After the most attentive consideration of the acts of congress, and the arguments of counsel, the court is of opinion, that the duties on refined sugars remaining in the building on the 1st of July 1802, had not then accrued, and were not then outstanding. The judgment of the circuit court, which was in favor of the plaintiff below, must, therefore, be reversed, and judgment rendered for the plaintiff in error.

The Charming Betsy.

Alexander Murray, Esq., *v.* The Schooner Charming Betsy.

Marine trespass.—Probable cause.—Damages.—Expatriation.—Armed vessel.

An American vessel, sold in a Danish island, to a person who was born in the United States, but who had *bonâ fide* become a burgher of that island, and sailing from thence to a French island, in June 1800, with a new cargo purchased by her new owner, and under the Danish flag, was not liable to seizure, under the non-intercourse law of 27th of February 1800.[1]

If there was no reasonable ground of suspicion that she was a vessel trading contrary to that law, the commander of a United States ship of war, who seizes and sends her in, is liable for damages.[2]

The report of assessors appointed by the court of admiralty to assess the damages, ought to state the principles on which it is founded, and not a gross sum, without explanation.

An American citizen, residing in a foreign country, may acquire the commercial privileges attached to his domicil; and by making himself the subject of a foreign power, he places himself out of the protection of the United States, while within the territory of the sovereign to whom he has sworn allegiance.

Quære? Whether a citizen of the United States can divest himself absolutely of that character otherwise than in such manner as may be prescribed by law?

Whether, by becoming the subject of a foreign power, he is freed from punishment for a crime against the United States?

What degree of arming constitutes an armed vessel?

The facts of this case are thus stated by the District Judge in his decree.[3]

"The libel in this cause, is founded on the act entitled "an act further to suspend the commercial intercourse between the United States and France, and the dependencies thereof" (27th February 1800, 2 U. S. Stat. 7); and states that the schooner (The Charming Betsy) sailed from Baltimore, after the passing of that act, owned, hired or employed by persons resident within the United States, or by citizens thereof, resident elsewhere, bound to Guadaloupe, and was taken on the high seas, on the 1st of June 1800, by the libellant, then commander of the public armed ship the Constellation, in pursuance of instructions given to the libellant, by the President of the United States, there being reason to suspect her to be engaged in a traffic or commerce contrary to the said act, &c. The claim and answer, replication and rejoinder, are referred to for a further statement of the proceed-
*65] ings *in this case, on all which I ground my decree. On a careful attention to the exhibits and testimony in this cause, and after hear-

---

[1] And see Sands *v.* Knox, 3 Cr. 499.

[2] Maley *v.* Shattuck, 3 Cr. 458; s. c. 1 W. C. C. 245. And see The Eleanor, 2 Wheat. 345.

[3] In the district court of Pennsylvania, Peters, J.

ing of counsel, I am of opinion, that the following facts are either acknowledged in the proceedings, or satisfactorily proved.

"That on or about the 10th of April 1800, the schooner, now called the Charming Betsy, but then called the Jane, sailed from Baltimore, in the district of Maryland, an American bottom, duly registered according to law, belonging to citizens of, and resident in, the United States, and regularly documented with American papers; that she was laden with a cargo belonging to citizens of the United States; that her destination was first to St. Bartholomew, where the master had orders to effect a sale of both vessel and cargo; but if a sale of the schooner could not be effected at St. Bartholomew, which was to be considered the 'primary object' of the voyage, the master was to proceed to St. Thomas, with the vessel and such part of the flour as should be unsold, where he was to accomplish the sale. That although a sale of the cargo, consisting chiefly of flour, was effected at St. Bartholomew, yet the vessel could not there be advantageously disposed of, and the master proceeded, according to his instructions, to St. Thomas, where a *bonâ fide* sale was accomplished, by Captain James Phillips, on behalf of the American owners, for a valuable consideration, to a certain Jared Shattuck, a resident merchant in the island of St. Thomas.

"That although it is granted that Jared Shattuck was born in Connecticut, before the American revolution, yet he had removed, long before any differences with France, in his early youth, to the island of St. Thomas, where he served his apprenticeship, intermarried, opened a house of trade, owned sundry vessels, and, as it is said, lands; which none but Danish subjects were competent to hold and possess. About the year 1796, he became a Danish burgher, invested with the privileges of a Danish subject, and owing allegiance to his Danish majesty. The evidence on *this head is sufficient to satisfy me of these facts; though some of them might [*66 be more fully proved. It does not appear, that Jared Shattuck ever returned to the United States to resume citizenship, but constantly resided, and had his domicil, both before and at the time of the purchase of the schooner Jane, at St. Thomas. That although the schooner was armed and furnished with ammunition, on her sailing from Baltimore, and the cannon, arms and stores were sold to Jared Shattuck, by a contract separate from that of the vessel, she was chiefly dismantled of these articles at St. Thomas, a small part of the ammunition, and a trifling part of the small arms excepted. That the name of the said schooner was at St. Thomas changed to that of the Charming Betsy, and she was documented with Danish papers, as the property of Jared Shattuck. That so being the *bonâ fide* property of Jared Shattuck, she took in a cargo belonging to him, and no other, as appears by the papers found on board, and delivered to this court.

"That she sailed, with the said cargo, from St. Thomas, on or about the 25th day of June 1800, commanded by a certain Thomas Wright, a Danish burgher, and navigated according to the laws of Denmark, for aught that appears to the contrary, bound to the island of Guadaloupe.

"That on or about the first of July last, 1800, she was captured, on her passage to Guadaloupe, by a French privateer, and a prize-master and seven or eight hands put on board; the Danish crew (except Captain Wright, an old man and two boys) being taken off by the French privateer. That on the 3d of the same July, she was boarded and taken possession of by some

of the officers and crew of the Constellation, under the orders of Captain Murray, and sent into the port of St. Pierre, in Martinique, where she arrived on the 5th of the same month of July. I do not state the contents of a paper called a *procês verbal*, which, however, will appear among the exhibits, because, in my opinion, it contains statements, either contrary to the real facts, or illusory, and calculated to serve the purposes of the French
*67] *captors. Nor do I detail the number of cutlasses, a musket and a small quantity of ammunition, found on board, when the schooner was boarded by Captain Murray's orders. The Danish papers were on board, and, except the *procês verbal*, formed by the French captors, no other ship's papers. The instructions of Captain Murray from the President of the United States comprehend the case of a vessel found in the possession of French captors, but then it should seem, that it must be a vessel belonging to citizens of the United States. It does not appear, that Captain Murray had any knowledge of Jared Shattuck being a native of Connecticut, or of any of the United States, until he was informed by Captain Wright, at Martinque.

"It is unnecessary to go into any disquisition about the instructions to the commanders of public armed ships, whether they were directory to Captain Murray in the case in question; and if so, whether they were, or not, strictly conformable to law, does not finally justify an act which, on investigation, turns out to be illegal, either as it respects the municipal laws of our country or the laws of nations. Captain Murray's respectable character, both as an officer and a citizen, forbids any idea of his intention to do a wanton act of violence towards either a citizen of the United States, or a subject of another nation. He, no doubt, thought it his duty to send the vessel in question to the United States for adjudication. He had also reasons prevailing with him, to sell Jared Shattuck's cargo in Martinique. His sending the schooner to Martinique was evidently proper, and serviceable to the owner, as she had not a sufficient number of the crew on board to navigate her. But the further proceeding turns out, in my opinion, wrong. Whatever probable cause might appear to Captain Murray to justify his conduct, or excite suspicion at the time, he ran the risk of, and is amenable for, consequences.

"On a full consideration of the facts and circumstances of this case, I am of opinion, that the schooner Jane, being the same in the libel mentioned,
*68] did *not sail from the United States with an intent to violate the act, for a breach whereof the libel is filed. That she did not belong, when she sailed from St. Thomas, for Guadaloupe, to a citizen of the United States, but to a Danish subject. Jared Shattuck either never was a citizen of the United States, under our present national arrangement, or, if he should at any time have been so considered, he had lawfully expatriated himself, and became a subject of a friendly nation. No fraudulent intent appears in his case, either of eluding the laws of the United States, in carrying on a covered trade, by such expatriation, or that he became a Danish burgher for any purposes which are considered as exceptions to the general rule which seems established on the subject of the right of expatriation. That, being a Danish burgher and subject, he had a lawful right to trade to the island of Guadaloupe, any law of the United States notwithstanding, in a vessel *bonâ fide* purchased, either from citizens of the United States, or any other vessel

documented and adopted by the Danish laws. I do not rely more than it deserves, on the circumstance of Jared Shattuck's burghership, of which the best evidence, to wit, the brief, or an authenticated copy, has not been produced. I know well, that this brief alone, unaccompanied by the strong ingredients in his case, might be fallacious. I take the whole combination to satisfy me of his being *bonâ fide* a Danish adopted subject; and altogether it amounts, in my mind, to proof of expatriation.

"The master (Wright) produces his Danish burgher's brief. He is a native of Scotland. But even the British case of *Pollard* v. *Bell*, 8 T. R. 435, to which I have been referred, shows that, with all the inflexibility evidenced in the British code, on the point of expatriation, a vessel was held to be Danish property, if documented according to the Danish laws, though the master, who had obtained a Danish burgher's brief, was a Scotchman. It shows, too, that, in the opinion of the British judges (who agree, on this point, with the general current of opinions of civilians and writers on general law), the municipal laws or ordinances of a country do not control the laws of nations. The British courts have gone great lengths to modify their ancient *feudal law of allegiance, so as to moderate its rigor, and adapt [*69
it to the state of the modern world, which has become most generally commercial. They hold it to be clearly settled, that although a natural-born subject cannot throw off his allegiance to the king, but is always amenable for criminal acts against it, yet for commercial purposes he may acquire the rights of a citizen of another country. Com. Rep. 677, 689. I cite British authorities, because they have been peculiarly tenacious on this subject. Naturalization in this country may sometimes be a mere cover; so may, and, no doubt, frequently are, burghers' briefs. But the case of Shattuck is accompanied with so many corroborating circumstances, added to his brief, as to render it, if not incontrovertibly certain, at least, an unfortunate case on which to rest a dispute as to the general subject of expatriation. I am not disposed to treat lightly the attachment a citizen of the United States ought to bear to his country. There are circumstances in which a citizen ought not to expatriate himself. He never should be considered as having changed his allegiance, if mere temporary objects, fraudulent designs, or incomplete change of domicil, appear in proof. If there are any such in Shattuck's case, they do not appear, and therefore, I must take it for granted that they do not exist. That, therefore, the ultimate destruction of his voyage, and sale of his cargo, are illegal.

"The vessel must be restored, and the amount of sales of the cargo paid to the claimant, or his lawful agent, together with costs, and such damages as shall be assessed by the clerk of this court, who is hereby directed to inquire into and report the amount thereof. And for this purpose, the clerk is directed to associate with himself two intelligent merchants of this district, and duly inquire what damage Jared Shattuck, the owner of the schooner Charming Betsy and her cargo, hath sustained, by reason of the premises. Should it be the opinion of the clerk, and the assessors associated with him, that the officers and crew of the Constellation benefited the owner of the Charming Betsy, by the rescue from the French captors, they *should [*70
allow in the adjustment, reasonable compensation for this service.

(Signed) RICHARD PETERS.

28th April 1801."

On the 15th of May following, upon the report of the clerk and assessors, a final decree was entered for $20,594.16 damages, with costs. From this decree, the libellant appealed to the circuit court, who adjudged, "that the decree of the district court be affirmed, so far as it directs restitution of the vessel, and payment to the claimant of the net proceeds of the sale of the cargo in Martinique, deducting the costs and charges there, according to the account exhibited by Captain Murray's agent, being one of the exhibits in this cause: and that the said decree be reversed for the residue, each party to pay his own costs, and one moiety of the custody and wharfage bills for keeping the vessel until restitution to the claimant." From this decree, both parties appealed to the supreme court.

The cause was argued, at last term, by *Martin*, *Key* and *Mason*, for the claimant. No counsel was present for the libellant.

For the *claimant* it was contended, that the sale of the schooner to Shattuck was *bonâ fide*, and that he was a Danish subject. That although she was in possession of French mariners, she was not an armed French vessel, within the acts of congress, which authorized the capture of such vessels. That neutrals are not bound to take notice of hostilities between two nations, unless war has been declared: that the right of search and seizure is incident only to a state of war. That neutrals are not bound to take notice of our municipal regulations: that the non-intercourse act was simply a municipal regulation, binding only upon our own citizens, and had nothing
*71] to do with *the law of nations; it could give no right to search a neutral. That in all cases where a seizure is made under a municipal law, probable cause is no justification, unless it is made so by the municipal law under which the seizure is made.

As to the position that the sale was *bonâ fide*, the counsel for the claimant relied on the evidence, which came up with the transcript of the record, which was very strong and satisfactory. Upon the question whether Shattuck was a Danish subject, or a citizen of the United States, it was said, that although he was born in Connecticut, yet there was no evidence that he had ever resided in the United States, since their separation from Great Britain. But it appears by the testimony, that he resided in St. Thomas, during his minority, and served his apprenticeship there. That he had married into a family in that island; had resided there ever since the year 1789; had complied with the laws which enabled him to become a burgher, and had carried on business as such, and had for some years, been the owner of vessels and lands. Even if, by birth, he had been a citizen of the United States, he had a right to expatriate himself. He had, at least, the whole time of his minority in which to make his election of what country he would become a citizen. Every citizen of the United States has a right to expatriate himself and become a citizen of any other country which he may prefer, if it be done with a *bonâ fide* and honest intention, at a proper time, and in a public manner. While we are inviting all the people of the earth to become citizens of the United States, it surely does not become us to hold a contrary doctrine, and deny a similar choice to our own citizens. Circumstances may, indeed, show the intention to be fraudulent and collusive, and merely for the purpose of illicit trade, &c. But such circumstances do not appear in the present case. Shattuck was fairly and *bonâ fide* domiciliated at St. Thomas

before our disputes arose with France. The act of congress, "further to suspend," &c., cannot, therefore, be considered as operating upon such a per-person. The first act to suspend the intercourse was passed on the 13th of June 1798 (1 U. S. Stat. 565), and expired with the end of the next session of congress. The next act, "further to suspend," &c., was passed on the 9th of February 1799 (Ibid. 613), and expired on the 3d of March 1800. [*72 The act upon which the present libel is founded, and which has the same title with the last, was passed on the 27th of February 1800 (2 Ibid. 7). All the acts are confined in their operations to persons resident within the United States, or under their protection.

She was not such an armed French vessel as comes within the description of those acts of congress, which authorized the hostilities with France. She had only one musket, twelve ounces of powder, and twelve ounces of lead. The only evidence of other arms arises from the deposition of one McFarlan. But he did not go on board of her, until some days after the capture, and his deposition is inadmissible testimony, because he was entitled to a share of the prize-money, if the vessel should be condemned; and although a release from him to Captain Murray appears among the papers, yet that release was not made, until after the deposition was taken; and the fact is expressly contradicted by other testimony. The mere possession, by nine Frenchmen, did not constitute her an armed vessel. She was unable to annoy the commerce of the United States, which was the reason of the adjudication of this court, n the case of *The Amelia*. (See *Talbot* v. *Seeman*, 1 Cr. 1). The *procès verbal* is no evidence of any fact but its own existence. If she had arms, they ought to have been brought in, as the only competent evidence of that fact. No arms are libelled, and none appear, by the account of sales, to have been sold in Martinique.

It being then, a neutral unarmed vessel, Captain Murray had no right to seize and send her in. A right to search a neutral arises only from a state of public known war, and not from a municipal regulation. In time of peace, the flag is to be respected. Until war is declared, neutrals are not bound to take notice of it.

The decrees of both the courts below have decided, that the vessel was not liable to capture. The only question is, whether the claimant is entitled to damages? Captain Murray has libelled her upon the non-intercourse act, He does not state that he seized her, because she was a French armed vessel. although he *states her to be armed, at the time of capture. It has also been decided by both the courts, that she is Danish property. If [*73 an American vessel had been illegally captured by Captain Murray, he would have been liable for damages; *à fortiori* in the case of a foreign vessel where, from motives of public policy, our conduct ought not only to be just but liberal.

In cases of personal arrest, if no crime has in fact been committed, probable cause is not a justification, unless it be made so by municipal law. As in the case of hue and cry, he who raises it is liable, if it be false. If the sheriff has a writ against A., and B. is shown to him as the person, and he arrests B. instead of A., he is liable to an action of trespass at the suit of B. *Wale* v. *Hill*, 1 Bulst. 149. So, if he replevies wrong goods, or takes the goods of one, upon a *fi. fa.* against another. In these cases, it is no justification to the officer, that he was informed, or believed, he was right. He must

in all cases, seize at his peril. So it is with all other officers, such as those of the revenue, &c., probable cause is not sufficient to justify, unless the law makes it a justification. If the information is at common law, for the thing seized, and the seizure is found to have been illegally made, the injured party must bring his action of trespass; but by the course of the admiralty, the captor, being in court, is liable to a decree against him for damages. *The Fabius*, 2 Rob. 202. The case of *Wale* v. *Hill*, in 1 Bulst. 149, shows that where a crime has not been committed, there, probable cause can be no justification. But where a crime has been committed, the party arresting cannot justify by the suspicion of others; it must be upon his own suspicion.

In the case of *Papillon* v. *Buckner*, Hardr. 478, although the goods seized had been condemned by the commissioners of excise, yet it was not held to be a good justification. In *Purviance* v. *Angus*, 1 Dall. 182, it was held, that an error in judgment would not excuse an illegal capture; and in
*74] *Leglise* v. *Champante*, *2 Str. 820, it is adjudged, that probable cause of seizure will not justify the officer.(*a*)

In 3 Anstr. 896, is a case of seizure of hides, where no provision was made in the law that probable cause should be a justification. This case cites *Pickering* v. *Truste*, 7 T. R. 53. For what reason do the revenue laws provide that probable cause shall be a justification, if it would be so, without such a provision? In these cases, the injury by improper seizures can be but small compared with those which might arise under the non-intercourse law. Great Britain has never made probable cause an excuse for seizing a neutral vessel for violating her municipal laws. A neutral vessel is only liable to your municipal regulations, while in your territorial jurisdiction; but as soon as she gets to sea, you have lost your remedy: you cannot seize her on the high seas. Even in Great Britain, if a vessel gets out of the jurisdiction of one court of admiralty, she cannot be seized in another. It is admitted, that a law may be passed, authorizing such a seizure, but then it becomes a question between the two nations. If the present circumstances are sufficient to raise a probable cause for the seizure, and if such probable cause is a justification, it will destroy the trade of the Danish islands. The inhabitants speak our language, they buy our ships, &c. It will be highly injurious to the interests of the United States; and this court will consider what cause of complaint it would furnish to the Danish nation. If a private armed vessel had made this seizure, the captain and owners would have been clearly liable on their bond, which the law obliges them to give. The object of this act of congress was

---

(*a*) The Chief Justice observed, that this case was overruled, two years afterwards, in a case cited in a note to Gwillim's edition of Bac. Abr.[1] The case cited in the note, is from 12 Vin. 173, tit. Evidence, P, b. 6, in which it is said "that Lord Ch. Baron Bury, in *Montague and Page* v. *Price*, held, that where an officer had made a seizure, and there was an information upon it, &c., which went in favor of the party, who afterwards brings trespass, the showing these proceedings was sufficient to excuse the officer; it was competent to make out a probable cause for his doing the act. Mich., 6 Geo. I."

[1] The case of Leglise *v.* Champante was in 2 Geo. II. That cited in the note to Bac. Abr., referred to by the chief justice, was in 6 Geo. I. The mistake arises from the note in Gwillim's edition not mentioning the date of the case cited from Viner.

more to prevent our vessels falling into the hands of the French than to make it a war measure, by starving the French islands.

*Even if a Danish vessel should carry American papers and American colors, it would be no justification. In a state of peace, we [*75 have no right to say they shall not use them, if they please. In time of war, double papers, or throwing over papers, are probable causes of seizure, but this does not alter the property; it is no cause of condemnation. The vessel is to be restored, but without damages.

The mode of ascertaining the damages adopted by the district court, is conformable to the usual practice in courts of admiralty. See Marriott's Rep., and in the same book, p. 184, in the case of *The Vanderlee*, liberal damages were given.

In the revenue laws of the United States, vol. 4, p. 391, probable cause is made an excuse for the seizure; but no such provision is, or ought to have been, made in the non-intercourse law. The powers given were so liable to abuse, that the commander ought to act at his peril.

The CHIEF JUSTICE mentioned the case of *The Sally*, Captain Joy, in 2 Rob. 185 (Amer. edit.), where a court of vice-admiralty had decreed, in a revenue case, that there was no probable cause of seizure.

This cause came on again to be argued, at this term, by *Dallas*, for the libellant, and *Martin* and *Key*, for the claimant.

Dallas, as a preliminary remark, observed, that the judge of the district court had referred to the clerk and his associates to ascertain whether any and what salvage should be allowed. This was an improper delegation of his authority, not warranted by the practice of courts of admiralty, nor by the nature of his office. Although they had not reported upon this point, yet he submitted it to the court for their consideration.

After stating the facts which appeared upon the record, and such as were either admitted or proved, he divided his argument into three general points.

1. That Jared Shattuck was a citizen of the United States, at the time of capture and recapture; and therefore, *the vessel was subject to [*76 seizure and condemnation, under the act of congress usually called the non-intercourse act.

2. That she was in danger of condemnation by the French, and therefore, if not liable to condemnation under the act of congress, Captain Murray was at least entitled to salvage.

3. That if neither of the two former positions can be maintained, yet Captain Murray had probable cause to seize and bring her in, and therefore, he ought not to be decreed to pay damages.

I. The vessel was liable to seizure and condemnation under the non-intercourse act; Shattuck being a citizen of the United States at the time of recapture. Captain Murray's authority to capture the Charming Betsey, depends upon the municipal laws of the United States, expounded by his instructions, and the law of nations. Before the non-intercourse act, measures had been taken by congress to prevent and repel the injuries to our commerce which were daily perpetrated by French cruisers. By the act of 28th May 1798 (1 U. S. Stat. 561), authority was given to capture "armed ves-

sels sailing under authority, or pretence of authority, from the republic of France," &c., and to retake any captured American vessel. The act of 28th June 1798 (Ibid. 574), regulates the proceedings against such vessels, when captured, ascertains the rate of salvage for vessels re-captured, and provides for the confinement of prisoners, &c. The act of July 9th, 1798 (Ibid. 578), authorizes the capture of armed French vessels anywhere upon the high seas, and provides for the granting commissions to private armed vessels, &c.

The right to retake an armed, or unarmed neutral vessel, in the hands of the French, is nowhere expressly given; but is an incident growing out of the state of war; *and is implied in several acts of congress. This *77] was decided in the case of *Talbot* v. *Seeman*, in this court, at August term 1801 (1 Cr. 33). The right of recapture, carrying with it the right of salvage, gave the right of bringing into port; and that port must be a port of the captor.

The first non-intercourse act was passed June 13th, 1798 (1 U. S. Stat. 565); a similar act was passed February 9th, 1799 (Ibid. 613). The act upon which the present libel is founded was passed February 27th, 1800 (2 Ibid. 7). These are not to be considered as mere municipal laws for the regulation of our own commerce, but as a part of the war measures which it was found necessary at that time to adopt. It was, *quoad hoc*, tantamount to a declaration of war.

Happily, there is not, and has not been, in the practice of our government, an established form of declaring war. Congress have the power, and may, by one general act, or by a variety of acts, place the nation in a state of war. So far as congress have thought proper to legislate us into a state of war, the law of nations in war is to apply. By the general laws of war, a belligerent has a right not only to search for her enemy, but for her citizens trading with her enemy. If authorities for this position were necessary, a variety of cases decided by Sir William Scott might be cited.

As to the present case, France was to be considered as our enemy. The non-intercourse act of 1800 prohibits all commercial intercourse "between any person or persons resident within the United States, or under their protection, and any person or persons resident within the territories of the French republic, or any of the dependencies thereof." And declares, that "any ship or vessel, owned, hired or employed, in whole or in part, by any person or persons resident within the United States, or any citizen *or *78] citizens thereof, resident elsewhere," &c., "shall be forfeited, and may be seized and condemned." A citizen of the United States, resident "elsewhere," must mean a citizen resident in a neutral country. If Shattuck was such a citizen, the case is clearly within the statute. It is not necessary that the vessel should be registered as an American vessel; it is sufficient, if owned by a citizen of the United States: registering is only necessary to give the vessel the privileges of an American bottom. Nor is it necessary that she should have been built in the United States.

By the 8th section of the act of 27th February 1800 (2 U. S. Stat. 10), reasonable suspicion is made a justification of seizure, and sending in for adjudication. The officer is bound to act upon suspicion, and that suspicion applies both to the character of the vessel, and to the nature of the voyage. Although the act of congress mentions only vessels of the United

States, still, from the nature of the case, the right to seize and send in must extend to apparent as well as real American vessels.

Such is the contemporaneous exposition given by the instructions of the executive.(*a*) The words of these instructions are: "You are not only to do all that in you lies, to prevent all intercourse, whether direct or circuitous, between the ports of the United States and those of France and her dependencies, in cases where the vessels or cargoes are apparently, as well as really American, and protected by American papers only, but you are to be vigilant that vessels or *cargoes, really American, but covered by Danish or other foreign papers, and bound to or from French ports, [*79 do not escape you." The law and the instructions having thus made it his duty to act on reasonable suspicion, he must be safe, though the ground of suspicion should eventually be removed.

Under our municipal law, therefore, the following propositions are maintainable. 1. That a vessel captured by the French, sails under French authority; and if armed, is, *quoad hoc*, a French armed vessel. The degree of arming is to be tested by the capacity to annoy the unarmed commerce of the United States. 2. The right to recapture an unarmed neutral is an incident of the war, and implied in the regulations of congress. 3. The non-intercourse law justifies the seizure of apparent, as well as of real American vessels.

Nor does this doctrine militate with the law of nations. A war, in fact, existed between the United States and France. An army was raised, a navy equipped, treaties were annulled, the intercourse was prohibited, and commissions were granted to private armed vessels. Every instrument of war was employed; but its operation was confined to the vessels of war of France upon the high seas. So far as the war was allowed, the laws of war attached.

That it was a public war, was decided in the case of *Bas* v. *Tingy*, in this court, February term 1800. (4 Dall. 37.) No authorities are necessary to show that a state of war may exist without a public declaration. And the right to search follows the state of war. Vattel, lib. 3, c. 7, § 114; *The Maria*, 1 Rob. 304; *Garrels* v. *Kensington*, 8 T. R. 234. Whether the vessel was American or Danish, she was taken out of the hands of our enemy.

*The law of nations in war gives not only the right to search [*80 a neutral, but a right to re-capture from the enemy. On this point, the case of *Talbot* v. *Seeman* is decisive, both as to the law of nations, and as to the acts of congress, and that the rule applies as well to a partial as to a general war. Captain Murray's authority, then, was derived, not only from our municipal law, and his instructions, but from the law of nations. If he has pursued his authority in an honest and reasonable manner, al-

(*a*) Upon Mr. Dallas offering to read the instructions—

Chase, J., said, he was always against reading the instructions of the executive; because, if they go no further than the law, they are unnecessary; if they exceed it, they are not warranted.

Marshall, Ch. J.—I understand it to be admitted by both parties, that the instructions are part of the record. The construction, or the effect they are to have, will be the subject of further consideration. They may be read.

Chase, J.—I can only say, I am against it, and I wish it to be generally known. I think it a bad practice, and shall always give my voice against it.

though he may not be entitled to reward, yet he cannot deserve punishment.

It remains to consider, whether the vessel was, in fact, liable to seizure and condemnation. What were the general facts to create suspicion at the time? 1. The vessel was originally American. The transfer was recent, and since the non-intercourse law. The voyage was to a dependency of the French republic, and therefore, prohibited, if she was really an American vessel. 2. The owner was an American by birth. The master was a Scotchman. The crew were not Danes, but chiefly Americans, who came from Baltimore. 3. The *procès verbal* calls her an American vessel; which was corroborated by the declarations of some of the crew. 4. The practice of the inhabitants of the Danish islands to cover American property in such voyages.

What was there, then, to dispel the cloud of suspicion, raised by these circumstances? 1. The declarations of Wright, the master, whose testimony was interested, inconsistent with itself, and contradicted by others. 2. The documents found on board.

These were no other than would have been found, if fraud had been intended. These were, *1. The sea-letter or pass from the governor-general of the Danish islands, who did not reside at St. Thomas, but at St. Croix. It states only by way of recital that the vessel was the property of Jared Shattuck, a burgher and inhabitant of St. Thomas. It does not state that he was naturalized or a subject of Denmark. 2. The muster-roll, which states the names and number of the master and crew, who were ten besides the captain, viz., William Wright, master, David Weems, John Robinson, Jacob Davidson, John Lampey, John Nicholas, Frederick Jansey, George Williamson, William George, Prudentio, a Corsican, and Davy Johnson, a Norwegian. There is but one foreign name in the whole. Wright, in his deposition, says that three were Americans, one a Norwegian, and the rest were Danes, Dutch and Spaniards. The muster-roll was not on oath, but was the mere declaration of the owner. 3. The invoice, which only says that Shattuck was the owner of the cargo. 4. The bill of lading, which says that he was the shipper. 5. The certificate of the oath of property of the cargo, states only by way of recital, that Shattuck, a burgher, inhabitant and subject, &c., was the owner of the cargo, but ays nothing of the property in the vessel. By comparing this certificate with the oath itself, it appears that the word "subject" has been inserted by the officer, and was not in the original oath. 6. Shattuck's instructions to Captain Wright. 7. The bill of sale by Phillips, the agent of the American owners, to Shattuck; but his authority to make the sale was not on board.

*81]

To show what little credit such documents are entitled to, he cited the opinion of Sir W. Scott, in the case of *The Vigilantia*, 1 Rob. 6–8 (Amer. ed.), and in the case of *The Odin*, Ibid. 208–211. The whole evidence on board was a mere custom-house affair, all depending upon his own oath of property. His *burgher's brief was not on board, nor did it appear, even by his own oath, that Shattuck was a burgher. And no document is yet produced, in which he undertakes to swear that he is a Danish subject. Such documents could not remove a reasonable suspicion founded

*82]

upon such strong facts. There could never be a seizure upon suspicion, if this was not warrantable at the time.

What has appeared since, to remove the suspicion, and to prove Shattuck to be a Danish subject? All the original facts remain, and the case rests on Shattuck's expatriation, whence arise two inquiries. 1. As to the right, in point of law, to expatriate. 2. As to the exercise of the right, in fact.

1. As to the right of expatriation. He was a native of Connecticut, and for aught that appears in the record, remained here until the year 1789, when we first hear of him in the island of St. Thomas. This was after the revolution, and therefore, there can be no question as to election, at least, there is no proof of his election to become a subject of Denmark.

If the account of the case of *Isaac Williams*, 1 Tuck. Bl. part 1, App. p. 436,(*a*) is correct, it was *the opinion of Ch. J. Ellsworth, that a citi-

---

(*a*) The state of the case, and the opinion of Ch. J. Ellsworth, as extracted by Judge Tucker from "The National Magazine," No. 3, p. 254, are as follows:[1]

On the trial of Isaac Williams, in the district (*quære?* circuit) court of Connecticut, February 27th, 1797, for accepting a commission under the French republic, and under the authority thereof, committing acts of hostility against Great Britain, the defendant alleged, and offered to prove, that he had expatriated himself from the United States and became a French citizen, before the commencement of the war between France and England. This produced a question as to the right of expatriation, when Judge Ellsworth, then Chief Justice of the United States, is said to have delivered an opinion to the following effect:

"The common law of this country remains the same as it was before the revolution. The present question is to be decided by two great principles; one is, that all the members of a civil community are bound to each other by compact; the other is, that one of the parties to this compact cannot dissolve it by his own act. The compact between our community and its members is, that the community shall protect its members; and on the part of the members, that they will at all times be obedient to the laws of the community, and faithful to its defence. It necessarily results, that the member cannot dissolve the compact without the consent or default of the community. There has been no consent, no default. Express consent is not claimed; but it is argued, that the consent of the community is implied, by its policy, its condition and its acts. In countries so crowded with inhabitants that the means of subsistence are difficult to be obtained, it is reason and policy, to permit emigration; but our policy is different, for our country is but sparsely settled, and we have no inhabitants to spare. Consent has been argued from the condition of the country, because we are in a state of peace. But though we were in peace, the war had commenced in Europe; we wished to have nothing to do with the war, but the war would have something to do with us. It has been difficult for us to keep out of the war; the progress of it has threatened to involve us. It has been necessary for our government to be vigilant in restraining our own citizens from those acts which would involve us in hostilities.

"The most visionary writers on this subject do not contend for the principle in the unlimited extent, that a citizen may at any, and at all times, renounce his own, and join himself to a foreign country.

"Consent has been argued from the acts of our government, permitting the naturalization of foreigners. When a foreigner presents himself here, we do not inquire what his relation is to his own country; we have not the means of knowing, and the inquiry would be indelicate; we leave him to judge of that. If he embarrasses himself by contracting contradictory obligations, the fault and folly are his own; but this implies no consent of the government that our own should also expatriate themselves. It

[1] Also reported in Whart. St. Tr. 652, and 4 Hall's L. J. 461.

zen of the United States could not expatriate himself. That learned judge is reported to have said in that case, that the common law of this country remains the same as it was before the revolution. But in the case of *Talbot* v. *Jansen*, 3 Dall. 133, this court inclined to the opinion that the right exists, but the difficulty was, that the law had not pointed out the mode of election and of proof.

It must be admitted, that the right does exist, but its exercise must be
*84] accompanied by three circumstances. 1. Fitness in point of time. 2. Fairness of intent. *3. Publicity of the act.

But the right of expatriation has certain characteristics, which distinguish it from a locomotive right, or a right to change the domicil. By expatriation, the party ceases to be a citizen and becomes an alien. If he would again become a citizen, he must comply with the terms of the law of naturalization of the country, although he was a native. But by a mere removal to another country, for purposes of trade, whatever privileges he may acquire in that country, he does not cease to be a citizen of this.

With respect to other parties at war, the place of domicil determines his character, enemy or neutral, as to trade. But with respect to his own country, the change of place alone does not justify his trading with her enemy; and he is still subject to such of her laws as apply to citizens residing abroad. *The Hoop*, 1 Rob. 165; *Gist* v. *Mason*, 1 T. R. 84; and particularly, *Potts* v. *Bell*, 8 Ibid. 548, where this principle is advanced by Doct. Nicholl, the king's advocate, in p. 555, admitted by Doct. Swabey, in p. 561, and decided by the court.

This principle of general law is fortified by the positive prohibition of the act of congress. In France, the character of French citizen remains, until a naturalization in a foreign country. In the United States, we require an oath of abjuration, before we admit a person to be naturalized. If he was naturalized, he has done an act disclaiming the protection of the United States, and is no longer bound to his allegiance. But if he has acquired only a special privilege to trade, it must be subject to the laws of his country.

2. But has he, in fact, exercised the right of expatriation? And is it proved by legal evidence? His birth is *primâ facie* evidence that he is a
*85] citizen *of the United States, and throws the burden of proof upon him. No law has been shown, by which he could be a naturalized subject of Denmark, nor has he himself ever pretended to be more than a burgher of St. Thomas. What is the character of burgher, and what is the nature of a burgher's brief? It is said, that to entitle a person to own ships, there must have been a previous residence; but no residence is necessary, to enable a man to be a master of a Danish vessel. It is a mere license to trade; a permit to bear the flag of Denmark; like the freedom of a corporation. It implies neither expatriation, an oath of allegiance, nor residence. *The Argo*, 1 Rob. 133; *Pollard* v. *Bell*, 8 T. R. 434. These cases show with what facility a man may become a burgher; that it is a mere mat-

---

is, therefore, my opinion, that these facts, which the prisoner offers to prove in his defence, are totally irrelevant," &c. The prisoner was accordingly found guilty, fined and imprisoned.

ter of purchase, and that it is a character which may be taken up and laid aside at pleasure, to answer the purposes of trade.

But there is no evidence that he ever obtained even this burgher's brief. He went from Connecticut, a lad, an apprentice or clerk, in 1788 or 1789: he was not seen in business there, until 1795 or 1796. In going, in 1789, he had no motive to expatriate himself, as there was then no war. We find him first trading in 1796, after the war, and the law of Denmark forbids a naturalization in time of war. At what time, then, did he become a burgher? If he ever did become such, in fact, and it was in time, he can prove it by the record. Wright's burgher's brief is produced, and shows that they are matters of record. The brief itself, then, or a copy from the record, duly authenticated, is the best evidence of the fact, and is in the power of the party to produce. Why is it withheld, and other *ex parte* evidence picked up there, and witnesses examined here? All the evidence they have produced is merely matter of inference. They have examined witnesses to prove that he carried on trade at St. Thomas, owned ships and land, married, and resided there. By the depositions, they prove that a man is not by law permitted to do these things, without being a burgher; and hence, they infer his burghership.

*These facts are equivocal in themselves, and not well proved. [*86
Certificates of citizenship are easily obtained, but are not always true. This is noticed by Sir. W. Scott, in the cases before cited. A case happened in this country, *United States* v. *Villato*, 2 Dall. 370; where a person having taken the oath of allegiance to Pennsylvania, agreeable to the naturalization act of that state, obtained a certificate from a magistrate, confirmed by the attestation of the supreme executive of the state, that he was a citizen of the United States. But upon a trial in the circuit court of Pennsylvania, it was adjudged, that he was not a citizen. *Captain Barney* also went to France, became a citizen, took command of a French ship of war, returned to this country, and is now certified to be a citizen of the United States, So, in the case of the information against the ship *John and Alice*, Captain Whitesides, he was generally supposed to be a citizen of the United States. On the trial, evidence of his citizenship was called for, when it appeared, that his father brought him into this country, in the year 1784, and remained here until 1792, when the father died. Neither he nor his father were naturalized, and the vessel was condemned. These instances show the danger of crediting such custom-house certificates.

All these certificates, in the present case, do not form the best evidence, because better is still in the possession of the party, and he ought to produce it. The general and fundamental rules of evidence are the same in courts of admiralty, as in courts of common law. If they appear to relax, it is only in that stage of the business, where they are obliged to act upon suspicion. In the present case, the opinion of merchants only is taken as to the laws of Denmark. No judicial character, not even a lawyer, was applied to. Certificates of merchants are no evidence of the law. *The Santa Crux*, 1 Rob. 58. The evidence offered is both *ex parte* and *ex post facto*. Fraud is not to be presumed, but why was not the burgher's *brief pro- [*87
duced, as well as the other papers, such as the oath of property, &c., when it was certainly the most important paper in the case? The only reason which can be given is, that it did not exist. It was a case like that

of Captain Whitesides, where people were led into a mistake from the length of his residence, and from having seen him there from the time of his youth.

Upon the whole, then, we have a right to conclude that Jared Shattuck was not a Danish subject; or that if he was, the fact is not proved, and therefore, he remains a citizen of the United States, in the words of the act of congress, "residing elsewhere." The consequence must be a condemnation of the vessel.

II. She was in danger of condemnation in the French courts of admiralty, and therefore, Captain Murray is entitled to salvage. This depends, 1. On the right to retake; 2. On the degree of danger; and 3. The service rendered.

1. He had a right to retake, on the ground of suspicion of illicit trade, in violation of the non-intercourse law, as well as on the ground of her being a vessel sailing under French authority, and so armed as to be able to annoy unarmed American vessels. He had also a right to bring her in for salvage, if a service was rendered. If his right to retake depends upon the suspicion of illicit trade, or upon her being a French armed vessel, he could take her only into a port of the United States.

The point of illicit trade has already been discussed. That the vessel was sailing under French authority is certain; the only question is, whether she was capable of annoying our commerce. She had port-holes, a musket, powder and balls, and *eight Frenchmen, who, probably, as is usual, had each a cutlass. Vessels have been captured, without a single musket: three or four cutlasses are often found sufficient. The vessel was sufficiently armed to justify Captain Murray, under his instructions, in bringing her in.

*88]

If, then, the taking was lawful, has she been saved from such danger as to entitle Captain Murray to salvage? There is evidence that Captain Wright requested Captain Murray to take the vessel, to prevent her falling into the hands of the English. He consented to be carried into Martinique. He protested only against the privateer, not against Captain Murray. His letter to Captain Murray does not complain of the re-capture, but of the detention. The taking was an act of humanity, for if Captain Murray had taken out the Frenchmen, and left the vessel with only Captain Wright and the boy, they could not have navigated her into port, and she must have been lost at sea, or fallen a prey to the brigands of the islands. This alone was a service which ought to be rewarded with salvage.

But she was in danger of condemnation in the French courts of admiralty. The case of *Talbot* v. *Seeman* has confirmed the principle adopted by Sir W. Scott, in the case of *The War Onskan*, 2 Rob. 246, that the departure of France from the general principles of the law of nations, varied the rule that salvage is not due for the re-capture of a neutral out of the hands of her friend; and that the general conduct of France was such as to render the re-capture of a neutral out of her hands, an essential service, which would entitle the re-captors to salvage. If she had been carried into a French port, how unequal would have been the conflict? Who would have been believed, the privateer or the claimant? The Danish papers would have been considered only as a cover for American property. The danger is shown by the apprehensions of Captain Wright and his crew; by the declarations of the

privateer; by the *procès verbal;* and by the actual imprisonment of the crew.

*But independent of the general misconduct of France, there are several French ordinances, under which she might have been condemned. The case of *Pollard* v. *Bell*, 8 T. R. 444, shows that such ordinances may justify the condemnation. The case of *Bernardi* v. *Motteaux*, 2 Doug. 575, shows that the French courts actually do proceed to condemnation upon them, as in the case of throwing over papers, &c. So, in the case of *Mayne* v. *Walter*, Park on Insurance 414 (363), the condemnation was because the vessel had an English supercargo on board. [*89

By the ordinances of France, Code des prises, vol. 1, p. 306, § 9, "all foreign vessels shall be good prize in which there shall be a supercargo, commissary or chief officer of an enemy's country; or the crew of which shall be composed of one-third sailors of an enemy's state; or which shall not have on board the *roles d'equipage* certified by the public officers of the neutra places from whence the vessels shall have sailed." And by another ordinance, 1 Code des prises, 303, § 6, "No regard is to be paid to the passports granted by neutral or allied powers, to the owners or masters of vessels, subjects of the enemy, if they have not been naturalized, or if they shall have not transferred their domicil to the states of the said powers, three months before the 1st of September, in the present year; nor shall the said owners or masters of vessels, subjects of the enemy, who shall have obtained such letters of naturalization, enjoy their effect, if, after they shall have obtained them, they shall return to the states of the enemy, for the purpose of there continuing their commerce;" and by the next article, "vessels, enemy built, or which shall have been owned by an enemy, shall not be reputed neutral or allied, if there are not found on board authentic documents, executed before public officers, who can certify their date, and prove that the sale or transfer thereof had been made to some of the subjects of an allied or neutral power, before the commencement of hostilities; and if the said deed or transfer of the property of an enemy to the subject of the neutral or ally, shall not have been duly enregistered before the principal officer of the place of departure, and signed by the owner, or the person by him authorized."

*In violation of these ordinances, the chief officer, Captain Wright, was a Scot, an enemy to France: for although he had a burgher's brief, yet it did not appear, that he had resided three months before he obtained it; and we have before seen, that a previous residence was not necessary, by the laws of Denmark, to entitle him to a burgher's brief, for the purpose of being master of a vessel. In the next place, the whole number of the crew, with the master, being eleven, and three of the crew being Americans and the master a Scot, more than one-third of the crew were enemies of France. The muster-roll did not describe the place of nativity of the crew. The vessel was purchased after the commencement of hostilities between France and the United States. And there was no authority on board from the American owners to Phillips, the agent who made the sale, in violation of the regulation of 17th February 1794, art. 4 (2 Code des prises, p. 14), which declares "the vessel to be good prize, if being enemy built, or belonging originally to the enemy, the neutral, the allied, or the French proprietor, shall not be able to show, by authentic documents, found on board, [*90

that he had acquired his right to her before the declaration of war." See also 2 Valin 249, § 9 ; 251, § 12, and 244.

What chance of escape had this vessel, under all these ordinances, which the French courts were bound to enforce? The case of *Pollard* v. *Bell*, 8 T. R. 434, is precisely in point. The vessel in that case was Danish, and had all the papers usually carried by Danish vessels. But she was condemned in the highest court of appeal in France, because the master was a Scot, who had obtained a Danish burgher's brief, subsequent to the hostilities. Has there, then, been no service rendered?

It is no objection to the claim of salvage, that it is not made in the libel. Salvage is a condemnation of part of the thing saved. The prayer for condemnation of the whole includes the part : it may be made by petition, or even *ore tenus.*

The means used for saving need not be used with that sole view. *Talbot* v. *Seeman.* *As to the *quantum* of salvage, he referred to the opinion of Sir W. Scott, in the case of *The Sarah*, 1 Rob. 263. *91]

III. But if the Charming Betsy is not liable to condemnation, under the non-intercourse law, and if Captain Murray is not entitled to salvage, yet the restitution ought to be made of the net proceeds of the sale only, and not with damages and costs.

In maritime cases, probable cause is always a justification. The grounds of suspicion, in the present instance, have been already mentioned ; and when to these are added the circumstances, that it was at Captain Wright's request that Captain Murray took possession of the vessel ; that he consented to be carried into Martinique; that if he had taken out the Frenchmen, and left the vessel in the midst of the ocean, with only Captain Wright and his boy, they would have been left to destruction ; that part of the cargo was damaged, part rifled, and all perishable ; and that Captain Murray offered to release the vessel and cargo, on security, there can hardly be a stronger case to save him from a decree for damages.

In the case of the *Two Susannahs*, 2 Rob. 110, it is, by Sir W. Scott, taken as a principle, that a seizure is justified by an order for further proof, and he decreed a restitution of the proceeds only, it not being shown that the captors conducted themselves otherwise than with fair intentions. In the present case, there is no pretence that Captain Murray did not act from the purest motives, and from a wish faithfully to execute his instructions.

Key, contrà.—1. The schooner Charming Betsy and her cargo were neutral property, and not liable to capture under the non-intercourse law. 2. When re-captured, she was not an armed French vessel capable of annoying our commerce, and therefore, not liable under the acts of congress authorizing the capture of such vessels. *3. She was not in imminent danger when re-captured, and therefore, Captain Murray is not entitled to salvage. 4. Under all the circumstances of the case, he acted illegally, and is liable for damages which have been properly assessed. *92]

I. As to the neutral character of the vessel and cargo, he contended, 1. That Jared Shattuck never was an American citizen. 2. That if he was, he had expatriated himself, and had become a Danish subject. 3. That if not a Danish subject, yet he was not a citizen of the United States.

1. The evidence is, that he was born in Connecticut, but before the decla-

ration of independence, and was, therefore, a natural-born subject of Great Britain. He was in trade for himself, in St. Thomas, in 1794. This he could not do, until he was twenty-one years of age, which will carry back the date of his birth to the year 1773. He was an apprentice at St. Thomas in the year 1788 or 1789. There is no evidence of his being in the United States since the declaration of independence. But if he had been, yet he went away while a minor, and he could not make his election during his minority. There is no evidence, that his parents were citizens of the United States. Being a natural-born subject of Great Britain, he could not become a citizen of the United States, unless he was here at the time of the revolution, or his parents were citizens, or unless he became naturalized according to law. It is incumbent upon Captain Murray, to prove him to be a citizen of the United States. It is sufficient for us, to show that he was born a subject of Great Britain. They must show how he became a citizen. This is a highly penal law, and everything must be proved which is necessary to bring the case within the penalty.

2. But if he ever was a citizen of the United States, he had expatriated himself. *That every man has a right to expatriate himself, is admitted by all the writers upon general law; and it is a principle peculiarly congenial to those upon which our constitutions are founded. Some of the states of the Union have expressly recognised the right, and even prescribed the form of expatriation. But where the form is not prescribed, nothing more is necessary, than that it be accompanied with fairness of intention, fitness of time, and publicity of election. [*93

In the present instance, all these circumstances concur. No time could have been more fit than the year 1788 or 1789, when all Europe and America were in a state of profound peace. His country had then no claim to his service. The fairness of intention is evidenced by its having been carried into effect, by an actual *bonâ fide* residence of ten or eleven years; by serving an apprenticeship; by actual domiciliation; by marriage; by becoming a burgher; by acquiring lands, and by owning ships. The publicity of election is witnessed by the same acts, and by taking the oath of allegiance to Denmark. The United States have prescribed no form of expatriation. All that he could do to render the act public and notorious, has been done.

It is said, a man cannot cease to be a citizen of one state, until he has become a citizen or subject of another. But a man may become a citizen of the world; an alien to all the governments on earth.(*a*) It is in evidence, that by the laws of Denmark, a man cannot become a subject and carry on trade, without being naturalized; that an oath of allegiance and an actual domicil are necessary to naturalization; but that a domicil is not necessary to *become a burgher, for the purpose of navigating a Danish vessel. [*94

In the two cases cited from 1 Rob. 133 (*The Argo*), and 8 T. R. 434 (*Pollard* v. *Bell*), the question was only as to the national character of the

(*a*) MARSHALL, Ch. Justice.—There can be no doubt of that.

Dallas said, he had been misunderstood. He only said, that the act of becoming a citizen of another state was the most public act of expatriation, and the best evidence of the fact.

master of the vessel, not of the owner; and therefore, they do not apply to the present case.

The burgher's brief of Captain Wright is dated 19th May 1794, and certifies that he had taken the oath of fidelity to his Danish majesty, and was entitled to all the privileges of a subject.

3. But if the facts stated in the record are not sufficient to prove Shattuck to be a Danish subject, yet they do not prove him to be a citizen of the United States, and if he is not a citizen of the United States, it is immaterial of what country he is a subject. By the law of nature and nations, a man may, by a *bonâ fide* domicil, and long continued residence in a country, acquire the character of a neutral, or even of an enemy. In the case of *Scott* v. *Schawrtz*, Comyns 677, it was decided, that residence in, and sailing from, Russia, gave the mariners of a Russian ship the character of Russian mariners, within the meaning of the British navigation act: and in the case of *The Harmony*, 2 Rob. 264, Sir W. Scott condemned the goods of an American citizen, because, by a residence in France, for four years, he had acquired a domicil in that country which had given his property the character of the goods of an enemy. In the case of *Wilson* v. *Marryat*, 8 T. R. 31, it was adjudged, that a natural-born British subject might acquire the character of a citizen of the United States for commercial purposes.

II. The Charming Betsy was not a French armed vessel, capable of annoying our commerce, and therefore, not liable to capture or condemnation, by virtue of the limited war which existed between the United States and France. In supporting this proposition, it is not intended to interfere *95] *with the decision of this court in the case of *Talbot* v. *Seeman*. There is a great difference between the force of the Amelia, in that case, and that of the Charming Betsy. The Amelia had eight cannon, was manned by twelve Frenchmen, and had been in possession of the French ten days, and must be admitted to have been such an armed French vessel as came within the meaning of the acts of congress.

But in the present case, the vessel was built at Baltimore, and owned by citizens of the United States. When she sailed from Baltimore, she had four cannon, a number of muskets, &c., which Shattuck was obliged to purchase with the vessel, and which he afterwards sold at a considerable loss. The master swears, that at the time of re-capture, she had only one musket, a few balls and twelve ounces of powder; and although McFarlan deposes to a greater quantity of arms, yet it appears that he did not go on board of her until eight days after the re-capture. If arms were on board, they ought to have been brought in with the vessel: this is particularly required by the act of congress. No arms are mentioned in the account of sales; it is to be presumed, as none were brought in, that none were on board. The master expressly swears that the French put no force or arms on board, when they took her. She could not, therefore, be such an armed vessel as was intended by the acts of congress.

III. She was not in imminent danger, when re-captured, and therefore, the re-captors are not entitled to salvage. It is a general principle, that the re-capture of a neutral does not entitle to salvage.

It is not intended to question the correctness of the decision of this court in the case of *Talbot* v. *Seeman*, nor that of Sir W. Scott, in the case

of *The War Onskan.* Those cases were exceptions to the general rule, because the conduct of France was in violation of the law *of nations, and because neutral vessels had no chance of escaping the [*96 rapacity of the French prize courts. This system of depredation upon neutral commerce continued during the years 1798 and 1799. The Amelia was recaptured by Captain Talbot, in September 1799, while the *arrêt* of 18th January 1798, so injurious to neutral commerce, and the violences of the prize courts, were in full operation.

The Charming Betsy was re-captured by Captain Murray, on the 3d of July 1800. During this interval, great events had occurred in France. On the 9th of November 1799, Bonaparte was placed at the head of the government, and a new order of things commenced. On the 24th of December 1799, the *arrêt* of the council of five hundred, of 18th January 1798, which made the character of neutral vessels dependent upon the quality of the cargo, and declared good prize all those laden in whole or in part with the productions of England or her possessions, was repealed, and by a new decree, the ordinance of 1778 was re-established. The government adopted a more enlightened and liberal policy towards neutrals. On the 26th of March 1800, a new tribunal of prizes was erected, at the head of which was placed the celebrated Portalis, author of the Civil Code. On the 29th of May 1800, their principles were tested in the case of *The Pigou*, an American ship belonging to Philadelphia. This case was a public declaration to all the world, that they began to entertain a proper respect for the law of nations, and from this time, the rule of salvage, as established in the case of *The War Onskan*, ceased.

The Pigou had been condemned in an inferior tribunal. On an appeal to the council of prizes, Portalis, with a degree of liberality and correctness which would confer honor upon any court in the world, declared that *excepting the case when a prize is evidently and actually enemy's [*97 property, all questions about the validity or invalidity of prizes, come to the examination of a fact of neutrality." And in discussing the question, as to the necessity of a *role d'equipage*, he says, "I will begin with the principle that all questions about neutrality are what are called in law, questions *bonâ fide*, in which due regard is to be had to facts, and weigh them properly, without adhering to trifling appearances." "But it would be a gross error, in believing that the want of, or the least irregularity in, one of these papers, could operate so far as to cause the vessel to be adjudged good prize. Sometimes regular papers cover an enemy's property, which other circumstances unmask. In other circumstances, the stamps of neutrality break through omissions and irregularities in the forms, proceeding from mere negligence, or grounded on motives free from fraud.

"We must speak to the point; and in these matters, as well as in those which are to be determined, we must decide not by mere strict forms, but by the principles of good faith; we must say, with the law, that mere omissions or mere irregularities in the forms, cannot prejudice the truth, if it is stated by any other ways: and *si aliquid ex solemnibus deficiat, cum equitas poscit, subveniendum est.*" "The main point in every case is, that the judge may be satisfied that the property is neutral or not." He then cited a case decided upon the 6th article of the regulation of the 21st of October 1744; by which article, the act of throwing over papers is made a substan-

tive ground of condemnation. But it was decided, that the papers ought to be of such a nature as to prove the property to be enemy's.

The two grounds upon which the Pigou was condemned in the inferior tribunal, were, that she was armed for war, without any commission or authority from the United States, and that there was on board no *role d'equipage*, attested by the public officers of the port of departure. She mounted ten guns, and was provided with muskets and other warlike stores.

*98] *Upon the first point, it was decided in the council of prizes, that she was not armed for war, but for lawful defence; and on the second, that a *role d'equipage* was not absolutely necessary, if the property appeared otherwise clearly to be neutral.(*a*)

(*a*) There is so much reason, justice and good sense appearing through a bad translation of, probably, not a very accurate account of this case, that it is with pleasure transcribed, as it has been published in this country, from the London public prints.

Opinion of PORTALIS.—After having read the opinion of commissioners of the government, left in writing on the table, which is as follows: It appears, that a judgment of the tribunal of commerce at l'Orient, had granted Captain Green the replevy of his vessel and part of the goods and specie which composed the cargo; and that on the appeal entered by the comptroller of marine at l'Orient, against that judgment, the tribunal of the department of Morbihan declared the vessel and cargo a good prize.

The grounds on which rested the decision of the tribunal of Morbihan were, that the vessel was armed for war, without any commission or authorization from the American government; and that there was on board no *role d'equipage* attested by the public officers of the port of his departure. The captured claim the nullity of the prize, and that the vessel be reinstated in the situation she was in, when captured, and that she be delivered up, as well as her cargo, and the dollars which were on board, and also the papers, with damages and interest adequate to the losses they had sustained.

To be able to determine on the respective demands, we must first fix upon the validity or invalidity of the prize; excepting the case when a prize is evidently and actually enemy's property, all questions about the validity or invalidity of prizes come to the examination of a fact of neutrality.

In this case, was the tribunal of Morbihan authorized to determine that the ship Pigou was in such circumstances as to be prevented from being acknowledged and respected as neutral? It is said, the vessel was armed for war, and without any authorization from her government; that she mounted ten guns of different rates, and that muskets and warlike stores have been found in her. The captured reply, that the vessel being bound to India, was armed for her own defence, and that the warlike ammunition, the muskets and guns, did not exceed what is usual to have on board for long voyages; for my part, I think it is not for having arms on board only, that a vessel can be said to be armed for war. The warlike armament is merely of an offensive nature; it is deemed so, when there is no other end than attacking, or, at least, when everything shows that attack is the main point of the armament; then a vessel is reputed inimical or pirate, if she has no commission or papers which may remove the suspicion. But defence is of natural right, and every means of defence is lawful, in voyages at sea, as in every other dangerous occurrence of life. A vessel consisting but of a small crew, and whose cargo in goods amounted to a considerable sum, was evidently intended for trade, and not for war. The arms found on board were not to commit plunder and hostility, but to avoid them; not for attack, but for defence. The pretence of armament for war, in my opinion, cannot be founded.

*99] *I am now to discuss the second argument against the captors, on the want of a *role d'equipage*, attested by the public officers of the place of her departure To support the validity of the prize, they allege the regulation of the 21st October 1774, of the 26th of July 1778, and the decree of the directory of the 12th Ventose, 5th year,

The Charming Betsy.

In another case (*The Statira*), which was decided very shortly after that of *The Pigou*, by the same council of prizes, two questions arose, 1st. Whether the Statira, being an American vessel captured by a British ship,

---

which require a *role d'equipage*. The captured, on their part, claim the execution of the treaty of commerce between France and the United States of America, of the 6th February 1778; they contend, that general regulations could not derogate from a special treaty, and that the directory could not infringe the treaty by an arbitrary decree.

It is a fact, that the regulations of 1774 and 1778 and the decree of the directory, require a *role d'equipage* attested by the public officers of the place of departure. It is also a fact, that the *role d'equipage* is not mentioned in the treaty of the 6th February, as one of the papers requisite to establish neutrality; but I believe, I am not under the necessity of discussing, whether the treaty is superior to the regulations, or whether the regulations are superior to the treaty.

I will begin with the principle, that all questions about neutrality, are what are called in law, questions *bonâ fide*, in which due regard is to be had to facts which are to be properly weighed, without adhering to trifling appearances. Neutrality is to be proved; for this reason, the regulation of marine of 1681, article 9, on prizes, states, that vessels with their cargoes, which shall not have on board charter-parties, bills of lading nor invoices, shall be considered as good prize. From the same motives, the regulations of 1774 and 1778 put the commanders of neutral vessels under obligation of proving at sea, their property being neutral, by passports, bills of lading, invoices and vessels' papers. The regulation of 1774, whose enacting parts have been renewed by the directory, literally expresses, among the papers requisite to prove neutral property, that there must be a *role d'equipage*, in due form.

But it would be a gross error, to suppose that the want of, or the least irregularity in, one of these papers, could operate so far as to cause the vessel to be adjudged good prize. Sometimes, regular papers cover an enemy's property, which other circumstances unmask. In other circumstances, the stamps of neutrality break through omissions and irregularities in the forms, proceeding from mere negligence, or grounded on motives free from fraud. We must speak to the point, and in these matters as well as on those which are to be determined, we must decide, not by mere strict forms, but by the principles of good faith; we must say, with the law, that mere omissions, or mere irregularities in the forms, cannot prejudice the truth, if it is stated by any other ways; and *si aliquid ex solemnibus deficiat, cum equitas poscit, subveniendum est.*

Therefore, the regulation of the 26th July 1778, art. 2, having stated that the masters of neutral vessels shall prove at sea, their property being neutral, by passports, bills of lading, invoices and other vessel-papers, adds, one of which, at least, shall establish the property being neutral, or shall contain an exact description of it. It is not then necessary, in every case, to prove the property neutral, by the simultaneous concurrence of all the papers enumerated in the regulations. But it is sufficient, according to the circumstances, that one of *these papers establish the property, if it is not opposed or destroyed by more peremptory circumstances. The main point in every case is, that the judge may be satisfied that the property is neutral or not. [*100

We have a precedent of what I assert, in art. 6, of the regulation of the 21st October 1774; by that article, every vessel, belonging to what nation soever, neutral, enemy or ally, from which papers shall be proved to have been thrown overboard, shall be adjudged good prize, on the proof only of the papers having been thrown overboard; nothing can be more explicit. Some difficulties arose on the execution of that severe clause of the law, which has been renewed by the regulation of 1778. On the 13th November 1779, the king wrote to the admiral, that he left entirely to him and to the commissioners of the council of prizes, to apply the rigidity of the decree, and of the regulation of the 26th July, or to moderate their clauses, as peculiar circumstances would require it, in their opinion.

and *re-captured by a French privateer, was liable to confiscation on the ground of her being in the hands of an enemy; and 2d. Whether her cargo was ground of condemnation?

On the first point, it was held, that the mere capture does not, before condemnation, vest the property in the captor, so as to make it transferable to the re-captor, and therefore, no ground of confiscation. On the 2d, there were two inquiries: 1st. Whether, in point of law, the character of the vessel, neutral or not, should be determined by the nature of the cargo? 2d. Whether the cargo consisted of contraband?

As to the first, the commissary (PORTALIS) reviews the laws upon this subject, prior to the *arrêt* of the council of 500, of the 29th Nivose, year 6 (January 18th, 1798), *the severity of which he condemns; but as the Statira was captured, while it was in force, the captor was entitled to have the capture tried by it. He observes, that such regulations are improperly styled laws, and they are essentially variable *pro temporibus*

*102]

A judgment of the council, of the 27th December, in the said year, rendered between Pierre Brandebourg, master of the Swedish ship Fortune, and M. de la Rogredourden, captain of the king's xebec, the Fox, liberated the said vessel, notwithstanding some papers had been thrown overboard. It was determined, that to ground an adjudication of the vessel, on the papers being thrown overboard, they ought to be of such nature as to prove the property enemy's, and that the captain ought to have had a concern in throwing his papers overboard: which was not the case with the Swedish master.

In this case, without discussing whether American masters are obliged or not to exhibit a *role d'equipage*, attested by the public officers of the place of their departure, I observe, that this *role* is supplied by the passport, and that the captured allege the impossibility for them to have their *role d'equipage* attested by public officers in Philadelphia, since the intercourse was forbidden, under pain of death, with Philadelphia, where a most tremendous epidemic was raging; I must add, that the passport, the invoice, and all the vessel's papers, establish evidently the property of the vessel and cargo being neutral; none of these papers have ever been disputed. Thus, the invalidity of the capture is obvious; whence it follows, that everything which has been taken from them ought to be restored, in kind, or by a just indemnification.

As to their claim for damages and interest, I must observe, that such a claim is not, in every case, the sequel of the invalidity of the capture. Suspicious proceedings of the captured may occasion the mistake of the captors. But when the injustice on the part of the captors cannot be excused, the captured have a right to damages and interest. Let us apply these principles to the cause. Could the captors entertain any grounded suspicions against the captain of the ship Pigou? was not the neutrality of the ship proved, by her being an American built ship, by her flag, by her destination, by the crew being composed of Americans, by her cargo consisting of American goods, without any contraband articles, by the name and the character of Captain Green, very well known by services he rendered to the French nation, by the register, the passport the invoice, by the papers on board, finally, by the place where she was captured, which was far from any suspicious destination? It was then impossible for the captors to make any mistake; the vessel struck her colors, at the first summons, the officers and crew made faithful declarations; they answered plainly in their examination; no pretence whatever was left to the captors; they don't appear to have observed the forms prescribed by the regulation. Some very heavy charges are uttered against them; but I think it is not time yet to take notice of them; they will be discussed when the articles captured are restored.

In these circumstances, I am of opinion, that a more absolute and full replevy be

et causis; that they should always be tempered by wisdom and equity. He adverts to the words *in whole or in part*, by which, he says, ought to be understood, a great part, according to the judicial maxim *parum pro nihilo habetur*. Upon this principle, he is of opinion, that a ship ought not to be subject to confiscation, even under the law of the 29th Nivose, unless such a part of the cargo comes under the description of what is there made contraband, as ought to excite a presumption of fraud against all the rest.

The question of contraband related to forty barrels of pitch, part of the cargo of the Statira. He observed, that pitch was not made contraband by the treaty of 1778, but as France was, by that treaty, entitled to all the advantages of the most favored nation, and as by a subsequent treaty between the United States and Great Britain, pitch was among the enumerated articles of contraband, it necessarily became such in regard to France. He, however, decides the quantity to be too small to justify condemnation, even upon the principle of the law of 24th (*quære?* 29th) Nivose. And the ship was restored. (*a*)

---

granted to Captain Green of the American ship Pigou and her cargo, as well as the papers found on board; as to the claim of damages and interest, made by Captain Green, that the former be granted to him, and they shall be settled by arbitrators in the usual form.

(Signed) PORTALIS.

Paris, 6 Prairial, 8th year.

The council declare that the capture of the ship Pigou and her cargo is null and of no effect; therefore, grant a full and absolute replevy of the vessel, rigging and apparel, together with the papers and cargo to Captain John Green; as to the damages and interest claimed by Captain Green, the council grant them to him, and they shall be settled by arbitrators in the usual forms.

Done at Paris on the 9th Prairial, 8th year of the republic. Present,

Citizen	REDON,	BARENNES,
Presidents	NIOU CANTE,	DUSAUB,
	MOREAU,	PAREVAL,
	MONTIGNY,	GRANDMAISON,
	MONPLACID,	TOURNACHER.

(*a*) The following account of the case of *The Statira* is extracted from London papers of June 1800. We stated to our readers, some time ago, the principles upon which the new council of prizes at Paris proceeded with respect to neutral vessels, and we gave the decision at length upon the American ship Pigou, which was ordered to be restored with costs. That decision showed that a greater degree of system had been established, and that the loose and frequently unjust principles upon which the directory acted with respect to captures of neutral ships, were meant to be abandoned. The following is the decision of the council on another case, that of *The Statira*.

The Statira, Captain Seaward, an American ship, had been captured by an English vessel, and re-captured by the French privateer, the Hazard. The first point which the commissary considers is, the effect which the Statira, having been in the possession of the English, ought to have. *He observes, that if the vessel captured [*103 and recovered had been French, and re-captured by a national vessel, there would have been nothing due to the re-captor, because this is only the exercise of that protection which the state owes to all its subjects in all circumstances. If it had been re-captured by a privateer, the French regulation gives the property of the vessel to the re-captor, on account of the risk and danger of privateering. It might be an act of generosity to restore the vessel to the original owner, but it is not of right, that it should.

These cases are read, to show that France had abstained from those violations of the law of nations, which had caused the rule in the case of *The War Onskan;* and to bring the present case within the principles established by the court in the case of *Talbot* v. *Seeman.*

*105] *The general conduct of France having been changed, it is to be presumed, she would have been released, with damages and costs; if not upon the principles of justice, good faith, and the law of nations, yet upon those of policy. France was at war with Great Britain; partial hostilities existed with the United States. The non-intercourse law prevented our vessels from trading with France, or her dependencies; and the French West Indies could only be supplied from the Danish islands. It is not to be believed, therefore, that they would, by condemning this vessel (coming to them with those very supplies which they wanted), embarrass a trade so necessary to their very existence.

But independently of the general misconduct of France towards neutrals, the captors rely upon three points arising under French ordinances.

In the next place, he considers the case of a neutral re-captured from the enemy. If really neutral, he says, the vessel must be released. The ground of this higher degree of favor for a neutral, he states to be, that the French vessel must have been lost to the country. But it is not certain, that the neutral captured by an enemy may not be released by the admiralty courts of the enemy. The mere capture does not vest the property immediately in the captor, so as to make it transferable to the captor. The commissary considers the property not vested in the captor, until sentence of condemnation.

We believe this is much milder, and more favorable for neutrals than our practice. The being a certain time in the enemy's custody, or *intra mœnia*, transfers the property to the captor. This was held in the late well-known case of the Spanish prize, captured by the French, and re-captured by the English. It is to be observed, however, that a principle of reciprocity is pursued, and that we give the same indulgence to the neutral which they would have given us in a similar case.

Having proved that the Statira was not liable to confiscation, on the ground of her being in the hands of an enemy, the commissary considers whether her cargo was ground of confiscation. Upon this point, he considers two questions; 1st. Whether, in point of law, the character of the vessel, neutral or not, should be determined by the nature of the cargo? 2d. Whether the cargo consisted of contraband? He then reviews all the laws upon this head. He shows, that until the decree of the 29th Nivose (year 6), January 18th, 1798, the regulation states, "His majesty prohibits all privateers to stop and bring into the ports of the kingdom the ships of neutral powers, even though coming from, or bound to, the ports of the enemy, with the exception of those carrying supplies to places blockaded, invested or besieged. With regard to the ships of neutral states, laden with contraband commodities for the enemy, they may be stopped,

*104] and the said commodities shall be seized and confiscated, but the vessels and the *residue of their cargo shall be restored, unless the said contraband commodities constituted three-fourths of the value of the cargo, in which case, the ship and cargo shall be wholly confiscated. His majesty, however, reserves the right of revoking the privileges above granted, if the enemy do not grant a reciprocal indulgence in the course of six months from the date hereof."

The law of the 29th Nivose (year 6) overturned all this system, and enacted, "that the state of ships, in regard to their being neutral or hostile, should be determined by their cargo; that accordingly, every vessel found at sea, laden in whole or in part with commodities coming from England, or its possessions, should be declared good prize,

The Charming Betsy.

1. That the *role d'equipage*, wants the place of nativity of the crew. But according to the opinion of Portalis, this is not a fatal defect, nor is it, of itself, a sufficient ground for condemnation.

*2. That more than one-third of the crew were enemies of France. [*106
The word *matelot*, in the ordinance of 1778, means a sailor, in contradistinction to the captain or master. Exclude the master, and there were only ten persons on board, and only three of those are pretended to be enemies; so that one-third were not enemies, within the meaning of the ordinance.

But these three pretended enemies were Americans. The hostilities which existed between France and the United States amounted at most to a partial, limited war, according to the decision of this court in the case of *Bas* v. *Tingy*. It was only a war against French armed force found on the high seas. It did not authorize private hostilities between the citizens of the

---

whoever might be owners of their articles and commodities." The severity of this regulation the commissary condemns, but as the Statira was captured while it was in force, the captor was entitled to have the capture tried by it.

He examines next how the regulation applies, premising his opinion, that such regulations are improperly styled laws, and they are essentially variable *pro temporibus et causis;* that they should always be tempered by wisdom and equity. He adverts to the words "in whole or in part." By the whole, he says, ought to be understood a great part, according to the judicial maxim *parum pro nihilo habetur*. Upon this principle, then, he is of opinion, that a ship ought not to be subject to confiscation, even under the law of the 29th Nivose, unless such a part of the cargo comes under the description of what is there made contraband, as ought to excite a presumption of fraud against all the rest. What that part should be, is not capable of definition, but should be left to the enlightened equity and sound discretion of the judge.

The Statira had on board sixty barrels of turpentine and forty barrels of pitch. The captor contended that these were contraband; the captured said, that by the treaty of 1778 with the Americans, they were not enumerated as contraband. But the commissary shows, that the Americans, by the treaty, were bound to admit the French to all the advantages of the most favorite nations; that having, in a subsequent treaty with England, made pitch contraband, with respect to the latter, necessarily, it became contraband with regard to France. The learned commissary, however, thinks, that even upon the principle of the law of the 24th Nivose, the quantity of pitch was too small to justify confiscation.

In the next place, the captor alleged that 2911 pieces of Campeachy wood, part of the cargo of the Statria, was the produce of English possessions. This point, however, had not been regularly ascertained, as the report on the subject was made without the captured being called as a party. The commissary states, however, strong circumstances of suspicion on this head. The captured had not appealed against the confiscation of the cargo; the point came under the consideration of the court, on the appeal of the captor, who wanted to get both ship and cargo. The commissary, therefore, saw no reason for condemning the ship, which was clearly neutral; but on account of the suspicions against the character of the cargo, he thought no indemnification whatever was due to the captured. Judgment was pronounced accordingly.

The piratical decree of the 29th Nivose (year 6), mentioned above, with so much severity by Portalis, has been repealed, and things have been placed upon the footing of the regulation of 1778; that is, the French are to treat neutrals in regard to contraband, in the same way in which they are treated by us; they will not allow the Americans to carry into England a commodity which the English would seize as contraband going into the ports of France.

two countries. Individuals are only enemies to each other, in a general war. The war extended only to those objects pointed out in the acts of congress; as to everything else, the state of the two nations was to be considered as a state of peace. It was a war only *quoad hoc*. The individuals of the two nations were always neutral to each other. A citizen of the United States could only be considered as an enemy of France, while in arms against her; the neutrality was the counterpart, or (to use a mathematical expression) the complement of the war. A citizen of the United States, peaceably navigating a neutral vessel, could not be burdened with the character of enemy.

3. The master was a Scot by birth. The ordinance cited from 1 Code des Prises, 303, § 6, in support of this objection, is in the alternative. The master of the vessel must be naturalized in a neutral country, or must have transferred his domicil to the neutral country, three months before the first of September in that year. Naturalization is not necessary, if there be such a transfer of the domicil; and the domicil is not necessary, if the party be naturalized. But the authority of Portalis shows that these decrees are not
*107] to be considered as laws, but *sub modo*. *They are only regulations made at particular times, for particular purposes.

If the same evidence had been produced at Guadaloupe, which has been brought here (and the same would have been more easily obtained there), there can be no doubt the vessel would have been restored. It is in evidence, that other vessels of Mr. Shattuck had been released. No salvage can be allowed, unless the danger was imminent, not problematical.

IV. Under all the circumstances of the case, Captain Murray acted illegally, and is liable for damages; which have been properly assessed. His subsequent conduct rendered the transaction tortious, *ab initio*. If he was justified in rescuing the vessel from the hands of the French, his subsequent detention of the vessel, and the sale of the cargo at Martinique, by his own agent, without condemnation, were unauthorized acts, in violation of the rights of neutrality. The libel says nothing of the cargo: it is first mentioned in the replication. The libel only prays condemnation of the vessel, on the ground of violation of the non-intercourse law.

By law, he was bound to bring the vessel and cargo into a port of the United States for adjudication, and had no authority to sell the cargo, before condemnation. As to the pretence of her being an armed French vessel, he ought to have sent the arms into port with the vessel, as the only evidence of their existence.

The commander of the French privateer, in his commission to the prize-master, calls her the Danish schooner Charming Betsy, William Wright, master. There was no evidence to impeach the credence due to the papers
*108] found on board of her, and which at that *time had every appearance of fairness, and which have since been incontestably proved to be genuine.

The facts stated in the *procês verbal* are, that she had no log-book; that the mate declared himself to be an American; that the flag and pendant were American; that the Danish flag had been made, during the chase, which was confirmed by the two boys, and that she had no pass from the French consul. Whatever weight might be given to these facts, if true, yet the outrageous and disorderly conduct of the crew of the privateer,

entirely destroys the credit of the *procès verbal*, and at best, it would be only the declaration of interested plunderers.

But it is said, that, by the law of nations, probable cause is a sufficient excuse; and that this law operates as the law of nations. In revenue laws, probable cause is no justification, unless it is made so by the laws themselves. This is not a war measure. If the United States were at war, it was unnecessary, because the act of trading with an enemy is itself a ground of condemnation. This law was passed, because the United States were not at war, and wished to avoid it, by showing their power over the French colonies in the West Indies. It is a municipal regulation, as well suited to a state of peace as of war. It affects our own citizens only. It is no part of the law of nations. What would other nations call it, were they bound to notice it? It can give no right to search and seize neutrals. It could not affect their rights.

He who takes, must take at his peril. The law only gives authority to seize vessels of the United States. If he takes the vessel of another nation, he must answer it.

As to the damages. Nothing can justify Captain Murray; but it was a mistake of the head, not of the heart. His intentions were honest and correct, but he suffered his suspicions to carry him too far. If it was an error in judgment, shall he have salvage? If an injury has been done to the innocent and unfortunate *owner, shall he have no redress? The consequences to him were the same, whatever might have been the motive. [*109 The damages have been properly assessed in the district court. If damages are to be given, they ought not to be less than the original cost of vessel and cargo, with the outfit, insurance, interest and expenses; and upon calculation, it will be found, that the damages assessed do not exceed the amount of these.(*a*)

Dallas.—It is said, that Mr. Shattuck never was a citizen of the United States. What is averred and admitted need not be proved. Mr. Soderstrom, in his rejoinder, expressly admits that he was once a citizen of the United States by alleging that he had transferred his allegiance from the government of the United States to his Danish majesty. Mr. Shattuck's burgher's brief is, at length, for the first time, produced and admitted to be made a part of the record. It bears date on the 10th of April 1797. It may here be remarked, that some of the witnesses have testified, that he became a burgher in 1795. This shows how little reliance ought to be placed upon their testimony. If, then, Mr. Shattuck did expatriate himself, it was not until April 1797. It has been conceded, that a man cannot expatriate himself unless it be done in a fit time, with fairness of intention, and publicity of act.

As to the fitness of the time. What was the situation of this country and France in the year 1797? In 1795, the British treaty had excited the jealousy of France. In 1796, she passed several edicts highly injurious to

(*a*) MARSHALL, Ch. J.—What would have been the law as to probable cause, if there had been a public general war between France and the United States, and the vessel had been taken on suspicion of being a vessel of the United States, trading with the enemy, contrary to the laws of war? Would probable cause excuse, in such a case, if it should turn out that she was a neutral?

our commerce. Mr. Pinckney had been sent as an envoy extraordinary, and was refused. France had gone on in a long course of injury and insult, which at *length roused the spirit of the nation. On the 14th of *110] June 1797, the act of congress was passed, prohibiting the exportation of arms; on the 23d, the act for the defence of the ports and harbors of the United States; on the 24th, the act for raising 80,000 militia; on the 1st July, the act providing a naval armament; on the 13th of June 1798, the first non-intercourse bill was passed, and on the 7th of July, the treaties with France were annulled. These facts show that the time when Mr. Shattuck chose to expatriate himself, was a time of approaching hostilities, and when everything indicated war.

As to the fairness of his intention. The same facts show what that intention was. It was to carry on that trade which everything tended to show would soon become criminal by the laws of war, and from the exercise of which the other citizens of the United States were about to be interdicted. The act of congress points to this very case. It was to prevent transactions of this nature, that the word "elsewhere" was inserted.

But why was not this burgher's brief, or a copy of it, put on board the vessel? The answer is obvious, because it would have discovered the time of expatriation, which would have increased the suspicions excited by the origin of the vessel, by the recent transfer, by the nature of the cargo, and by the character of the crew. Domicil in a neutral country gives a man only the rights of trade; it will not justify him in a violation of the laws of his country.

If, then, Mr. Shattuck could not expatriate himself, or if he has not expatriated himself, he is bound to obey the laws of the United States. A nation has a right to bind, by her laws, her own citizens residing in a foreign country; as the United States have done in the act of congress respecting the slave-trade, and in the non-intercourse law.

The question, whether the vessel was capable of annoying our commerce, depends upon matter of fact, of which *the court will judge. The *111] number of men was sufficient; the testimony respecting the cutlasses is supported by the nature of the transaction, and by the usage in such cases. Some arms were necessary to prevent Captain Wright and his boys from rising and rescuing the vessel. Circumstances are as strong as oaths, and are generally more satisfactory. The vessel, having port-holes, was constructed for war, and in an hour after her arrival at Guadaloupe, might have been completely equipped. Upon the principles of the case of *Talbot* v. *Seeman*, Captain Murray was bound to guard against this, and he would have been culpable, if he had suffered her to escape.

But it is said, that she was not in danger of condemnation by the French, because France had ceased from her violation of the laws of nations, because she had repealed the obnoxious *arrêt* of 18th January 1798, and because one-third of the crew were not her enemies. Admitting all this, yet if one ground of condemnation remained, she would have been condemned. The vessel was transferred from an enemy to a neutral, during the heat of hostilities. This alone was a sufficient ground of condemnation, under the ordinance already cited from 1 Code des Prises, 304, art. 7. In the case of *Talbot* v. *Seeman*, the ground of salvage was, that the vessel was liable to con-

demnation under a French *arrêt*. And that the courts of France were bound to carry the *arrêt* into effect.

The conduct of Captain Murray was not illegal. He was bound, by law, as well as by his instructions, to take the vessel out of the hands of the French. It was with the consent, if not at the request, of Captain Wright; and it was, in itself, an act of humanity. His conduct was fair, upright and honorable in the whole transaction. He offered to take security for the vessel and cargo. The cargo was perishable: if it had been brought to the United States, it would not have been in a merchantable condition; or if it had been, it would not have sold so high here (being chiefly articles of American produce) as at Martinique. The sale was fair, and the proceeds brought to the United States to wait the event of the trial.

Probable cause is a thing of maritime jurisdiction; and authorities in point may be found, even at common law. *If it is a municipal regulation, it is one which affects the whole world. It is engrafted upon [*112 the law of nations. It is municipal only as it emanates from the municipal authority of the nation. But the whole world is bound to notice a law which affects the interests of all nations in the world.

As to the damages. The principles upon which they are assessed do not appear from the report of the assessors, but the probability is, that they were founded upon the estimates of the probable profits of the voyage, as stated in the testimony of some of the witnesses. In a case of this kind, where the purity of intention is admitted, it can never be proper to give speculative or vindictive damages.(*a*)

Martin, in reply.—1. As to the national character of Shattuck. He was born before the revolution; probably, in 1773 or 1774; at least twenty-one years before April 10th, 1797, which will bring it before the declaration of independence. In *Duane's Case*, it was decided, that even if it had been proved, that he was born in New York, yet his birth being before the revolution, and having been carried to Ireland, during his minority, he was an alien.

The rejoinder of Mr. Soderstrom does not admit the fact, that Shattuck was a citizen of the United States; but if it did, it is coupled with an express allegation that he had duly expatriated himself; and if part is taken, the whole must be taken. The words of the rejoinder are, "and this party expressly alleges and avers that the said Jared Shattuck, at the several times and periods above mentioned, and long before, and in the intermediate times which elapsed between the said several times or periods, had been, then was, ever since hath been, and now is, a subject of his majesty the king of Denmark, owing allegiance to his *said majesty, and to no [*113 other prince, potentate, state or sovereignty whatever; and that he the said Jared Shattuck had, long before his said purchase of the said schooner, duly expatriated himself from the dominions of the United States, to those of his said majesty; and transferred his allegiance and subjection from the said United States and their government, to his said majesty and

(*a*) In answer to an inquiry by the Chief Justice, for authorities to support the position that probable cause is always a justification, in maritime cases, Mr. Dallas referred generally to Brown's Civil and Admiralty Law, and to the decisions of Sir Wm. Scott.

his government." The whole purport of which is, that if he was ever a citizen of the United States, he had expatriated himself.

Even if it was an admission of the fact, yet it could not prejudice Mr. Shattuck, as the rejoinder is by Mr. Soderstrom, in character of consul of Denmark, and as the representative of the nation. If he was born before the revolution, he never owed natural allegiance to the United States; and if he remained here, after the revolution, during part of his minority, he owed only a temporary and local allegiance; during the existence of which, if he had taken up arms against the United States, he would have been guilty of treason. But that allegiance continued only while he was a resident of the country; he had a right to transfer such temporary allegiance whenever he pleased. Foster's Cr. Law 183, 185.

That he acted with a fair and honest intention is proved, by his *bonâ fide* residence and domicil for ten or eleven years. 2 Browne's Civil and Admiralty Law 328. The navigation act of Great Britain is a municipal law, and yet a *bonâ fide* domicil and residence of foreigners, were held sufficient to bring the persons within its provisions. *Scott, qui tam*, v. *Schawrtz*, Comyns 677.(*a*)

*114] *But a stronger case than that is found in 1 Bos. & Pul. 430 (*Marryatt* v. *Wilson*), in the exchequer chamber, on a writ of error from the king's bench. In that case, a natural-born British subject, naturalized in the United States, since the peace, was adjudged to be a citizen of the United States, within the treaty and navigation acts of Great Britain, so as to carry on a direct trade from England to the British East Indies. The opinion of Eyre, Ch. J., beginning in p. 439, is very strong in our favor.

There is no probability that the vessel would have been condemned at Guadaloupe. Mr. Shattuck, and his course of trade, were well known there, and they had already released some of his vessels. Another reason is, that Bonaparte was at that time negotiating with the northern powers of Europe, to form a coalition to support the principle that free ships should make free goods; and he would have succeeded, but for the able negotiations of Lord Nelson at Copenhagen.

In Park on Insurance 363, it is said, "If the ground of decision appear to be, not on the want of neutrality, but upon a foreign ordinance mani-

---

(*a*) The case of *Scott* v. *Schwartz* was an information against the Russian ship The Constant, because the master and three-fourths of the mariners were not of that country or place, according to the statute of 12 Car. II., c. 18, § 8. The ship was built in Russia, and the cargo was the product of that country. The master was born out of the Russian dominions, but in 1733, was admitted, and ever since continued, a burgher of Riga; and had been a resident there, when not engaged in foreign voyages, and traded from thence nine years before the seizure. There were only eleven mariners on board, of whom four were born in Russia. Morgan, a fifth, was born in Ireland, and there bound apprentice to the master, and as such went with him to Riga, and from three or four years before the seizure, served on board the same ship, and sailed therein from Riga, on this and former voyages. The other six were born out of the dominions of Russia, but Stephen Hanson, one of them, had resided at Riga eight years next before the seizure; Hans Yasper five years; Rein Steingrave four years, and Derrick Andrews, the cook, seven years; and these four, during those years, had sailed from Riga in that and other vessels. It was adjudged, that these people were of that country or place, within the meaning of the statute, and the vessel properly manned and navigated.

festly unjust, and contrary to the law of nations, and the insured has only infringed such a partial law; as the condemnation did not proceed on the point of neutrality, it cannot apply to the warranty so as to discharge the insurer." And in support of this position he cites the case of *Mayne* v. *Walter*.

There is no ordinance of France, which, upon the principles established in the case of *The Pigou*, would have been a sufficient ground of condemnation. *The circumstances required by those ordinances are only evidence of neutrality, which is always a question of *bona fides*. A condemnation [*115 upon either of these ordinances alone, would have been contrary to the law of nations; but if they are considered as only requiring certain circumstances, tending to establish the fact of neutrality, they are perfectly consistent with that law. This is the light in which they have been considered by Portalis. The French have never considered our vessels as the vessels of an enemy. Our vessels have not been condemned by them as enemy property; but their sentences have always been grounded upon a pretended violation of some particular ordinance of France. Hence, it appears, that they would not have considered an American vessel, sold to a Dane, as an enemy's vessel transferred to a neutral during a state of war.

But the claim of salvage is an afterthought. It was not necessary to bring her to the United States to obtain salvage. Salvage is a question of the law of nations, and may be decided by the courts of any civilized nation. Instead of rendering a service, he has done a tenfold injury. Captain Murray's intentions were undoubtedly correct and honorable, and we do not wish vindictive damages; but Mr. Shattuck will be a loser, even if he gains his cause, and recovers the damages already assessed. Probable cause cannot justify the taking and bringing in a neutral; but it may prevent vindictive damages.

February 22d, 1804. MARSHALL, Ch. J., delivered the opinion of the court.—The Charming Betsy was an American built vessel, belonging to citizens of the United States, and sailed from Baltimore, under the name of the Jane, on the 10th of April 1800, with a cargo of flour for St. Bartholomew; she was sent out for the purpose of being sold. The cargo was disposed of at St. Bartholomew; but finding it impossible to sell the vessel at that place, the master proceeded with her to the island of St. Thomas, where she was disposed of to Jared Shattuck, who changed her name to that of the Charming Betsy, *and having put on board her a cargo consisting [*116 of American produce, cleared her out, as a Danish vessel, for the island of Guadaloupe.

On her voyage, she was captured by a French privateer, and eight hands were put on board her for the purpose of taking her into Guadaloupe as a prize. She was afterwards re-captured by Captain Murray, commander of the Constellation frigate, and carried into Martinique. It appears, that the master of the Charming Betsy was willing to be taken into that island; but when there, he claimed to have his vessel and cargo restored, as being the property of Jared Shattuck, a Danish burgher.

Jared Shattuck was born in the United States, but had removed to the island of St. Thomas, while an infant, and was proved to have resided there ever since the year 1789 or 1790. He had been accustomed to carry on trade as a Danish subject; had married a wife and acquired real

property in the island, and also taken the oath of allegiance to the crown of Denmark in 1797.

Considering him as an American citizen, who was violating the law prohibiting all intercourse between the United States and France, or its dependencies, or the sale of the vessel as a mere cover to evade that law, Captain Murray sold the cargo of the Charming Betsy, which consisted of American produce, in Martinique, and brought the vessel into the port of Philadelphia, where she was libelled under what is termed the non-intercourse law. The vessel and cargo were claimed by the consul of Denmark as being the *bonâ fide* property of a Danish subject.

This cause came on to be heard before the judge for the district of Pennsylvania, who declared the seizure to be illegal, and that the vessel ought to be restored, and the proceeds of the cargo paid to the claimant, or his lawful agent, together with costs and such damages as should be assessed by the clerk of the court, who was directed to inquire into and report the amount thereof; for which purpose, he was also directed to associate with himself two intelligent merchants of the district, and duly inquire what damage Jared Shattuck had sustained by reason of the premises. If
*117] they should be of opinion that the *officers and crew of the Constellation had conferred any benefit on the owners of the Charming Betsy, by rescuing her out of the hands of the French captors, they were, in the adjustment, to allow reasonable compensation for the service.

In pursuance of this order, the clerk associated with himself two merchants, and reported that having exmained the proofs and vouchers exhibited in the cause, they were of opinion, that the owner of the vessel and cargo had sustained damage to the amount of $20,594.16, from which is to be deducted the sum of $4363.86, the amount of moneys paid into court arising from the sales of the cargo, and the further sum of $1300, being the residue of the proceeds of the said sales remaining, to be brought into court, $5663.86. This estimate is exclusive of the value of the vessel, which was fixed at $3000. To this report, an account is annexed, in which the damages, without particularizing the items on which the estimate was formed, were stated at $14,930.30.

No exceptions having been taken to this report, it was confirmed, and, by the final sentence of the court, Captain Murray was ordered to pay the amount thereof. From this decree, an appeal was prayed to the circuit court, where the decree was affirmed so far as it directed restitution of the vessel, and payment to the claimant of the net proceeds of the sale of the cargo in Martinique, and reversed for the residue. From this decree, each party has appealed to this court.

It is contended on the part of the captors, in substance, 1st. That the vessel Charming Betsy and cargo are confiscable under the laws of the United States. If not so, 2d. That the captors are entitled to salvage. If this is against them, 3d. That they ought to be excused from damages,
*118] *because there was probable cause for seizing the vessel and bringing her into port.

1. Is the Charming Betsy subject to seizure and condemnation for having violated a law of the United States? The libel claims this forfeiture, under the act passed in February 1800, further to suspend the commercial intercourse between the United States and France and the dependencies

thereof. That act declares, "that all commercial intercourse," &c. It has been very properly observed, in argument, that the building of vessels in the United States for sale to neutrals, in the islands, is, during war, a profitable business, which congress cannot be intended to have prohibited, unless that intent be manifested by express words, or a very plain and necessary implication. It has also been observed, that an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains, and consequently, can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country. These principles are believed to be correct, and they ought to be kept in view, in construing the act now under consideration.

The first sentence of the act which describes the persons whose commercial intercourse with France, or her dependencies, is to be prohibited, names any person or persons resident within the United States, or under their protection. Commerce carried on by persons within this description is declared to be illicit. From persons the act proceeds to things, and declares explicitly the cases in which the vessels employed in this illicit commerce shall be forfeited. Any vessel owned, hired or employed, wholly or in part, by any person residing within the United States, or by any citizen thereof, residing elsewhere, which shall perform certain *acts [*119
recited in the law, becomes liable to forfeiture. It seems to the court, to be a correct construction of these words, to say, that the vessel must be of this description, not at the time of the passage of the law, but at the time when the act of forfeiture shall be committed.

The cases of forfeiture are, 1st. A vessel of the description mentioned, which shall be voluntarily carried, or shall be destined, or permitted to proceed to any port within the French republic. She must, when carried, or destined, or permitted to proceed to such port, be a vessel within the description of the act. The second class of cases are those where vessels shall be sold, bartered, intrusted or transferred, for the purpose that they may proceed to such port or place. This part of the section makes the crime of the sale dependent on the purpose for which it was made. If it was intended, that any American vessel, sold to a neutral, should, in the possession of that neutral, be liable to the commercial disabilities imposed on her while she belonged to citizens of the United States, such extraordinary intent ought to have been plainly expressed; and if it was designed to prohibit the sale of American vessels to neutrals, the words placing the forfeiture on the intent with which the sale was made ought not to have been inserted. The third class of cases are those vessels which shall be employed in any traffic by or for any person resident within the territories of the French republic, or any of its dependencies. In these cases, too, the vessels must be within the description of the act, at the time the fact producing the forfeiture was committed.

The Jane having been completely transferred, in the island of St. Thomas, by a *bonâ fide* sale, to Jared Shattuck, and the forfeiture alleged to have accrued on a fact subsequent to that transfer, the liability of the vessel to forfeiture must depend on the inquiry, whether the purchaser was within the description of the act.

Jared Shattuck having been born within the United *States, and [*120

not being proved to have expatriated himself, according to any form prescribed by law, is said to remain a citizen, entitled to the benefit, and subject to the disabilities, imposed upon American citizens; and therefore, to come expressly within the description of the act which comprehends American citizens residing elsewhere.

Whether a person born within the United States, or becoming a citizen according to the established laws of the country, can divest himself absolutely of that character, otherwise than in such manner as may be prescribed by law, is a question which it is not necessary at present to decide. The cases cited at bar, and the arguments drawn from the general conduct of the United States on this interesting subject, seem completely to establish the principle, that an American citizen may acquire, in a foreign country, the commercial privileges attached to his domicil, and be exempted from the operation of an act expressed in such general terms as that now under consideration. Indeed, the very expressions of the act would seem to exclude a person under the circumstances of Jared Shattuck. He is not a person under the protection of the United States. The American citizen who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of his own government; and if, without the violation of any municipal law, he should be oppressed unjustly, he would have a right to claim that protection, and the interposition of the American government in his favor, would be considered as a justifiable interposition. But his situation is completely changed, where, by his own act, he has made himself the subject of a foreign power. Although this act may not be sufficient to rescue him from punishment for any crime committed against the United States, a point not intended to be decided, yet it certainly places him out of the protection of the United States, while within the territory of the sovereign to whom he has sworn allegiance, and consequently, takes him out of the description of the act.

*121] It is, therefore, the opinion of the court, that the *Charming Betsy, with her cargo, being at the time of her re-capture the *bonâ fide* property of a Danish burgher, is not forfeitable, in consequence of her being employed in carrying on trade and commerce with a French island.

2. The vessel not being liable to confiscation, the court is brought to the second question, which is—Are the re-captors entitled to salvage?

In the case of *The Amelia* (1 Cr. 1), it was decided, on mature consideration, that a neutral armed vessel, in possession of the French, might, in the then existing state of hostilities between the two nations, be lawfully captured; and if there were well-founded reasons for the opinion, that she was in imminent hazard of being condemned as a prize, the re-captors would be entitled to salvage. The court is well satisfied with the decision given in that case, and considers it as a precedent not to be departed from in other cases attended with circumstances substantially similar to those of the Amelia. One of these circumstances is, that the vessel should be in a condition to annoy American commerce.

The degree of arming which should bring a vessel within this description has not been ascertained, and perhaps, it would be difficult precisely to mark the limits, the passing of which would bring a captured vessel within the description of the acts of congress on this subject. But although there

may be difficulty in some cases, there appears to be none in this. According to the testimony of the case, there was on board but one musket, a few ounces of powder and a few balls. The testimony respecting the cutlasses is not considered, as showing that they were in the vessel at the time of her re-capture. The capacity of this vessel for offence appears not sufficient to warrant the capture of her as an armed vessel. Neither is it proved to the satisfaction of the court, that the Charming Betsy was in such imminent hazard of being condemned, as to entitle the re-captors to salvage.

*It remains to inquire, whether there was in this case such probable cause for sending in the Charming Betsy for adjudication, as will [*122 justify Captain Murray for having broken up her voyage, and excuse him from the damages sustained thereby. To effect this, there must have been substantial reason for believing her to have been at the time, wholly or in part, an American vessel, within the description of the act; or hired or employed by Americans; or sold, bartered or trusted for the purpose of carrying on trade to some port or place belonging to the French republic.

The circumstances relied upon are, principally, 1st. The *procês verbal* of the French captors. 2d. That she was an American built vessel. 3d. That the sale was recent. 4th. That the master was a Scotchman, and the muster-roll showed that the crew were not Danes. 5th. The general practice in the Danish islands of covering neutral property.

The *procês verbal* contains an assertion that the mate declared that he was an American, and that their flag had been American, and had been changed, during the cruise, to Danish, which declaration was confirmed by several of the crew. If the mate had really been an American, the vessel would not, on that account, have been liable to forfeiture, nor would that fact have furnished any conclusive testimony of the character of the vessel. The *procês verbal*, however, ought for several reasons to have been suspected. The general conduct of the French West India cruisers, and the very circumstance of declaring that the Danish colors were made during the chase, were sufficient to destroy the credibility of the *procês verbal*. Captain Murray ought not to have believed that an American vessel, trading to a French port, in the assumed character of a Danish bottom, would have been without Danish colors.

*That she was an American vessel, and that the sale was recent, [*123 cannot be admitted to furnish just cause of suspicion, unless the sale of American built vessels had been an illegal or an unusual act. That the master was a Scotchman, and that the names of the crew were not generally Danish, are circumstances of small import, when it is recollected, that a very great proportion of the inhabitants of St. Thomas are British and Americans. The practice of covering American property in the islands might and would justify Captain Murray in giving to other causes of suspicion more weight than they would otherwise be entitled to, but cannot be itself a motive for seizure. If it was, no neutral vessel could escape, for this ground of suspicion would be applicable to them all.

These causes of suspicion, taken together, ought not to have been deemed sufficient to counterbalance the evidences of fairness with which they were opposed. The ship's papers appear to have been perfectly correct, and the information of the master, uncontradicted by those belonging to the vessel who were taken with him, corroborated their verity. No circumstance ex-

isted which ought to have discredited them. That a certified copy of Shattuck's oath, as a Danish subject, was not on board, is immaterial, because, being apparently on all the papers a burgher, and it being unknown that he was born in the United States, the question, whether he had ceased to be a citizen of the United States, could not present itself.

Nor was it material, that the power given by the owners of the vessel to their master to sell her in the West Indies, was not exhibited. It certainly was not necessary, to exhibit the instructions under which the vessel was acquired, when the fact of acquisition was fully proved by the documents on board, and by other testimony.

Although there does not appear to have been such cause to suspect the Charming Betsy and her cargo to have been American, as would justify Captain Murray in bringing her in for adjudication, yet many other circumstances combine with the fairness of his character, to *produce a conviction, that he acted upon correct motives, from a sense of duty; for which reason this hard case ought not to be rendered still more so, by a decision in any respect oppressive.

*124]

His orders were such as might well have induced him to consider this as an armed vessel within the law, sailing under authority from the French republic; and such too as might well have induced him to trust to very light suspicions respecting the real character of a vessel, appearing to belong to one of the neutral islands. A public officer, intrusted on the high seas to perform a duty deemed necessary by his country, and executing according to the best of his judgment the orders he has received, if he is a victim of any mistake he commits, ought certainly never to be assessed with vindictive or speculative damages. It is not only the duty of the court to relieve him from such, when they plainly appear to have been imposed on him, but no sentence against him ought to be affirmed, where, from the nature of the proceedings, the whole case appears upon the record, unless those proceedings are such as to show on what the decree has been founded, and to support that decree.

In the case at bar, damages are assessed as they would be by the verdict of the jury, without any specification of items, which can show how the account was made up, or on what principles the sum given as damages was assessed. This mode of proceeding would not be approved of, if it was even probable, from the testimony contained in the record, that the sum reported by the commissioners of the district court was really the sum due. The district court ought not to have been satisfied with a report, giving a gross sum in damages, unaccompanied by any explanation of the principles on which that sum was given. It is true, Captain Murray ought to have excepted to this report. His not having done so, however, does not cure an error apparent upon it, and the omission to show how the damages which were given had accrued, so as to enable the judge to decide on the propriety of the assessment of his commissioners, is such an error.

Although the court would in any case disapprove of this mode of proceeding, yet, in order to save the parties the cost of further prosecuting this business in the circuit *court, the error which has been stated might have been passed over, had it not appeared probable, that the sum, for which the decree of the district court was rendered, is really greater than it

*125]

ought to have been, according to the principles by which the claim should be adjusted.

This court, therefore, is not satisfied with either the decree of the district or circuit court, and has directed me to report the following decree:

Decree of the Court.—This cause came on to be heard, on the transcript of the record of the circuit court, and was argued by counsel; on consideration whereof, it is adjudged, ordered and decreed as follows, to wit: That the decree of the circuit court, so far as it affirms the decree of the district court, which directed restitution of the vessel, and payment to the claimant of the net proceeds of the sale of the cargo in Martinique, deducting the costs and charges there, according to amount exhibited by Captain Murray's agent, being one of the exhibits in the cause, and so far as it directs the parties to bear their own costs, be affirmed; and that the residue of the said decree, whereby the claim of the owner to damages for the seizure and detention of his vessel was rejected, be reversed.

And the court, proceeding to give such further decree as the circuit court ought to have given, doth further adjudge, order and decree, that so much of the decree of the district court as adjudges the libellant to pay costs and damages, be affirmed; but that the residue thereof, by which the said damages are estimated at $20,594.16, and by which the libellant was directed to pay that sum, be reversed and annulled. And this court does further order and decree, that the cause be remanded to the circuit court, with directions to refer it to commissioners, to ascertain the damages sustained by the claimants, in consequence of the refusal of the libellant to restore the vessel and cargo at Martinique, and in consequence of his sending her into a port of the United States for adjudication; and that the said commissioners be instructed to take the actual prime cost of the cargo and vessel, with interest thereon, including *the insurance actually paid, and such expenses as were necessarily sustained in consequence of bringing the vessel into the United States, as the standard by which the damages ought to be measured. Each party to pay his own costs in this court, and in the circuit court. All which is ordered and decreed accordingly. (*a*) [*126

Capron *v.* Van Noorden.

Absence of jurisdiction.

A plaintiff may assign for error, the want of jurisdiction in that court to which he has chosen to resort.

A party may take advantage of an error in his favor, if it be an error of the court.

The courts of the United States have not jurisdiction, unless the record shows that the parties are citizens of different states, or that one is an alien, &c.

Error to the Circuit Court of North Carolina. The proceedings stated Van Noorden to be late of Pitt county, but did not allege Capron, the plaintiff, to be an alien, nor a citizen of any state, nor the place of his residence.

(*a*) Captain Murray was reimbursed his damages, interest and charges, out of the treasury of the United States, by an act of congress, January 31st, 1805. (6 U. S. Stat. 56.)