

## Syllabus.

## THE WILLIAM BAGALEY.

1. Personal property left in a hostile country by an owner who abandons such country in order to go to the other belligerent, and so to return to his proper allegiance and soil, becomes, unless an effort is made with promptitude to remove it from such country, impressed with its character, and as such liable to the consequences attaching to enemy's property.
2. The presumption of the law of nations is against an owner who suffers such property to continue in the hostile country for much length of time.
3. The effect of war is to dissolve a partnership subsisting between citizens of nations at war; and if the person abandoning the hostile country, have had his property in partnership with citizens of the enemy country, it is his duty to dispose of, and withdraw his interest in the firm. If he do not, such interest is subject to the rule above stated with regard to individual property.
4. Ships in time of war are bound by the character impressed upon them by the government from which their documents issue and under whose flag and pass they sail. The share of a citizen in a ship sailing under an enemy's flag and papers, and who has had ample time and every facility to withdraw his effects from the enemy country, or dispose of such interests as could not be removed, but who has not attempted so to withdraw or dispose of them, is accordingly subject to capture and condemnation equally with the shares of enemies in the same ship. And where the cargo and ship are owned by the same person, the cargo follows the fate of the ship.
5. During the late rebellion, a loyal citizen domiciled at the time it broke out in one of the rebellious States, and trading there as a member of a commercial firm, abandoned it and removed to a loyal State. He never in any way aided or abetted the rebellion, but there was no evidence that he ever attempted or desired to withdraw his property from the rebellious region. In a year, more or less, after the rebellion broke out, the rebel authorities professed by one of their decrees to confiscate his interest in the firm; and the partners resident in the rebellious States—*he* having no connection with or knowledge of their action—loaded a ship which he alleged belonged to his firm when he left it, and which, in attempting, under papers, flag, officers, and crew of the Confederate States, to run the blockade established by the United States, two years before, of the Southern coast, was captured by a Federal cruiser. *Held*, that so much time having elapsed after the proclamation and before the confiscation and the capture, without effort on the part of the loyal owner to get it away from the rebellious region, his share in vessel and cargo was rightly condemned with the shares of the partners in rebel-

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lion ; that the alleged confiscation was no excuse for his not having previously made an effort to withdraw or dispose of his interest in the firm, and that neither his loyal domicile during the rebellion, nor, under the circumstances, the confiscation, nor his want of connection with or knowledge of the enterprise, nor all combined, defeated the right of the captors.

6. In proceedings in prize, parties who were not in any way parties to the litigation in the District Court, and are neither appellants nor appellees, cannot come into this court and be heard as "interveners."

APPEAL from the District Court for the Eastern District of Louisiana.

The steamer William Bagaley,—with a register issued at Mobile, June 16, 1863, under the authority of the "Confederate States," and reciting a previous enrolment in 1857 and a present ownership,—"property having changed,"—by Waring and others ("citizens of the Confederate States" and "trustees of association of stockholders"), with a master appointed by these trustees, and bearing the Confederate flag,—sailed from Mobile, July 17, 1863, during the blockade of that port, proclaimed April 19, 1861, by the United States, for Havana. Her cargo was of cotton, turpentine, &c. No papers were on board, for "fear of being captured." The "cotton was shipped for the benefit of the owners in Mobile." All the officers and crew were, with one exception, "citizens of the Confederate States." The master had instructions to escape the blockading vessels, but not to resist.

Being perceived by the blockading squadron, she was pursued, and, after a brisk chase, captured. Being brought into New Orleans and libelled for condemnation, a claim for one-sixth of the vessel and cargo was interposed by Joshua Bragdon, and of this sixth he prayed restitution.

The facts upon which he grounded his claim were, that he was, and for many years had been, a resident of the State of Indiana, a loyal State; that the firm of Cox, Brainerd & Co., of Mobile, Alabama, a rebel State, were the sole owners of the captured vessel and her cargo, of which firm the claimant had been for several years a member, and owned one-sixth interest in all the property of the copartnership, which in-

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terest he had never in any way transferred. That he was, and always had been, a true and loyal citizen of the United States, and that he had never, in any way, aided or abetted the rebellion, and after the breaking out of the same had never exercised any act of ownership or control over the property or the captured steamer, and that he had no connection with, or knowledge of, the unlawful voyage of the steamer which occasioned her capture. That in consequence of his loyalty, the so-called Confederate government seized all his interest and property in said firm of Cox, Brainerd & Co., and by a decree and process of one of her pretended courts, "at some time during the year 1862,—the exact date not known,"—confiscated the same. That all such acts and proceedings of the insurrectionary government were void, and that the title of the claimant to his property remains unimpaired.

On the trial these facts were admitted of record by the District Attorney as true. The court dismissed the claim with costs, and condemned both vessel and cargo.

No other claim having been interposed in the proceedings in the lower court for any portion of the captured property or its proceeds, the only question presented by the appeal was the legal sufficiency and merit of the claim of Bragdon for his one-sixth.

After the case came into this court by appeal, however, the owners of the remaining five-sixths filed a petition asking to intervene for *their* interests. Their excuse for not appearing or putting in any claim in the District Court, it may be here stated, was, that they were residents of a State hostile to the United States, and had therefore no standing in that court; that this disability continued till after the case was removed into this court by appeal. And they set up, as reason for the restitution of their shares to them, that since the appeal they had received from the President "a full pardon and amnesty for all offences by them committed arising from participation, direct or implied, in the said rebellion."

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*Messrs. Henry Crawford, S. S. Cox, and J. J. Lewis, for the appellants and for the petitioners :*

There is no dispute about the facts. The case is to be taken as a special verdict or case agreed on and stated.

I. We have, then, a question of good prize or lawful property—a contest between the government and a citizen, whom she admits to have been unshaken in his allegiance during a long rebellion, as to the right of the former to forfeit his property, or her duty to restore the same upon his application.

If the United States has warrant as against the admitted rightful owner to forfeit this property as good prize, it can only be on account of the commission of some offence against the law of nations. There are only two such offences which can be relative to the present case. We will treat them in their order.

1. *The claimant's property in vessel and cargo cannot be forfeited as enemy's property.*

To justify condemnation of property for such reason it is necessary to establish (a) the domicile of the owner in the enemy's country, or (b) the employment of the property, either actually or constructively, by him in illegal trade with the enemy.

(a) Since it is not the place where a thing is, which determines the nature of that thing, but the character of the person to whom it belongs, the general principle upon the subject has always been, that the domicile of the party is the true test of national character and determines the nature of property.\* And so the property of one resident in the enemy's territory is *res hostilis*, and the lawful subject of maritime capture.†

The question presented by this claim cannot be injuriously affected by the principle thus announced. The claimant here was not domiciled on the south side of what Grier, J.,‡ calls "the boundary marked by lines of bayonets, which can be

\* The Emanuel, 1 Robinson, 296; Upton's Laws of War, 113, 150.

† The Venus, 8 Cranch, 253; The Hoop, 1 Robinson, 196.

‡ Prize Cases, 2 Black, 635.

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crossed only by force;" nor had he at any time been "a citizen or subject of any State or district in insurrection against the United States;" but, on the contrary, as the government admits, was, and long had been, a resident loyal citizen of the State of Indiana.

(b) The other criterion of "enemy's property" is equally powerless to work a forfeiture. That test is thus defined by an eminent writer: "All the property of enemies found afloat, and all property of citizens or subjects conducting themselves as belligerents, may be lawfully captured."\*

This rule has been applied in such a multitude of cases that a cursory reference to the language employed by courts cannot fail to give a correct appreciation of its true meaning and limitation. In the leading case of *The Rapid*,† it is said:

"A citizen or ally may be engaged in a hostile trade, and thereby involve his property in the fate of those in whose cause he embarks."

Again, in another case:

"He incorporated himself into the permanent interests of the enemy."‡

In a third case, Sir William Scott says:

"By intendment of law, all property condemned is the property of enemies; that is, of persons so to be considered in the particular transaction."§

Text-writers proceed in the same way:

"He who clings to the profits of a hostile connection must be content to bear its losses also."||

Story, J., thus speaks:

"When a person is engaged in the commerce of the enemy

\* Phillimore, *International Law*, vol. 3, § 345.

† 8 Cranch, 155.

‡ *Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch, 191.

§ *The Elsebe*, 5 Robinson, 172.

|| *Upton's Maritime War*, 110; 1 *Kent's Commentaries*, 82.

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upon the same footing and with the same advantages as native resident subjects, his property employed in such trade is deemed incorporated in the general business of that country, and subject to confiscation, be his residence where it may.”\*

In the case of navigating under the pass or flag of the enemy, the party who uses them “is not at liberty,” it is said in *The Fortuna Verissimo*, “when they turn to his disadvantage, to deny the character which he has worn for his own benefit.”†

All these instances,—sailing under the enemy’s pass or flag; breach of blockade; carriage of contraband; establishment or continuance of a house of trade in the enemy’s country; illegal traffic with the enemy,—are cases of a *criminal voluntary adoption of the enemy character* by the citizen, odious violations of his duty to his government; and justice requires that all his ventures so employed be the rightful subjects of capture and condemnation as enemies’ property.

The application of this principle to the facts of the case at bar is not difficult. The claimant never was, at any time, within the insurrectionary lines; he had no dominion over his property after the inception of the rebellion, and he had no participation in, connection with, or knowledge of, the transaction of his former copartners.

Instead, therefore, of the claimant’s involving his property by “embarking in the cause” of the rebellion, within the meaning of the rule as laid down in *The Rapid*, he maintained his loyalty with such firmness that the rebel government confiscated his property as that of an alien enemy. He did not in any manner “incorporate himself into the permanent interest of the enemy.” He is not seeking, as was the claimant in *The Fortuna Verissimo*, “to deny the character which he has worn for his own benefit,” but he is striving

\* *San Jose Indiano*, 2 Gallison, 268; and see *Maisonaire v. Keating*, Id. 338; and *The Friendship*, 4 Wheaton, 105.

† 1 *Dodson*, 87; and see *The Success*, Id. 131; *The Hiram*, 1 Wheaton, 440; *The Vigilantia*, 1 Robinson, 13.

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to maintain, as best he may, the character of a consistently loyal citizen. Other than this he has neither sought nor worn. He has not been, in the language of Judge Story, "engaged in the commerce of the enemy, upon the same footing, and with the same advantages, as resident subjects," nor upon any footing or terms whatever. From the commencement of the rebellion, he stood aloof from his rebellious associates; he maintained his proper fealty; he turned his back upon his property situated within the control of the insurrectionary forces, trusting in the power of the government to reassert its supremacy, and in its honor to restore. He has "not clung to, nor received the profits of, any hostile connection," but in thought and act has remained true to his obligations as a citizen. He has not, in any manner, "conducted himself as a belligerent."

2. *The claimant's property cannot be decreed good prize for any breach of blockade, unless the offence was committed in his interest and in person or by agent.*

The breach of blockade is viewed in all cases as a criminal act. This necessarily implies a criminal intent, and, of course, a knowledge of the existence of the blockade and the determination to violate it.\*

The books bear testimony to the frequency with which the courts have enforced this discrimination between those who are wholly innocent, and those who are tainted with the corrupt design, and commit the overt act: the property of the one being restored, while full forfeiture is visited upon the latter. No doubt, it is a presumption of the law of prize, that a breach of blockade is committed in the interest of the cargo; and hence, *prima facie*, both vessel and cargo are subject to condemnation. Still if it be admitted that the owners of the cargo stood clear from even a possible intention of fraud, their property will be excepted from the penal consequence.†

The leading authorities upon this point will be found col-

\* The Betsy, 1 Robinson, 92; The Nancy, 1 Acton, 59.

† United States v. Guillem, 11 Howard, 62; The Exchange, 1 Edwards, 43; The Neptunus, 3 Robinson, 173; The Adonis, 5 Id. 228.

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lated in *United States v. Guillem*, in this court.\* There the vessel had been guilty of an undoubted violation of the law and was condemned accordingly, but upon the intervention of an innocent owner of a portion of the cargo, it was holden, that "if the owner can show that he did not participate in the offence, his property is not liable to forfeiture."

It is notable, also, how indulgently the courts construe the law in certain cases in favor of the personally innocent, even as against the wilful action of their agents. As when orders have been given for goods prior to the existence of a blockade, and it appears that there was not time for countermanding the shipment afterwards, the courts hold that the owner of the cargo is not responsible for the act of his enemy agent, who might have an interest in sending off the goods, in direct opposition to the interests of his principal.† Under similar circumstances‡ the cargo of an innocent neutral was restored; Sir William Scott saying:

"The rule that a principal is bound by the acts of his agent is obviously too rigid to be applied to a case where it is the interest of the agent to get the goods off, and run the risk of capture, while the principal is wholly innocent of the risk."

This broad distinction between guilty property which may be, and the goods of innocent owners which cannot be forfeited, is recognized throughout all the administration of the law of prize. The case of the carriage of contraband furnishes an illustration. Formerly, under a less refined dispensation of the international code, the presence of contraband articles worked a forfeiture of the ship, but this too rigid rule has been relaxed in modern times to a forfeiture of freight and expenses only, save in aggravated cases, or when the contraband articles belong to the owner of the vessel.§ To escape from the contagion of contraband, the in-

\* 11 Howard, 62.

† The Exchange, 1 Edwards, 39.

‡ The Neptunus, 3 Robinson, 173; and see The Adelaide, 3 Id. 281.

§ The Mercurius, 1 Robinson, 288; The Jonge Tobias, Id. 329; The Franklin, 3 Id. 217

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nocent articles must belong to a different owner,\* for the penalty of forfeiture extends only to all the property of the same owner involved in the same unlawful transaction.†

The distinction is also approved in the case of carriage of despatches, which works a forfeiture of the ship which conveys them, and *ob continentiam delicti* of the cargo if they belong to the same owner.‡

Also, in the case of the carriage of enemy's goods in the ship of a neutral, when although the specific property is subject to capture, the lien of the neutral for his freight cannot be divested or forfeited.§

While the accepted doctrine is, that a deliberate and continued resistance to search is followed by the legal consequence of forfeiture, this consequence cannot be visited upon the cargo when the owner is innocent of any participation in the unlawful resistance.||

Determined by these tests the interest of the claimant is obviously beyond the reach of forfeiture. He comes fairly within the exception stated in *United States v. Guillem*, as "he did not participate in the offence."

There is, however, another principle touching the law of blockade, borrowed from the general admiralty practice, and of frequent application. Recognizing the full force of the maxim *qui facit per alium facit per se*, the law of nations holds the owners of vessels to be accountable for the acts of those to whom they have intrusted the vessel, and in such cases decrees forfeitures or awards restitution of the owner's property according to the criminal or lawful conduct of their agents.

Phillimore thus notices the doctrine of agency :¶

"It is a general rule that ship and cargo are both confiscated

\* The *Staat Embden*, 1 Id. 26; Halleck's *International Law*, 573.

† 3 Phillimore's *International Law*, 372; *The Floreat Commercium*, 3 Robinson, 178; *The Sarah Christina*, 1 Id. 242.

‡ *The Atalanta*, 6 Id. 460.

§ *The Frances*, 8 Cranch, 418; *The Marianna*, 6 Robinson, 25.

|| *The Nereide*, 9 Cranch, 388.

¶ 3 *International Law*, 306.

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for a breach of blockade, but then an important distinction must be taken, viz., whether the owners of the cargo are, or are not identical with the owners of the ship. If they are not, the cargo is not confiscable, unless, before the goods were shipped, the owners were, or ought to have been, apprised of the existence of the blockade, or *unless it be shown that under the circumstances the act of the master personally binds them.*"

Sir William Scott in judicial decision holds similar language:\*

"In a case of breach of blockade, in order to make the conduct of the vessel affect the cargo, it is necessary that the owners were or might have been cognizant, or *to show that the act of the master of the ship personally binds them.* The master is the agent of the owners of the vessel, and can bind them by his contracts or misconduct, but he is not the agent of the owners of the cargo unless specially so constituted."

The reason for this rule of the owner's liability for his agent's conduct, is thus stated in one case by that great judge:†

"If the owner of the ship will place his property under the absolute management and control of persons who are capable of lending it to be made an instrument of fraud in the hands of the enemy, he must sustain the consequences of such misconduct on the part of his agent."

And elsewhere,‡ thus:

"Owners of cargo must answer to the country imposing the blockade, *for the acts of the persons employed by them.*"

So again, in the case of *The Columbia*.§

"This vessel came from America, as appears, with innocent

\* *The Mercurius*, 1 Robinson, 82; and see *The Mary*, 9 Cranch, 126; *The Neptunus*, 3 Robinson, 173.

† *The Ranger*, 6 Id. 126.

‡ *The James Cook*, 1 Edwards, 261.

§ 1 Robinson, 54; and see *The Calypso*, 2 Id. 161.

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intentions on the part of her American owners, for it was not known in America that Amsterdam was blockaded, and therefore there is no proof immediately affecting the owners. But a person *may* be penally affected by the misconduct of his agent as well as by his own acts; and *if he delegated general powers to others and they misuse their trust*, his remedy must be against them."

It is safe to assume that the authorities cited above, establish that no forfeiture can be incurred unless the offence was committed by some agent appointed by the owner, and touching the identical property intrusted to his care. If this be correct, it follows that the government fails to make out any case against the property of this appellant. It will be remembered that she admits, not only that he was personally innocent of all wrongful practices, but that since the beginning of the rebellion, he, "in no way exercised any act of ownership or control over his property, and that he had no connection with or knowledge of the unlawful conduct and voyage of the vessel, for which she was condemned as prize." He had appointed no agents; no one was upon the vessel representing or pretending to represent him, or whose wrongful conduct could in the estimation of a wise and just code be justly imputed to him. Neither was the voyage planned or prosecuted in his interest, for his rebellious copartners had the exclusive control of the property, while his interest was attempted to be divested by the rebellious government, and no matter how remunerative the illegal voyage might have proven if successful, it stands upon the record that "the claimant had no connection with or knowledge" of it. He had "employed" no one; "had constituted no one master," and so far as his property was concerned, their possession and use of it was wrongful as to him, for he had not intrusted it "to any one." Since the relation of principal and agent did not exist between him and any one on board the vessel, it is simply impossible, under the authorities quoted, and the evident justice and reason of the thing, that the claimant should be clothed with great responsibilities, and visited with heavy forfeiture for the conduct

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of those, in whom he has reposed no authority whatever, to whom he had intrusted no property, and whose every action was utterly beyond his control, and in direct denial of his rights.

So far as concerns Bragdon's interest in this property he was clothed by law with both the right of property and the right of possession, while his copartners had the naked possession of his interest without right, and under the decree of a false court, whose authority cannot for a moment be recognized. It would be preposterous to contend, that for the deeds of persons guiltily in the possession of property, the true and innocent owner is to be held responsible. "Possession and use," says this court in the early case of *The Resolution*,\* "ought upon a question of property to have the same influence in courts of admiralty as in courts of common law. It ought to be considered as a good title and as conclusive upon all mankind *except the right owner*. If the papers affirm the ship and cargo to be the property of an enemy, there must be a condemnation, unless those who contest the capture can produce clear and unquestionable evidence to the contrary."

"Upon a piratical capture," it declared in the later case of *The Josefa Segunda*,† "the property of the original owners cannot be forfeited for the misconduct of the captors in violating the municipal laws of the country where the vessel seized by them is carried."

An English case in point with the present, is *The Friendship*,‡ where a British ship having been captured by the enemy, was again captured by a British cruiser for a flagrant breach of blockade by a neutral in possession; but the court adhering to the doctrine above quoted, ruled that the illegal acts of those illegally in possession did not divest the title of the rightful owner, and awarded restitution upon his intervening in the proceedings for condemnation.

If an opposite doctrine was conceded, no case could ever

\* 2 Dallas, 1.

† 5 Wheaton, 338.

‡ 6 Robinson, 38

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occur in which restitution could be awarded, and the *jus postliminii* would remain to the mockery of the citizen an unmeaning fiction of the law.

3. *The fact that the claimant owns only a portion of the captured property instead of the whole, will not exclude him from the protection of the legal principles above established.*

Courts discriminate between the guilty and innocent co-owners of the same property, restoring one portion to the citizen and forfeiting the other as the property of enemies and subject to capture.

The exact case is thus put by Sir William Scott, in *The Jonge Tobias*.\*

“Formerly, according to the old practice, the carriage of contraband worked a forfeiture of the ship, but in later times the rule has been relaxed to the forfeiture of the ship only when owned by the same person. *If he owns a share of the vessel, his share only will be condemned.*”

In Graham’s claim,† Judge Story decides:

“I hold this shipment to be on joint account. I therefore hold William Graham as entitled to one-third part of the present shipment, and as he is a domiciled British merchant I condemn it as lawful prize to the captors. The other two-thirds belonging to citizens, I order to be restored.”

In another instance,‡ when a cargo was shipped from Malaga to St. Petersburg in an English vessel, by a Spanish house on joint account with a London firm, the same judge held, that while the share of the enemy was good prize, the interest of the neutral Spanish house could not be subjected to condemnation.

In *The San Jose Indiano and Cargo*, partners’ interests were distinguished, the enemy’s interests being condemned and citizens’ restored, in divers instances.§

It remains to direct the attention of the court to certain

\* 1 Robinson, 329.

† 1 Gallison, 618.

‡ *The Betsy*, 2 Id. 210.

§ 2 Id. 284, 298, 300, 301, 303, 304, 305.

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other rules of the international code, which authorize and require its restoration.

4. *The claimant having established an indefeasible legal title to this property, was entitled, as soon as it was rescued from the enemy, and came within the dominion of the United States, to full restitution thereof.*

The record shows, that long prior to the rebellion, the claimant was the owner of this property. That being within the insurrectionary district, he exercised no control over it, and it was continually within the rebellious territory and under the exclusive authority of rebellious citizens. That in the year 1862, the so-called Confederate government seized his property *jure belli*, and undertook to extinguish the title of the claimant, by a condemnation and sale. A new register appears to have been taken out after the sale, "property having changed." Then follows the capture by our cruisers.

There is then property; an illegal capture by a government neither *de facto* nor *de jure*, but only a rank usurpation; an illegal and void condemnation and sale, and then a restoration of the property to the power of the country of the rightful owner. It being conceded that no taint of fraud or disloyalty can be imputed to the claimant, it would seem to be a proposition almost too plain for argument, that the title of the original proprietor has not been divested by any of these transactions. That the seizure of his property by the insurgent government was illegal and criminal, and that the sentence of condemnation and the proceedings subsequent thereto, were without the semblance of authority and void, are statements which it were idle to elaborate.

The obligation of the government under such a state of affairs, is clearly defined by the French writer Vattel:\*

"The sovereign is bound to protect the persons and property of his subjects, and to defend them against the enemy. When, therefore, a subject or any part of his property has fallen into the enemy's possession, should any fortunate event bring them

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\* Page 385, 391.

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again into the sovereign's power, it is undoubtedly his duty to restore them to their former condition, to re-establish the persons in all their rights and obligations, to give back their effects to the owners, in a word, to replace everything on the same footing on which it stood previous to the enemy's capture."

Our American author Halleck\* redeclares the same thing :

"This right of postliminy is founded upon the duty of every state to protect the persons and property of its citizens against the operations of the enemy. When, therefore, a subject is rescued by the state or its agents he is restored to his former rights and condition under his own state, for his relations to his own country are not changed, either by the capture or the rescue. So of the property of the subject recaptured from the enemy by the state or its agents, it is no more the property of the state than it was before it fell into the hands of the enemy. It must therefore be restored to its former owner."

This doctrine was recognized many years ago in England.†

When a British ship had been captured by the French, condemned as prize and fitted out by them as a vessel of war, and was then recaptured by a British cruiser, it was held that a British subject had always a right, not barred by any given duration of time, to restitution of his property.‡

During the war of the rebellion, this right of the citizen to his property and the obligation of the government to restore, have been conceded and enforced and restitution awarded to the true owners.§

\* International Law, 866, § 2; and see, *The Acteon*, 2 Dodson, 48.

† *Woodward v. Larking*, 3 *Espinasse*, 286.

‡ *The Renard*, Hay & Marriott, 222; and see, the *Vriendschap*, 6 *Robinson*, 38.

§ *The Mary Alice*; *The H. C. Brooks*; *Lizzie Weston*, M. S. Decisions of South. Dist. of New York; *Claims of Lear & Sons and Irvin & Co.*, approved and allowed.

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Outside the doctrine of postliminy, which rests upon its own peculiar principles, the courts of admiralty have been diligent in restoring property in all cases where the original owner's title has not been lawfully divested, and it is now a doctrine of universal acceptance, that the original title must prevail, unless the property was captured by a lawful enemy, in a lawful manner, and a sentence of condemnation by a competent court has intervened.

It is not essential for the operation of this rule that the capture should be piratical. "A capture, though not piratical, may be illegal and of such a nature as to induce the court to award restitution."\* If property be retaken from a captor clothed with a lawful commission, but not an enemy, it must be restored. For the act of taking being a wrongful act could not change the property. And so our courts have invariably decided that where a capture is made of the property of the subjects of a nation in amity with the United States, by a vessel, built, owned, equipped, and armed in the United States, it is illegal, and if the property is brought within the jurisdiction of this country, it will be restored to the original owner.†

The absence of a valid sentence of condemnation is considered equally fatal as an illegal capture.

If a neutral state seize and sell the vessel, there being no sentence of condemnation, the title is not changed.‡

Where a British ship had been captured, carried into Norway, and condemned before a French consul, it was held that the sentence was invalid, and the property should be restored.§ A case is cited at the end of *Assievedo v. Cambridge*, in 1695, reported by Lucas,|| where restitution was decreed after a long adverse possession, two sales, and several voyages.

\* *Talbot v. Janson*, 3 Dallas, 133.

† *La Conception*, 6 Wheaton, 235; *The Arrogante Barcelones*, 7 Id. 496; *The Santa Maria*, 7 Id. 490; *The Monte Allegre*, 7 Id. 520; *The Fanny*, 10 Id. 658; *The Bello Corrunes*, 6 Id. 152; *The Vrow Anna Catharina*, 5 Robinson, 20.

‡ *Wilson v. Forster*, 6 Taunton, 25.

§ *The Kierlightt*, 3 Robinson, 99.

|| 10 Modern, 77.

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Inasmuch as in the case at bar, the original seizure by the insurgents was unlawful, and the sentence of condemnation utterly invalid, the application of these authorities is obvious. Upon the general doctrine of restitution, the reasoning of this court in *The Resolution* is very appropriate:

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

5. *The object of the war against rebellion as prosecuted by the government, and its policy repeatedly declared by the legislative and executive departments and followed by the judiciary, require the restoration of this property.*

By the rebellion of 1861, it “became necessary,” “for the general government to vindicate by arms its own rights and the rights of its citizens.”

These words comprehend in and of themselves the whole scope and object of the war of self-defence in which the nation has been engaged for the past few years.

Congress resolved early in the struggle that the war was not waged for conquest or oppression, but “to defend and maintain the supremacy of the Constitution, and to preserve the Union.”\*

By the acts of July 13, 1861, and July 29, 1861, to provide for the suppression of the rebellion, and under the authority of which the war has been mainly carried on, it is enacted that whenever it becomes impracticable to enforce the laws of the United States by the ordinary course of judicial proceedings, it shall be lawful to call out the militia,

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\* Mr. Crittenden's resolution, July, 1861.

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and employ the army and navy "to enforce the faithful execution of the laws, and suppress such rebellion."

The President says, in his proclamation of September 22, 1862:

"I do hereby proclaim and declare that hereafter as heretofore, the war will be prosecuted for the object of practically restoring the constitutional relation between the United States and each of the States and people thereof, in which State that relation is or may be disturbed."

These declarations of the object of the war have been followed by the courts. "The war, so far as the government has been an actor," says Betts, J., in *The Hiawatha*, "has been defensive, and in protection of the existence and property of the government, and the welfare of its citizens." "In a civil war," says Sprague, J., in *The Amy Warwick*, "the military power is called in only to maintain the government in the exercise of its legitimate civil authority."

But, while the object of the war was thus clearly defined, the condition of affairs was so anomalous, the contest of such gigantic size, and extended over such a vast territory, that any measures which the government might take to defend its existence and restore its supremacy, would necessarily affect the deserving,—the loyal as well as the disloyal.

It is instructive, however, to note with what jealous care Congress and the Executive so ordered and wielded the belligerent power of the nation, that while it was a weapon against treason, it was as far as possible a shield for the loyal and the oppressed. Whiting\* says upon this subject:

"The President having adopted the policy of protecting loyal citizens, wherever they may be found, all seizure of their property and all interference with them have been forborne."

The President, in his proclamation of September 22, 1862, declares:

"The Executive will in due time recommend that all loyal

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\* War Powers, 59.

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Argument in support of the claim.

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persons shall be compensated for all losses they may have incurred by acts of the United States.”

The letters of Admiral Porter to the Secretary of the Navy, of May 11 and 31, 1864, touching the Red River cotton, and the proclamation of General Butler\* on taking possession of New Orleans, are but reiterations of the general policy of the government.

By legislation in every form, the legislative department of the nation has recognized the same distinction and provided for the protection of all who have in fact maintained their allegiance.

Section 1, of the act of August 6, 1861, “to confiscate property used for insurrectionary purposes,” enacts that if any person shall knowingly use his property, or suffer it to be used in aiding, abetting, or promoting the insurrection, such property shall be the lawful subject of prize and capture.

The act of July 31, 1861, appropriates two millions of dollars to purchase arms “to place in the hands of the loyal citizens residing in any of the States, of which the inhabitants are in rebellion against the government of the United States.”

Section 9, of the act amending an act regulating commercial intercourse, July 2, 1864, prohibits all further intercourse “except to supply the necessities of loyal persons residing in the insurrectionary States.”

Section 3 of the act to provide for the collection of abandoned property, March 3, 1863, ch. 120, provides, that when the property of any one resident in the seceded States has been seized and sold by virtue of the act, the owner may go before the Court of Claims within two years after the suppression of the rebellion, and, upon proof of his loyalty, will be entitled to receive the proceeds arising from the sale of his property.

Section 7 of the Confiscation Act, July 17, 1862, enacts that “if said property shall be found to have belonged to a

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\* See 2 Wallace, 264.

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Argument in support of the claim.

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person engaged in rebellion, or who has given aid or comfort thereto, the same shall be condemned as enemy's property."

An act to protect certain liens, March 3, 1863, provides that if any loyal citizen holds a lien upon any vessel or other property, that the same shall be preferred to the claim of the government for condemnation.

Section 7 of the act regulating the<sup>a</sup> collection of direct taxes in insurrectionary districts, allows any loyal citizen having a lien upon any real estate which has been sold for taxes to redeem the same. February 6, 1863.

It would seem, therefore, from the testimony of these measures, that both the executive and legislative branches of the government have declared the settled policy of the nation to be, that no forfeitures shall be inflicted in this war on any but the rebellious, and that under all contingencies the truly loyal citizens South and North shall be protected and secured in the enjoyment of their rights of person and of property. To put any other construction upon these enactments and the general conduct of the war, would be to shut our eyes against their obvious and accepted meaning. Such policy is in recognition of the obligations which a just government owes to its faithful citizens, and may well be called *the policy of justice*.

*The policy of magnanimity* pursued by the government to its rebellious citizens is embraced in the proclamations of protection, amnesties, pardons, and restorations to property and privileges, which are familiar to all, and are in strict conformity with the declared object of the war. Touching the latter, this court, in the late case of *The Venice*,\* has approvingly said:

"The same policy may be inferred from the conduct of the war. Wherever the national troops have re-established order under national rule, the rights of persons and property have been in general respected and enforced. Officer Farragut and General Butler expressed in proclamation the general policy of

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\* 2 Wallace, 274.

## Argument in support of the petitioners.

the government. Both were the manifestation of a general purpose which seeks the establishment of the national authority, and the ultimate restoration of States and citizens to their national relations under better forms and firmer guarantees, without any views of subjugation by conquest."

Keeping in view the declared object of this war, how is it possible to say that the condemnation of the property of a loyal citizen of a loyal State is a warrantable exercise of belligerent right; that it would conduce in the remotest degree to the accomplishment of the desired end? For any such purpose it would be wholly impotent. Contributing nothing to "the reparation of injury, the re-establishment of right, and the restoration of order," such action on the part of government would of itself be an injury to the citizen, a palpable denial of his common and constitutional right, and the sure promoter of disorder and discontent. Against any such forfeiture the government has deliberately set its face. She has pledged herself to her loyal citizens in every form by which a government can express its deliberate purpose,—by legislative enactments, executive proclamations, judicial decisions, the consistent management of war,—that this conflict has been waged for the protection, and not the destruction, of those rights. This claimant alike with every other true citizen has the right to demand, as he does now demand, that the government shall make good her pledges by according to him the full measure of his rights.

II. *As to the remaining owners, now petitioners in this court.*

Though ordinarily an appellate court receives no evidence which was not presented on the hearing in the court below, in all admiralty causes the rule is different. The case, when an appeal is taken and perfected, is heard *de novo*, and there is no final decree till the appellate court has acted and determined by *decree* the rights of the claimants to the fund.\*

In the case of *The Schooner Pinkney*, the vessel was condemned in the District Court for violation of the act of Con-

\* *Boone v. Chiles*, 10 Peters, 177; *United States v. Schooner Peggy*, 1 Cranch, 103.

## Argument in support of the petitioners.

gress prohibiting commercial intercourse with certain parts of the Island of St. Domingo. An appeal was taken first to the Circuit Court, and afterwards to this court. Pending the last appeal the act expired by its own limitation. In delivering judgment, Chief Justice Marshall says:

“The majority of the court is clearly of opinion that in admiralty cases *an appeal suspends the sentence altogether*, and that it is not *res adjudicata* until the final sentence of the appellate court is pronounced. The cause in the appellate court is to be heard *de novo*, as if no sentence had been passed. This has been the uniform practice, not only in cases of appeal from the District to the Circuit Court of the United States, but in this court also. In prize causes the principle has never been disputed.”\*

In *The Venus*, a prize case, the court says, “The cause is before us as if in the inferior court.”

Under this rule it is allowable to allege and prove what was not alleged or proved in the court below.†

And, until a decree has been actually made, the court is bound to consider every claim against the fund in court.‡

The case stands, therefore, upon the same footing as though the condemnation had not been decreed in the District Court; and the question presented is, whether this court, having a grasp upon the fund, and being called on to make distribution, will not, sitting in admiralty as in equity, make an order of distribution as justice and equity shall appear to require.

The rights of these claimants, as distributees, depend on the force and effect of the several pardons granted them by the President. [The counsel then went into a consideration of the effect of the pardons.]

\* *Yeaton v. United States*, 5 Cranch, 281. And see *Penhallow v. Doane*, 3 Dallas, 87, 119; *United States v. Preston*, 3 Peters, 57.

† *Malley Shattuck*, 3 Cranch, 458; *Brig James Wells*, 7 Id. 22; *The Clarissa Claiborne*, Id. 107; *The Samuel*, 1 Wheaton, 9, 112; *The Marianna Flora*, 11 Id. 1; *The Sally Magee*, 3 Wallace, 459.

‡ *Constancia*, 10 Jurist, 849.

## Argument for the condemnation.

*Mr. Ashton, Assistant Attorney-General, contra :*

I. *As to the claim of Bragdon for the one-sixth.*

Giving the fullest effect to the case as stated by the claimant, it is, on its face, a case of enemy property and breach of blockade.

1. The partnership of Cox, Brainard & Co., of which the claimant was a member, was established and domiciled in the enemy country.\*

2. Such a partnership is, by the law of war, treated throughout as a *hostile establishment*, and the whole partnership property is liable to capture and condemnation as enemy's property, notwithstanding one or more of the partners may be domiciled in a neutral country; *à fortiori*, if some of the partners are domiciled in one of the hostile countries and the rest in the other, the partnership is hostile, and the partners are also personally enemies.†

3. The courts of prize, in the language of Lord Stowell, in *The Vrow Elizabeth*,‡ regard vessels as having "a peculiar character impressed upon them by the special nature of their documents, and they have always been held to the character with which they are so invested to the exclusion of any claims of interest that persons living in neutral countries may actually have in them."

During the war with Russia, Dr. Lushington, in England, had occasion to consider and apply the doctrine enunciated in *The Vrow Elizabeth*, in the cases of two vessels, *The Primus* and *The Industrie*, under the Russian flag, portions of which belonged to Russian subjects, the other shares being owned by neutral Danes.§ These cases both occurred at the beginning of hostilities, and the neutral part-owners were *bonâ fide* entitled to their shares at a period antecedent to the war and up to the time of seizure.

\* *The San José Indiano*, 2 Gallison, 286.

† *The Friendschaft*, 4 Wheaton, 107; *The Antonia Johonna*, 1 Id. 167; *The Franklin*, 6 Robinson, 127.

‡ 5 Robinson, 11.

§ *The Primus*, 29 English Law and Equity, 589; *The Industrie*, 33 Id. 573.

## Argument for the condemnation.

He held that the claims were not maintainable, and that the neutral as well as the hostile shares were confiscable; that the flag and pass are binding on all persons having property in the ship; that whoever embarks his property in shares of a ship is bound by the character of that ship, *whatever it may happen to be*; that where a vessel is sailing under a neutral flag, the captors may show that the property is not neutral, but part of it belongs to an enemy, and in that case you divide it and condemn the part which is hostile, and not that part which is neutral; and that the proposition is not true *vice versa*, that where a vessel is sailing under a *hostile flag* you can claim on behalf of the neutral the property under an enemy's flag; and that no distinction could be made between the flag being adopted prior to the commencement of hostilities, and when there was no reason to suppose that hostilities would have taken place, and the flag being adopted *flagrante bello*.

These two cases were cases of *part-owners*, whereas the present case is one of alleged ownership by a *partnership*, to which the doctrines just stated are, *à fortiori*, applicable.

4. This court has in recent cases confiscated the interests of Northern persons in vessels engaged in commerce with the rebel ports for *illicit trading with the enemy*, altogether irrespective of any agency or complicity, on the part of such owners, in the guilty voyages.

In the case of *The Pilgrim*,\* the vessel was owned, two-thirds in New Orleans, and one-third in New York and Connecticut, and was captured for breach of blockade of New Orleans. Grier, J., said that "the cargo and two-thirds of the vessel were liable to confiscation as enemy property, and the remainder for illicit trading with the enemy."

In the case of *The Herald*,† a British vessel was partly owned in New York, and the court held that "the shares of the vessel owned in New York might be condemned for trading with the enemy, but it is enough that vessel and cargo were equally involved in breach of blockade."

\* December Term, 1863, No. 113.

† 3 Wallace, 768.

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Argument for the condemnation.

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In neither of these cases was there any imputation of guilty knowledge of the breach of blockade on the part of the loyal Northern part-owners.

5. Admitting the allegation of the partnership and of the ownership of this vessel by the firm at the time of capture, the claimant of course has no interest, right, or share, in any of the property of the firm, except what remains after the discharge and payment of all the debts and liabilities of the partnership, and therefore cannot claim or receive restitution of any particular portion of such property as representing the value of his interest therein.

A court of prize has no means of settling the accounts of the firm and determining the particular interests of the several members in the property. The ownership of this vessel was in the firm, and the resident members at Mobile, who were in possession of her, had authority to divest their own interests, as well as the interest of the Northern member, in virtue of their general power and agency as recognized by the law of partnership.

6. A transfer of the vessel had been effected before the present voyage to other persons, who obtained the register found on board, which divested the interest of the firm who may have owned her before the war. But all interests and rights in both the vessel and the cargo are confiscable for breach of blockade. It is not competent for owner of either vessel or cargo, in such case, to protect his property from condemnation by showing innocence in the transaction. All parties are concluded by the illegal act of the master, though it may have been done without their privity, and even contrary to their wishes. It is the act and intention of the master which determine the guilt or innocence of the property and its liability to confiscation; and this applies equally to vessel and cargo.\*

7. A hostile character is impressed upon the vessel by the specifically hostile character of the *trade* in which she had

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\* *Baltazzi v. Ryder*, 12 Moore's Privy Council, 184.

## Opinion of the court.

been engaged during the war, independently of the *domicil* status, or relations of the owners.\*

When a vessel is engaged *de facto* for a period of two years exclusively in the navigation and trade of the enemy's country, in the possession and control of enemies, and under their flag, the question of ownership does not arise, and she is confiscable in consequence of the hostile taint which such use and employment affix upon the property.

II. *As to the petitioners, rebel owners of the five-sixths.* Conceding, *argumenti gratiâ*, that they had a right to be heard in this court, not having appeared in the other, the effect of the pardon is not sufficiently clear in a case of seizure like the present.†

Mr. Justice CLIFFORD delivered the opinion of the court.

The steamer and cargo were captured as prize of war on the 18th day of July, 1863, and, having been duly libelled and prosecuted as such in the District Court, on the 17th day of August following, they were both condemned as forfeited to the United States. Monition was duly published, but no one appeared as claimant, either for the steamer or cargo. Directions of the decree of condemnation were, that the steamer and cargo, after ten days' public notice, should be sold by the marshal, and that the proceeds of the sale should be deposited in the registry of the court for distribution, according to law. Return of the marshal shows that the notice was duly given, and that the sale was made as directed by the decree. Proceeds of the sale were paid to the marshal, but before the amount was actually deposited in the registry of the court the appellant filed his petition of intervention, claiming one-sixth of the proceeds, upon the ground that he was the true and lawful owner of one-sixth part of the vessel and cargo. Allegations of the petition of intervention were, in substance and effect, as follows:

\* The *Vigilantia*, 1 Robinson, 1; The *Embden*, Id. 16; The *Endraught*, Id. 22; The *Planter's Wensch*, 5 Id. 227; The *Bermuda*, 3 Wallace, 545.

† See The *Gray Jacket*, *supra*.

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1. That the petitioner was, and for many years had been, a citizen of the State of Indiana; that at the breaking out of the rebellion he was a member of the firm of Cox, Brainard & Co., at Mobile, Alabama; that the partners of the firm, as such, were the sole owners of the steamer and cargo; and that he had never parted with his share or in any way transferred his interest in the partnership

2. That the steamer, after the rebellion broke out to the time of the capture, was continually in the waters of the rebellious States, and under the control and management of those engaged in the rebellion, which rendered it impracticable and unlawful for him to proceed to the place where the steamer was, or to exercise any control over the steamer or any part of the partnership property.

3. That he was, and always had been, a true and loyal citizen; that he had never given any aid, encouragement or assistance to the rebellion, and that he had no connection with, or knowledge of, the unlawful voyage of the steamer on account of which she was condemned as lawful prize.

4. That some court of the Confederate States, so called, at some time in the year 1862, had condemned and confiscated his interest in the partnership, but he averred that the decree was wholly nugatory and void, and that his interest in the steamer and cargo had never been extinguished or destroyed.

Basing his claim upon these allegations of fact, he prayed that he might be paid out of the proceeds of the sale one-sixth of the amount required to be paid into the registry of the court.

Exceptions were filed to the petition of intervention, but they were overruled by the court, and the District Attorney appeared and admitted that all the facts therein alleged were true. Parties were heard as upon an agreed statement, and the District Court entered a decree that the intervention and claim of the petitioner be rejected and dismissed, with costs. Appeal was taken by the intervenor from that decree, and he now seeks to reverse it, upon the ground that he, as

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owner of one-sixth part of the steamer and cargo, is entitled to one-sixth of the proceeds of the sale.

1. Captors contend that the steamer and cargo were both rightfully condemned as enemy property, and also for breach of blockade. Appellant denies the entire proposition as respects his interest in the captured property, and insists that the one-sixth of the same belonging to him cannot properly be condemned on either ground, because he was never domiciled in the rebellious States, and because he never employed the property, either actually or constructively, in any illegal trade with the enemy, or in any attempt to break the blockade.

Projected voyage of the steamer was from Mobile to Havana, and the master testified that she sailed under the Confederate flag. Proofs show that she left her anchorage in the night-time, and that she was captured, as alleged in the libel, after a brisk chase by several of our blockading squadron, more than two hundred miles from the port of departure. When captured, she had on board a permanent register, issued at Mobile under Confederate authority, and which described her owners as trustees of a certain association, and citizens of the Confederate States.

Testimony of the master showed that the cargo, which consisted of seven hundred bales of cotton, three thousand two hundred staves, and one hundred and twenty-five barrels of turpentine, was consigned to parties in Havana, and that the shipment was for the benefit of owners residing at the home port. Except an informal manifest, the steamer had no papers on board relating to the cargo, and the master testified that she carried none for the consignee, "for fear of being captured." He was appointed by the trustees, and he also testified that his instructions were to elude the blockading vessels if possible, but not to resist in case he was unable to escape. Ship's company consisted of thirty men, and all the officers and crew, with one exception, were citizens of the enemy country. Direct admission is made by the master in his testimony that he stole out of the harbor, and that the steamer and cargo were captured for breach of

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blockade. Such an admission was hardly necessary to establish the charge, as every fact and circumstance in the case tended to the same conclusion. Five-sixths of the steamer and cargo were confessedly enemy property, and the whole adventure was projected and prosecuted for the benefit of resident enemy owners. None of these facts are controverted by the appellant, but he insists that inasmuch as he was domiciled in a loyal State, and had no connection with the adventure or the voyage, his interest cannot properly be held liable to capture.

2. War necessarily interferes with the pursuits of commerce and navigation, as the belligerent parties have a right, under the law of nations, to make prize of the ships, goods, and effects of each other upon the high seas. Property of the enemy, if at sea, may be captured as prize of war, but the property of a friend cannot be lawfully captured, provided he observes his neutrality. Public war, duly declared or recognized as such by the war-making power, imports a prohibition by the sovereign to the subjects or citizens of all commercial intercourse and correspondence with citizens or persons domiciled in the enemy country.\*

Neutral friends, or even citizens, who remain in the enemy country after the declaration of war, have impressed upon them so much of the character of enemies, that trading with them becomes illegal, and all property so acquired is liable to confiscation.†

Part-owners of ships are seldom partners in the commercial sense, because no one can become the partner of another without his consent, and because if they acquire title by purchase, they usually buy distinct shares at different times and under different conveyances, and even when they are the builders they usually make separate contributions for the purpose. Generally speaking, they are only tenants in

\* *Jecker v. Montgomery*, 13 Howard, 498.

† *The Hoop*, 1 Robinson, 196; *Maclachlan on Shipping*, 473; *The Rapid*, 8 Cranch, 155; *Potts v. Bell*, 8 Term, 561; *Wheaton's International Law* by Lawrence, 547.

## Opinion of the court.

common; but the steamer, in this case, belonged to the partnership, and throughout the rebellion to the time of capture was controlled and managed by the partners in the enemy country.\*

Even where the part-owners of a ship are tenants in common the majority in interest appoint the master and control the ship, unless they have surrendered that right by agreeing in the choice of a ship's husband as managing owner.†

Admiralty, however, in certain cases, if no ship's husband has been appointed, will interfere to prevent the majority from employing the ship against the will of the minority without first entering into stipulation to bring back the ship or pay the value of their shares. But the dissenting owners, in such a case, bear no part of the expenses of the voyage objected to, and are entitled to no part of the profits. Such are the general rules touching the employment and control of ships; but unless the co-owners agree in the choice of a managing owner, or the dissenting minority go into admiralty, the majority in interest control the employment of the ship and appoint the master.‡

Tenants in common of a ship can only sell their own respective shares, but where the ship belongs to a partnership one partner may sell the whole ship.§

3. Proclamation of blockade was made by the President on the nineteenth day of April, 1861, and on the thirteenth day of July, in the same year, Congress passed a law authorizing the President to inderdict, by proclamation, all trade and intercourse between the inhabitants of the States in insurrection and the rest of the United States.||

Provision of the sixth section of the act is, that after fifteen days from the issuing of such proclamation, "any ship or vessel belonging in whole or part to any citizen or inhabitant" of a State or part of a State, whose inhabitants shall

\* *Helme v. Smith*, 7 Bingham, 709.

† *Smith's Mercantile Law*, 6th ed. 197.

‡ *Maude & Pollock on Shipping*, 67, 72.

§ 3 *Kent's Com.*, 11th ed. 154; *Wright v. Hunter*, 1 East, 20; *Lamb v. Durant*, 12 Massachusetts, 54.

|| 12 Stat. at Large, 1258, 257.

## Opinion of the court.

be so declared to be in insurrection, if found at sea or in the port of any loyal State, may be forfeited. Reference is made to those provisions, as showing that our citizens were duly notified that Congress as well as the President had recognized the undeniable fact that civil war existed between the constitutional government and the Confederate States; and that seasonable notice was given to all whose interests could be affected, and that ample opportunity and every facility were extended to them, which could properly be granted, to enable them to withdraw their effects from the States in rebellion, or to dispose of such interests as in the nature of things could not be removed.

Open war had existed between the belligerents for more than two years before the capture in this case was made, and yet there is not the slightest evidence in the record that the appellant ever attempted or manifested any desire to withdraw his effects in the partnership or to dispose of his interest in the steamer. Effect of the war was to dissolve the partnership, and the history of that period furnishes plenary evidence that ample time was afforded to every loyal citizen desiring to improve it, to withdraw all such effects and dispose of all such interests. "Partnership with a foreigner," says Maclachlan, "is dissolved by the same event which makes him an alien enemy;" and Judge Story says, "that there is in such cases an utter incompatibility created by operation of law between the partners as to their respective rights, duties, and obligations, both public and private, and therefore that a dissolution must necessarily result therefrom, independent of the will or acts of the parties."\*

Executory contracts with an alien enemy, or even with a neutral, if they cannot be performed except in the way of commercial intercourse with the enemy, are *ipso facto* dissolved by the declaration of war, which operates to that end and for that purpose with a force equivalent to that of an act of Congress.†

\* Maclachlan on Shipping, 475; Story on Partnership, sec. 316; Griswold v. Waddington, 15 Johnson, 57; Same case, 16 Id. 438.

† Exposito v. Bowden, 7 Ellis & Blackburne, 763.

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Duty of a citizen when war breaks out, if it be a foreign war, and he is abroad, is to return without delay; and if it be a civil war, and he is a resident in the rebellious section, he should leave it as soon as practicable and adhere to the regular established government. Domicile in the law of prize becomes an important consideration, because every person is to be considered in such proceedings as belonging to that country where he has his domicile, whatever may be his native or adopted country.\*

4. Personal property, except such as is the produce of the hostile soil, follows as a general rule the rights of the proprietor; but if it is suffered to remain in the hostile country after war breaks out, it becomes impressed with the national character of the belligerent where it is situated. Promptitude is therefore justly required of citizens resident in the enemy country, or having personal property there, in changing their domicile, severing those business relations, or disposing of their effects, as matter of duty to their own government, and as tending to weaken the enemy. Presumption of the law of nations is against one who lingers in the enemy's country, and if he continue there for much length of time, without satisfactory explanations, he is liable to be considered as remorant, or guilty of culpable delay, and an enemy.†

Ships purchased from an enemy by such persons, though claimed to be neutral, are for the same reasons liable to condemnation, unless the delay of the purchaser in changing his domicile is fully and satisfactorily explained. Omission of the appellant to dispose of his interest in the steamer, and his failure to withdraw his effects from the rebellious State, are attempted to be explained and justified, because the same were, as alleged in the petition, confiscated during the rebellion under the authority of the rebel government. More than a year, however, had elapsed after the proclama-

\* *The Vigilantia*, 1 C. Robinson, 1; *The Venus*, 8 Cranch, 288; 3 Phillimore's *International Law*, 128.

† *Maclachlan on Shipping*, 480; *The Ocean*, 5 Robinson, 91; *The Venus*, 8 Cranch, 278.

## Opinion of the court.

tion of blockade was issued before any such pretended confiscation took place. Members of a commercial firm domiciled in the enemy country, whether citizens or neutrals, after having been guilty of such delay in disposing of their interests or in withdrawing their effects, cannot, when the property so domiciled and so suffered to remain, is captured as prize of war, turn round and defeat the rights of the captors by proving that their own domicile was that of a friend, or that they had no connection with the illegal voyage.

Property suffered so to remain has impressed upon it the character of enemy property, and may be condemned as such or for breach of blockade. Prize courts usually apply these rules where the partnership effects of citizens or neutrals is suffered to remain in the enemy country, under the control and management of the other partners who are enemies. But there are other rules applicable to ships owned under such circumstances which must not be overlooked in this case.

5. Courts and text-writers agree that ships are a peculiar property, and that such peculiarity assumes more importance as a criterion of judicial decision in war than in peace. They have a national character as recognized by the law of nations, because they regularly carry the flag of the nation to which they belong. Evidences of ownership are also peculiar, but vary somewhat according to the laws of the country in which the ships were built, or in which they are owned.\*

Commercial nations generally have, for the advancement of their own individual prosperity, conferred great privileges upon the ships belonging to their own citizens, and, in consideration thereof, have imposed upon their owners certain special duties and obligations. Usually they are required to be registered at the home port, and they are not allowed to sail on any voyage, foreign or coasting, without such papers as the laws of the country to which they belong require.†

American vessels sailing for a foreign port are, in all cases, required by law to carry a passport, and it is generally ad-

\* Wheaton's International Law, by Lawrence, p. 580.

† Abbott on Shipping, 72.

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mitted that such a document is indispensable in time of war.\* When a ship is captured as prize of war she is bound by the flag and pass under which she sailed. Owners are also bound by those insignia of national character. They are not at liberty when they happen to be evidence against them to turn round and deny the character the ship has assumed for their benefit.†

Established rule is that when the owners agree to take the flag and pass of another country they are not permitted, as matter of convenience, in case of capture, to change the position they have voluntarily chosen, but others are allowed to allege and prove the real character of the vessel. Meaning of the rule is that the ship is bound by the character impressed upon her by the authority of the government from which all her documents issue; and Chancellor Kent says this rule is necessary to prevent the fraudulent mask of enemy's property.‡ Adopting that rule, Dr. Lushington held, in the case of *The Industrie*,§ that the share of a neutral in ownership, though purchased before the war, was subject to condemnation equally with the shares of enemies in the same ship. Principle of the decision is that whoever embarks his property in shares of a ship is in general bound by the character of the ship, whatever it may be, and that principle is as applicable to a citizen, after due notice and reasonable opportunity to dispose of his shares, as to a neutral.||

6. Decision of Lord Stowell, in the case of *The Mercurius*,¶ was that violation of blockade by the master affects the ship, but not the cargo, unless it is the property of the same owner, or unless the owner of the cargo was cognizant of the intended violation.

Proofs show that the cargo in this case was the property of the same owners, and, therefore, the case being within the principle of that decision, the cargo must follow the fate

\* 1 Stat. at Large, 489. Maude & Pollock on Shipping, 95.

† Story on Prize, 61; *The Elizabeth*, 5 C. Robinson, 3; *The Fortuna*, 1 Dodson, 87; *The Success*, Id. 132.

‡ 1 Kent's Com., 11th ed. 91.

|| *The Primus*, 29 Eng. Law & Eq. 589.

§ 33 Eng. Law & Eq. 572.

¶ 1 C. Robinson, 80.

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of the ship. Subsequent cases, however, decided by the same learned judge, appear to have carried the rule much further, and to have established the doctrine in that country that when the blockade was known, or might have been known, to the owners of the cargo at the time when the shipment was made, the master shall be treated as the agent of the cargo, as well as of the ship, and that the former, as well as the latter, is liable to capture and condemnation.\*

Latest reported decision in that country is that of *Baltazzi v. Ryder*,† which was heard on appeal before the privy council, and the determination, both in the admiralty court and in the appellate court, was that where the cargo belonged to the same owners as the ship, the owners of the cargo, as well as the ship, were in general concluded by the illegal act of the master.

Giving full effect to the admissions in this case, the appellant shows no just ground for the reversal of the decree made by the District Court.

7. Since the appeal was entered in this court the other partners have filed a petition here, asking leave to intervene for their interests, and claiming the other five-sixths of the vessel and cargo. They were not parties in the court below, having never appeared in the suit or made any claim whatever, and of course did not, and could not, appeal from the decree. Substance of their excuse for not appearing in the District Court is that they were residents in a State hostile to the United States, and consequently that they had no standing in that court, by reason of such disability. Statement of the petition also is that those disabilities continued till after the case was removed into this court by appeal; but they allege that since that time they have severally received the pardon of the President for all pains and penalties incurred for breach of blockade, and for all offences committed by them in the rebellion, and by reason of the premises they pray that their proportion of the proceeds of

\* The *Alexander*, 4 C. Robinson, 94; The *Adonis*, 5 Id 259; The *Exchange*, 1 Edwards's Adm. 39; The *James Cook*, Id. 261.

† 12 Moore's Privy Council, 183.

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the sale of the steamer and cargo may be restored to them. Irrespective, however, of any question which might otherwise arise as to the effect of the pardon, it is quite clear that the case is not properly before the court. Settled rule in this court is that no one but an appellant in such a case can be heard for the reversal of a decree in the subordinate court.\*

8. Appellees are always heard in support of the decree, but they cannot have any greater damages than were assessed in the court of subordinate jurisdiction. Interveners here, however, are neither appellants or appellees, as they did not appear as claimants in the District Court, and were not in any way made parties to the litigation. Original jurisdiction in prize, as well as in all other admiralty causes, is vested exclusively in the district courts. Property captured, where appeals are allowed to the Circuit Court, follows the cause into that court, but it does not in any case follow the cause into this court, because this court has no original jurisdiction in such cases.†

Evidently the application in this case is in its nature original, and not appellate, and it is well settled that this court has no original jurisdiction in prize causes.‡ Such an application cannot be first presented in this court and allowed, because it would be assuming jurisdiction not granted either by the Constitution or the laws of Congress.

Petition of intervention is dismissed, and the

DECREE OF THE DISTRICT COURT AFFIRMED.

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\* *Harrison v. Nixon*, 9 Peters, 484; *Canter v. Am. Ins. Co.*, 3 Id. 318; *Stratton v. Jarvis*, 8 Id. 4; *Airey v. Merrill*, 2 Curtis's C. C. 8; *Allen v. Hitch*, 2 Id. 147; *Buckingham v. McLean*, 13 Howard, 150.

† *Jennings v. Carson*, 4 Cranch, 28; *The Collector*, 6 Wheaton, 194.

‡ *The Harrison*, 1 Wheaton, 298; *Marbury v. Madison*, 1 Cranch, 173.