board a prize-master, and other men. The possession in the first instance was Ballard's; he was not ousted of it; the prey was not taken from him; indeed, it was never intended to deprive him of it. So far from it, that it was an artifice to cover the booty. Talbot's possession was gained by a fraudulent co-operation with Ballard, a citizen of the United States, and was a mere fetch or contrivance, in order to secure the capture. Ballard still continued in possession. The Magdalena, thus taken and possessed, was carried into Charleston. Can there be a doubt with respect to restoration? Stating the case, answers the question. It has been said, that Ballard had a commission, and acted under it. The point has already been considered, and indeed is not worth debating; the commission, if any, was illegal, and of course, the seizures were so. But then, what effect has this upon Talbot? Does it make his case better or worse? The truth is, that Talbot knew that Ballard had no commission, and he also knew the precise case and situation of the *Ami de la Liberte;* to whom she belonged, where fitted out, and for what purpose. Talbot gave Ballard guns, within the jurisdiction of the United States, and thus aided in making him an illegal cruiser; he consorted and acted with him, and was a participant in the iniquity and fraud. In short, Ballard took the Magdalena, had the possession of her, and kept it; Talbot was in, under Ballard, by connivance and fraud, not with a view to oust him of the prize, but to cover and secure it; not with a view to bring him into judgment as a transgressor against the law of nations, but to intercept the stroke of justice and prevent his being punished. If Talbot procured possession of the Magdalena, through the medium of Ballard, a citizen of the United States, and then brought her within the jurisdiction of the said states, would it not be the duty of the competent authority, to

order her to be restored? The principle deducible from the law of nations is plain—you shall not make use of our neutral arm, to capture vessels of your enemies, but of our friends. If you do, and bring the captured vessels within our jurisdiction, restitution will be awarded. Both the powers, in the present instance, though enemies to each other, are friends of the United States; whose citizens ought to preserve a neutral attitude; and should not assist either party in their hostile operations. But if, as is agreed on all hands, Ballard first took possession of the Magdalena, and if he continued in possession, and brought her within the jurisdiction of the United States, which I take to be the case, then no question can arise with respect to the
*158] legality *of restitution. It is an act of justice, resulting from the law of nations, to restore to the friendly power the possession of his vessel, which a citizen of the United States illegally obtained, and to place Joost Jansen, the master of the Magdalena, in his former state, from whence he had been removed by the improper interference, and hostile demeanor of Ballard. Besides, it is right to conduct all cases of this kind, in such a manner, as that the persons guilty of fraud, should not gain by it. Hence, the efficacy of the legal principle, that no man shall set up his own fraud or iniquity as a ground of action or defence. This maxim applies forcibly to the present case, which, in my apprehension, is a fraud upon the principles of neutrality, a fraud upon the law of nations, and an insult, as well as a fraud, against the United States, and the republic of France.

I am, therefore, of opinion, that the decree of the circuit court ought to be affirmed. Being clear on the preceding points, it supersedes the necessity of deciding upon other great questions in the cause; such as, whether Redick and Talbot were French citizens; whether the bill of sale was colorable and fraudulent; whether Redick, if a French citizen, did not lend his name as a cover; and whether the property did not continue in Sinclair and Wilson, citizens of the United States.

Iredell, Justice.—In delivered my opinion on the great points arising in this case, I shall divide the consideration of it, under the following heads: 1. Whether the district court had jurisdiction *primâ facie* upon the subject-matter of the libel, taking for granted that the allegations in it were true. 2. Admitting that the court had jurisdiction *primâ facie*, whether William Talbot had stated and supported a case sufficient to entitle him to hold the property as prize, exempt from the jurisdiction and control of the district court.

I. The first inquiry is—whether the district court had jurisdiction *primâ facie*, upon the subject-matter of the libel, taking for granted that the allegations in it were true. These allegations in substance are: That the ship was taken on the high seas, by a schooner called *L'Ami de la Liberte*, commanded by Edward Ballard, who had no lawful commission to take her as the property of an enemy of the French republic, under whose authority the capture was alleged to be made. That William Talbot, who came up, after the surrender, and put some men on board, when the prize was in possession of Ballard, had also no lawful commission for the purpose of such a capture, being an American citizen, and his owners American citizens likewise.
*159] *That there was fraud and collusion between Talbot and Ballard, both vessels being, in fact, the property of the same owners, Wilson

and Sinclair, who were American citizens. Such, substantially, are the allegations of the libel, and admitting them to be true, nothing is more clear than that the capture was unlawful.

But it is objected, that this is a question of prize or no prize, and whether the ship was lawfully a prize or not, is for some court of the French republic alone to determine, under whose authority Ballard and Talbot allege they acted; and it is contended, that the capture in question being of a Dutch ship, and not an American, the United States have no right to decide a dispute between the Dutch and the French, in regard to a capture on the high seas, claimed as lawful by one party, and denied to be such by the other, since such an interposition would be equally a violation of the law of nations, and of the 17th article of the treaty with France. To this objection, the following answers appear to me to be satisfactory:

1. That it is true, both by the law of nations, and the treaty with France, if a French privateer brings an enemy's ship into our ports, which she has taken as prize on the high seas, the United States, as a nation, have no right to detain her, or make any inquiry into the circumstances of the capture. But this exemption from inquiry, by our courts of justice, in this respect, only belongs to a French privateer, lawfully commissioned, and therefore, if a vessel claims that exemption, but does not appear to be duly entitled to it, it is the express duty of the court, upon application, to make inquiry, whether she is the vessel she pretends to be, since her title to such exemption depends on that very fact. Otherwise, any vessel whatever, under a color of that kind, might capture, with impunity, and defy all inquiry, if she kept out of a French port, equally in violation of the law of nations, and insulting to the French republic, which, from a regard to its own honor and a principle of justice, would undoubtedly disdain all piratical assistance. She might say, now, I trust, with as much truth as dignity, *non tali auxilio, nec defensoribus istis, tempus eget.*

2. That such an inquiry being thus proper to be made, if upon the inquiry it shall appear, that the vessel pretending to be a lawful privateer, is really not such, but uses a colorable commission, for the purposes of plunder, she is to be considered by the law of nations, so far at least as a transfer of property is concerned, or a title to hold it insisted upon, in the same light as having no commission at all.

3. That *primâ facie* all piracies and trespasses committed *against the general law of nations, are inquirable, and may be proceeded against, in any nation where no special exemption can be maintained, either by the general law of nations, or by some treaty which forbids or restrains it. It is expressly held, in an authority quoted 1 Lex Mercatoria 252, "That if a Spaniard robs a Frenchman on the high seas, their princes being both then in amity with the crown of England, and the ship is brought into a port in England, the Frenchman may proceed *criminaliter* against the Spaniard, to punish him, and *civiliter*, to have restitution of his vessel." The authorities referred to are, Selden, Mare Claus. lib. 1, c. 27; Grotius de Jure Belli ac Pacis, lib. 3, c. 9, § 16, both books of very high authority. [*160

What is called robbery on the land, is piracy, if committed at sea. 3 Inst. 113; 1 Com. Dig. 269. And as every robbery on land includes a trespass, so does every piracy at sea. 1 Com. Dig. 268. Consequently, if there be an unlawful taking, it may be piracy or trespass, according to the circum-

stances of the case, both being equally unlawful, though one a higher species of offence than the other, which cannot alter the intrinsic illegality of the fact common to both, but only occasion a greater or less degree of punishment, proportioned to the nature of the offence. It is, therefore, no answer to say, in bar of restitution, that no piracy has been committed, and therefore, no restitution is to follow, since, if a trespass has been committed, though not a piracy, restitution is equally proper, as if the offence had amounted to piracy itself.

4. That by a due consideration of the law of nations, whatever opinions may have prevailed formerly to the contrary, no hostilities of any kind, except in necessary self-defence, can lawfully be practised by one individual of a nation, against an individual of any other nation at enmity with it, but in virtue of some public authority. War can alone be entered into by national authority; it is instituted for national purposes, and directed to national objects; and each individual on both sides is engaged in it as a member of the society to which he belongs, not from motives of personal malignity and ill-will. He is not to fly like a tiger upon his prey, the moment he sees an individual of his enemy before him. Such savage notions, I believe, obtained formerly. Thank God! more rational ones have succeeded, and a liberal man can frequently see great integrity and honor on both sides, though different and irreconcilable views of national interest or principles may unfortunately engage two nations in hostility. Even in the case of one enemy against another enemy, therefore, there is no color of justification for
*161] any offensive hostile act, unless it be authorized *by some act of the government, giving the public constitutional sanction to it.

5. That, notwithstanding an apparent contrariety of opinions on the subject, it would be easy to show, upon principle, if not by authority, that such hostility, committed without public authority, on the high seas, is not merely an offence against the nation of the individual committing the injury, but also against the law of nations, and of course, cognisable in other countries: but that is not material in the present stage of the inquiry, which affects only the conduct of our own citizens, in our own vessels, attacking and taking, under color of a foreign commission, on the high seas, goods of our friends. This is so palpable a violation of our own law (I mean the common law, of which the law of nations is a part, as it subsisted either before the act of congress on the subject, or since that has provided a particular manner of enforcing it) as well as of the law of nations generally; that I cannot entertain the slightest doubt, but that, upon the case of the libel, *primâ facie*, the district court had jurisdiction.

The next inquiry is—whether William Talbot has stated and supported a case sufficient to entitle him to hold the property as prize, exempt from the jurisdiction of the district court. This claim is grounded as follows: 1. That at the time of his receiving the commission, and at the time of the capture, he was a real French citizen, and his vessel was French property. viz., the property of Samuel Redick, a French citizen at Point-a-Pitre, in Guadaloupe. 2. That he had a lawful commission to cruise from the French republic. 3. That whether Ballard had a lawful commission or not, he himself was lawfully entitled: 1st. To part, if Ballard had a lawful commission, as having been in fight at the time of the capture, and therefore, contributing to intimidate the enemy into a surrender, upon the common

principle: 2d. If Ballard had no lawful commission, and is to be considered as a pirate, his capture did not change the property; of course, it remained Dutch, and he, as captain of a French privateer, had a right to seize and retain it.

The first point to be considered is—whether Talbot, at the time of his receiving the commission, and at the time of the capture, was a French citizen. This involves the great question as to the right of expatriation, upon which so much has been said in this cause. Perhaps, it is not necessary it should be explicitly decided on this occasion; but I shall freely express my sentiments on the subject.

*That a man ought not to be a slave; that he should not be confined against his will to a particular spot, because he happened to [*162 draw his first breath upon it; that he should not be compelled to continue in a society to which he is accidentally attached, when he can better his situation elsewhere, much less when he must starve in one country, and may live comfortably in another; are positions which I hold as strongly as any man, and they are such as most nations in the world appear clearly to recognise.

The only difference of opinion is, as to the proper manner of executing this right. Some hold, that it is a natural, inalienable right in each individual; that it is a right upon which no act of legislation can lawfully be exercised, inasmuch as a legislature might impose dangerous restraints upon it; and of course, it must be left to every man's will and pleasure, to go off, when, and in what manner, he pleases. This opinion is deserving of more deference, because it appears to have the sanction of the constitution of this state, if not of some other states in the Union. I must, however, presume to differ from it, for the following reasons:

1. It is not the exercise of a natural right, in which the individual is to be considered as alone concerned. As every man is entitled to claim rights in society, which it is the duty of the society to protect; he, in his turn, is under a solemn obligation to discharge all those duties faithfully, which he owes, as a citizen, to the society of which he is a member, and as a man, to the several members of the society, individually, with whom he is associated. Therefore, if he has been in the exercise of any public trust, for which he has not fully accounted, he ought not to leave the society, until he has accounted for it. If he owes money, he ought not to quit the country, and carry all his property with him, without leave of his creditors. Many other cases might be put, showing the importance of the public having some hold of him, until he has fairly performed all those duties which remain unperformed, before he can honestly abandon the society for ever. But it is said, his ceasing to be a citizen, does not deprive the public, or any individual of it, of remedies in these respects: yet the right of emigration is said to carry with it the right of removing his family and effects. What hold have they of him afterwards?

2. Some writers on the subject of expatriation say, a man shall not expatriate in a time of war, so as to do a prejudice to his country. But if it be a natural, inalienable right, upon the footing of mere private will, who can say, this shall not be exercised in time of war, as well as in time of peace, since the *individual, upon that principle, is to think of himself only? [*163 I, therefore, think, with one of the gentlemen for the defendant, that

the principle goes to a state of war, as well as peace, and it must involve a time of the greatest public calamity, as well as the profoundest tranquillity.

3. The very statement of an exception in time of war, shows that the writers on the law of nations, upon the subject, in general, plainly mean, not that it is a right to be always exercised, without the least restraint of his own will and pleasure, but that it is a reasonable and moral right, which every man ought to be allowed to exercise, with no other limitation than such as the public safety or interest requires, to which all private rights ought and must for ever give way. And if, in any government, principles of patriotism and public good ought to predominate over mere private inclination, surely, they ought to do so, in a republic founded on the very basis of equal rights, to be perfectly enjoyed, in every instance, where the public good does not require a restraint.

4. In some instances, even in time of war, expatriation may fairly be permitted. It ought not then to be restrained. But who is to permit it? The legislature, surely; the constant guardian of the public interest, where a new law is to be made, or an old one dispensed with. If they may take cognisance in one instance (as for example, in time of war), because the public safety may require it, why not in any other instance, where the public safety, for some unknown cause, may equally require it? Upon the eve of a war, it may be still more important to exercise it, as we often see in case of embargoes.

5. The supposition, that the power may be abused, is of no importance, if the public good requires its exercise. This feverish jealousy is a passion that can never be satisfied. No man denies the propriety of the legislature having a taxative power. Suppose, it should be seriously objected to, because the legislature might tax to the amount of 19*s.* in the pound? They have the power, but does any man fear the exercise of it? A legislature must possess every power necessary to the making of laws. When constructed as ours is, there is no danger of any material abuse. But a legislature must be weak to the extremest verge of folly, to wish to retain any man as a citizen, whose heart and affections are fixed on a foreign country, in preference to his own. They would naturally wish to get rid of him as soon as they could, and therefore, perhaps, the proper precaution would be, to restrain acts of banishment (if such could be at all permitted), rather than to limit the legislative control over expatriation. But is there no danger of abuse on the other side? Have not all the contentions about expatriation in the courts, arisen from a want of the exercise *of this very authority? *164] For, if the legislature had prescribed a mode, every one would know, whether it had or had not been pursued, and all rights, private as well as public, would be equally guarded; but upon the present doctrine, no rights are secured, but those of the expatriator himself. I, therefore, have no doubt, that when the question is in regard to a citizen of any country, whose constitution has not prohibited the exercise of the legislative power in this instance, it not only is a proper instance in which it may be exercised, but it is the duty of the legislature to make such provision, and for my part, I have always thought the Virginia assembly showed a very judicious foresight in this particular.

Whether the Virginia act of expatriation be now in force, is a question so important, that I would not wish unnecessarily to decide it. If it be, I have no doubt, that a citizen of that state cannot expatriate himself in any

other manner. It seems most probable (but I think not certain), from this record, that Talbot was a citizen of Virginia. We are, however, undoubtedly, to consider him as a citizen of the United States. Admitting, he had a right to expatriate himself, without any law prescribing the method of his doing so, we surely must have some evidence that he had done it. There is none, but that he went to the West Indies, and took an oath to the French republic, and became a citizen there. I do not think that merely taking such an oath, and being admitted a citizen there, in itself, is evidence of a *bonâ fide* expatriation, or completely discharges the obligations he owes to his own country. Had there been any restrictions, by our own law, on his quitting this country, could any act of a foreign country, operate as a repeal of these? Certainly not. When he goes there, they know nothing of him, perhaps, but from his own representation. He becomes a citizen of the new country, at his peril. The act is complete, if he has legally quitted his own: if not, it is subordinate to the allegiance he originally owed. By allegiance, I mean, that tie by which a citizen of the United States is bound as a member of the society. Did any man suppose, when the rights of citizenship were so freely and honorably bestowed on the unfortunate Marquis de la Fayette, that that absolved him, as a subject or citizen of his own country? It had only this effect, that whenever he came into this country, and chose to reside here, he was *ipso facto* to be deemed a citizen, without anything further. The same consequence, I think, would follow in respect to rights of citizenship, conferred by the French republic, upon some illustrious characters, in our own, and other countries. If merely intended, as ingeniously suggested at the bar, that upon going to France, and performing the usual requisites, they should be then French citizens, where is the *honor of it? Since [*165
any man may avail himself of an indiscriminate indulgence granted by law. Some disagreeable dilemmas may be occasioned by this double citizenship, but the principles, as I have stated them, appear to me to be warranted by law and reason, and if any difficulties arise, they show more strongly the importance of a law regulating the exercise of the right in question.

His going to the West Indies, and taking an oath of allegiance there, considering it in itself, is an equivocal act. It might be done, with a view to relinquish his own country for ever. It might be done, with a view to relinquish it for a time, in order to gain some temporary benefit by it. If the former, and this was clearly proved, it possibly might have the effect contended for. If the latter, it would show, that he voluntarily submitted to the embarrassments of two distinct allegiances: he must make them as consistent as he can. By our treaty with Holland, an American citizen, cruising upon Dutch subjects, as commander of a privateer, under a foreign commission, is to be deemed a pirate. If he left America, for the very purpose of doing this, and became a French citizen, that he might have a color for doing so, then his taking a French commission could not absolve him from a crime which he was committing in the very act of taking it, and of which the French government might not be aware, as they are not bound to take notice of any other treaties but their own. If he went, intending to reside there for a time, and to act under a commission, which he believed would, for the present, justify him, though this might excuse him from the guilt of piracy, it would not make such a contract lawful, because, in this case, even his intention was not to expatriate himself for ever; and consequently, he

still remained an American citizen, and had no authority to take a commission at all. It, surely, is impossible for us to say, he meant a real expatriation, when his conduct, *primâ facie*, as much indicates a crime, as anything else. If he had such an intention, before he left this country, why not mention it? If a citizen of Virginia, and their act of expatriation was not in force, yet surely, it prescribed as good a method of effecting it as any other, and his not pursuing this method (if he really meant an expatriation), can be accounted for in no other manner, but that he was conscious, the vessel he was fitting out was for the purpose of cruising, and would have been stopped by the government, had his design of expatriation so plainly evinced it. I, therefore, must say, there is no evidence to satisfy me, that he ceased to be an American citizen, so as to be absolved from the duties he owed to his own country; and among others, that duty of not cruising against the Dutch, in violation of the law of nations, generally, and of the treaty with Holland, in particular.

*166] * My observations, as to Talbot, will, in a great measure, apply to Redick, who appears to have been a citizen of Virginia. There is no evidence to satisfy me, that he ceased to be an American citizen, and became a French citizen, absolved from the duty he owed, as a citizen, to his own country. There is nothing to show this, but a residence, of no long duration, in a French island, his taking an oath to the French republic, and being admitted a French citizen, which, for the reasons I have given, I do not think sufficient.

In addition to my other observations, I may add, how is it possible, upon this principle, for the public to know in what situation they stand, as to any one of these persons? It is not impossible (I believe instances, indeed, have already happened of it), that an American citizen may go to some of the dominions of the French, become a French citizen for a time, enjoy all the benefits of such, and afterwards return to his own country, and claim and enjoy all the privileges of a citizen there, without the least possibility of the public knowing, otherwise than from accident, whether he has become a citizen of another government or not. Suppose, one of them was to insist on holding an estate in land, devised to him after his new citizenship, how could it be proved, he was an alien?

Whether, therefore, the property of the privateer was in Redick, or in Wilson and Sinclair, I think it was equally American property, though I confess, the weight of the evidence, impresses me strongly with the belief, that the property was Wilson and Sinclair's. And in regard to the objection, that nothing they could say or do, or Talbot either, could affect Redick, I think, as Talbot appears as the agent of Redick, of whom we know nothing but through him, his declarations are to be regarded as Redick's own, and any declarations of Wilson or Sinclair, in his presence, and any of the conduct of either of them, sanctioned by him, must have the same effect, as if the declarations had been made in the presence of Redick, and such conduct sanctioned by himself.

I consider the proof of the commission sufficient, but deny its operation, as I consider the vessel to have been an American vessel, owned by an American or Americans, and with an American captain on board.

I now proceed to inquire into the consequences of Ballard's capture, and

Talbot's co-operation with him, though, perhaps, upon my principles, it is not absolutely necessary.

1. Ballard's capture, I think, is clearly unsupportable. Admitting him to have been expatriated (which, if the Virginia law was in force, I think he was), he did not become a French citizen at all. Only one of the crew was a Frenchman. I think, all the rest were proved to be Americans or English. She *was fitted out in the United States; the commission, if good at all, was of a temporary and secret nature, and seems to have been [*167 confined to a special purpose, to be executed within the United States. She certainly had no authority to cruise, that being specified in every commission of that nature. Whoever were her owners, she does not appear to have been French property; on the contrary, there is the highest possibility, that Talbot's and Ballard's vessels had the same owners. So conscious was he of the illegality of his conduct, that he even preferred no claim for the captured property.

2. Talbot (considering himself as master of a lawful privateer) claims upon two grounds: 1. Upon supposition of Ballard's being a lawful commission, he claims, as being in sight at the time of the capture: to this it is sufficient to say, that it was not a lawful commission. 2. If Ballard had no lawful commission, he claims upon his independent right, alleging, that if Ballard had no lawful commission, the property was not changed to Ballard, and therefore, he had a right to take.

This claim (if Talbot's was a lawful privateer) would undoubtedly be good, if he was not a confederate with Ballard. But it is clear that he was, that he cruised before and after, in company with him, that he put guns on board of his vessel; and there is the strongest reason to believe, that they both belonged to the same owners. It is true, if Talbot had come up, ignorant of Ballard's authority, and inadvertently put men on board the prize, in conjunction with Ballard, supposing he had a lawful commission, when in reality he had not, it might with some reason be contended, that Talbot should hold the prize. But wilful ignorance is never excusable; when there is time to inquire, inquiry ought to be made. There is not, however, the least reason for supposing any ignorance in the case. He abetted Ballard's authority, such as it was; he acted in support of it, not in opposition to it. It does not appear, that he ever questioned it, until after his arrival in Charleston. It was, therefore, a mere after-thought. A man having a commission, is authorized, but not compelled, to exercise it; his will must concur to make a capture under it. It does not appear, that he relied, at sea, upon his own force, but upon Ballard's; at least, in this instance, upon his own and Ballard's in conjunction. A man having a lawful commission, is authorized to cruise himself, and to cruise in company with others, having lawful authority. It does not authorize him to associate with pirates, or any unlawful depredators, on the high seas. If he does so, he departs from his commission, assumes a new character which that does not authorize, and risks all the consequences of it. It is impossible, that Ballard can be guilty of *a crime, and Talbot, who associated with him in the wilful commission of it, can be wholly innocent of it. A man can be guilty of no [*168 crime, in obeying a lawful commission. He, therefore, in this instance, if guilty of a crime, must be considered altogether detached from a rightful authority, which he abandoned, in search of the profit of an illegal adven-

ture. If, at sea, he acted in support of Ballard's claim, how can he claim now, on the principle of that being unsupportable? At sea, was the place for him to make his option: he has no right, after the prize is brought into port, to say—"I made a bad option there: I supported Ballard's claim, whereas, I ought to have opposed it, and stood upon my own. I will now take this Dutch ship as a prize, by my own authority." For such, in effect, I take to be the substance of any claim, suggested after his arrival in port.

I, therefore, think, upon this ground, even admitting that Talbot's was a rightful privateer, his claim is unsupportable.

Wilson, Justice.—As I decided this cause in the circuit court, it gives me pleasure to be relieved from the necessity of giving any opinion on the appeal, by the unanimity of sentiment that prevails among the judges.

Cushing, Justice.—The facts in this case, so far as they appear to me to be essential for forming an opinion, may be reduced to a very narrow compass. Ballard, the commander of a vessel, which was illegally fitted out in the United States, cruises in company with Talbot, who alleges that he is a French citizen, and produces a French commission. Ballard captures the Magdalena, a Dutch prize; then Talbot joins him; and both, having put prize-masters on board, bring the prize into the harbor of Charleston. The questions arising on this statement are, simply, whether the capture, under such circumstances, is a violation of our treaty with Holland? And whether it is such a case of prize, as the courts of the United States can take cognisance of, consistently with the treaty between America and France? Now, the whole transaction at Guadaloupe, as well as here, presents itself to my mind as fraudulent and collusive. But even supposing that Talbot was, *bonâ fide*, a French citizen, the other circumstances of the case are sufficient to render the capture void. It was, in truth, a capture by Ballard, who had no authority, or color of authority, for his conduct. He was an American citizen; he had never left the United States; his vessel was owned by American citizens; and the commission, which he held by assignment, was granted by a French admiral, within the United States, to another person, for a particular purpose, but not for the purpose of capture. Then, shall not the property, which he has thus taken from a nation at peace with the
*169] United States, and *brought within our jurisdiction, be restored to its owners? Every principle of justice, law and policy unite in decreeing the affirmative; and there is no positive compact with any power to prevent it.

On the important right of expatriation, I do not think it necessary to give an opinion; but the doctrine mentioned by Heineccius, seems to furnish a reasonable and satisfactory rule. The act of expatriation should be *bonâ fide*, and manifested, at least, by the emigrant's actual removal, with his family and effects, into another country. This, however, forms no part of the ground on which I think the decree of the circuit court ought to be affirmed.

Rutledge, Chief Justice.—The merits of the cause are so obvious, that I do not conceive there is much difficulty in pronouncing a fair and prompt decision, for affirming the decree of the circuit court.

The doctrine of expatriation is certainly of great magnitude; but it is

not necessary to give an opinion upon it, in the present cause, there being no proof, that Captain Talbot's admission as a citizen of the French republic, was with a view to relinquish his native country; and a man may, at the same time, enjoy the rights of citizenship under two governments.

It appears, upon the whole, that Ballard's vessel was illegally fitted out in the United States; and the weight of evidence satisfies my mind, that Talbot's vessel, which was originally American property, continued so, at the time of the capture, notwithstanding all the fraudulent attempts to give it a different complexion. The capture, therefore, was a violation of the law of nations, and of the treaty with Holland. The court has a clear jurisdiction of the cause, upon the express authority of *Pelaches's Case*, 4 Inst. And every motive of good faith and justice must induce us to concur with the circuit court, in awarding restitution.

The decree of the circuit court affirmed.

The counsel for the *appellees*, then moved the court to assess additional damages, which was opposed by *Dallas*, for the appellant; and after argument, the following order was made:

By the Court.—Ordered, that the decree of the circuit court of South Carolina district, pronounced on the 5th day of November, in the year of our Lord, one thousand seven hundred and ninety-four, affirming the decree of the district court of the same district, pronounced on the sixth day of August, in the year of our Lord, one thousand seven hundred and ninety-four, be in all its parts established and affirmed. And it is further considered, ordered, adjudged and decreed, that the said William Talbot, the plaintiff in error, do pay to the said Joost *Jansen, the defendant in error, in addition to the sum of $1755.53, for demurrage [*170 and interest, and $82 for costs, in the decree of the said circuit court mentioned, demurrage for the detention and delay of the said brigantine Vrouw Christina Magdalena, at the rate of $9.33, lawful money of the United States, *per diem*, to be accounted from the fifth day of November last past, till the sixth day of June last, the day of the actual sale of the said brigantine, under the interlocutory order of this court, of the third day of March last past, to wit, for two hundred and thirteen days, a sum of $1987.29; and also interest at the rate of seven *per centum per annum*, for two hundred and ninety days, on the sum of $51,845, being the amount of the sales of the cargo of the said brigantine heretofore sold, by order and permission of the said district court, and making a sum of $2883.42; and also a like sum of seven *per centum per annum* on the amount of sales of the said brigantine Vrouw Christina Magdalena, under the order of this court, that is to say, interest for seventy-seven days, on the sum of $1820, from the said sixth day of June last, making the sum of $26.87, the whole of which interest to be accounted to this day, and making together the sum of $2910.29, lawful money of the United States; and which said interest and demurrage, make together the sum of $4897.58, in addition to and exclusive of the demurrage, interest and costs adjudged in the said circuit court of the United States, for South Carolina district; also $91.93, for his costs and charges: and that the said Joost Jansen have execution of this judgment and decree, by special mandate to the said circuit court, and process agreeable to the act of the congress of the United States, in that case made and provided.