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Talbot Vs. Jansen

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Decided On : 1795

Appeal No. : 3 U.S. 133

Appellant : Talbot

Respondent : Jansen

Judgement :

Talbot v. Jansen - 3 U.S. 133 (1795)
U.S. Supreme Court Talbot v. Jansen, 3 U.S. 3 Dall. 133 133 (1795)

Talbot v. Jansen

3 U.S. (3 Dall.) 133

WRIT OF ERROR IN THE NATURE OF AN APPEAL FROM THE

CIRCUIT COURT FOR THE DISTRICT OF SOUTH CAROLINA

SYLLABUS

A capture upon the high seas was made by a vessel illegally fitted out in the United States by citizens of the United States and carrying the flag of the French Republic, being commissioned as a privateer, of the *Magdalena,* a vessel and

cargo bound from Curacoa to Amsterdam, the vessel and cargo being the property of citizens of the United Netherlands. The vessel captured was brought into Charleston, and proceedings were instituted in the District Court of the District of South Carolina, to obtain a restitution of the vessel and cargo and damages from the captors. *Held* that the capture was illegal and that the vessel and cargo be restored to the owners with damages.

A capture by a citizen of a neutral state who sets up an act of expatriation to justify it is unlawful where the removal from his own country was by sailing, contrary to the laws of his country, in the capacity of a cruiser against friendly powers.

A capture by a vessel built, owned, and equipped as a vessel of war in a neutral country is unlawful, and the courts of the neutral country will decree restitution of the captured property.

Every illegal act committed on the high seas is not piracy, and a capture may be illegal without being piratical.

A capture made by a lawfully commissioned belligerent cruiser with the aid and by the means of a neutral who had no right to cruise is unlawful, and the captured property will be restored by the neutral if brought within the jurisdiction of its court. Captures by belligerent vessels lawfully commissioned are alone exempt from inquiry by neutral courts, and if the capturing vessel claims to be so exempted, the court should inquire whether and have proof that she is entitled to the same.

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

A Libel was filed against Edward Ballard, Captain of an armed vessel called *L'Ami de la Liberte,* on the admiralty side of the District Court of South Carolina in June, 1794, by Joost Jansen, late master of the brigantine *Magdalena* (then lying at Charleston, within the jurisdiction of the court), in which it was set forth that the brigantine and her cargo were the property of citizens of the United Netherlands, a nation at peace and in treaty with the United States of America; that the brigantine

sailed from Curacoa, on a voyage to Amsterdam, but, on 16 May, 1794, being about fifteen miles N.W. of Havana, on the west side of Cuba, she was taken possession of by *L'Ami de la Liberte;* that on the next day the libellant met another armed schooner called *L'Ami de la Point-a-Petre,* commanded by Captain Wm. Talbot, on board of which the mate and four of the crew of the brigantine *Magdalena* were placed, and that the two schooners, together with the brigantine, sailed for Charleston, where the last arrived on 25 May, 1794. The libellant proceeds to aver that Edward Ballard was a native of Virginia, a citizen and inhabitant of the United States, and a branch pilot of the Chesapeake & Port Hampton; that *L'Ami de la Liberte* is an American built vessel, owned by citizens of the United States (particularly by John Sinclair, Solomon Wilson, etc.), and was armed and equipped in Chesapeake Bay and Charleston by Edward Ballard and others, contrary to the President's proclamation as well as the general law of neutrality and the law of nations; that Edward Ballard had not and could not legally have any commission to capture Dutch vessels or property; that the capture was in direct violation of the thirteenth and nineteenth articles of the treaty between

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America and Holland, and that a capture without a commission or with a void commission or as pirates could not divest the property of the original *bona fide* owners, in whose favor, therefore, a decree of restitution was prayed.

On 27 June 1794, William Talbot filed a claim in this cause, and thereupon set forth that he was admitted a citizen of the French Republic on 28 December 1793, by the Municipality of Point-a-Petre at Guadaloupe, and on the 2 January following received a commission from the governor of that island as captain of the schooner *L'Ami de la Point-a-Petre,* which was owned by Samuel Redick, a French citizen, resident at Point-a-Petre since 31 Dec. 1793, and had been armed and equipped at that place as a privateer under the authority of the French Republic. That the claimant, being on a cruise, boarded and took the brigantine, being the property of subject of the United Netherlands, with whom the Republic of France was at war, and that although he found a party from *L'Ami de la Liberte* on board the brigantine, yet as they produced no commission or authority for taking possession

of her, the claimant sent her as his prize into Charleston, having put on board several of his crew to take charge of her, and particularly John Remfen in the character of prize master, to whom he gave a copy of his commission. The claimant therefore prayed that the libel should be dismissed with costs.

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

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

On 6 August, 1794, the district court decided in favor of its jurisdiction, dismissed the claim of Captain

Talbot, and decreed restitution of the brigantine and her cargo to the libellant for the use of the Dutch owners. An appeal was instituted, but in October Term 1794, The circuit court affirmed the decree of the district court; and allowed two guineas *per diem* for damages, and 7 percent on the proceeds of the cargo (which had been sold under an order of the court) from 6 August 1794, with $82 costs. Upon this affirmance of the decree of the district court the present writ of error was founded.

It may be proper to add that Captain Ballard had been indicted in the District of Charleston on a charge of piracy, but was acquitted agreeably to the directions given to the jury by Mr. Justice Wilson, who presided at the trial.

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

1st. In relation to the citizenship of Captain Talbot and the property of the vessel which he commanded, it appeared that he was a native of Virginia, that he sailed from America in the close of November, 1793, and arrived soon afterwards at Point-a-Petre, in the Island of Guadaloupe; that having taken an oath of allegiance to the French Republic, he was there naturalized by the municipality as a French citizen on 28 December, 1793, and that on 2 January, 1794, authority was given by the Governor of Guadaloupe to Samuel Redick to fit out the schooner, *L'Ami de la Point-a-Petre,* under Captain Talbot's command, Redick having entered into the usual security, as owner of the privateer. This schooner was built in America, called the *Fairplay,* and had been owned by John Sinclair and Solomon Wilson, American citizens, but she was carried to Point-a-Petre by Captain Talbot, and there, on 31 December, 1793, by virtue of a power of attorney from Sinclair & Wilson dated 24 November, 1793, he sold her for 26,400 livres, as the bill of sale set forth, to S. Redick, who was a native of the United States but had also been naturalized (after an occasional residence for some time) as a citizen of the French Republic on the same 28 December, 1793. The bill of sale also stated that certain cannon and ammunition on board the vessel were included in the sale. The schooner, commanded by Captain Talbot, sailed immediately after this transaction on a cruise, and had taken several prizes previously to the capture of the *Magdalena.* There was some slight evidence also to sanction an allegation that of these prizes, taken subsequent to the sale of the vessel to Redick, a part of the proceeds had been paid by Talbot to the original owners, Sinclair & Wilson.

2d. In relation to the citizenship of Captain Ballard and the

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

3rd. In relation to the concert of the two schooners and the capture of the *Magdalena,* it appeared that before Capt. Ballard's vessel was fit for sea, it had been generally reported and believed and there was some evidence that Sinclair had declared, that she was destined as a concert to cruise with Capt. Talbot; that Capt. Talbot had received a letter from Sinclair directing him to proceed to Savannah River and there wait for Capt. Ballard, in whose vessel Sinclair meant to sail; that accordingly, some days afterwards, Capt. Ballard's vessel hove in sight off Savannah, when Capt. Talbot said, "there is our owner, let us give him three cheers;" that both vessels went

to Tybee Bar, and sailed more than a mile above the lighthouse, where four cannon and some swivels were taken from on board of Capt. Talbot's vessel and

mounted on board *L'Ami de la Liberte;* that Sinclair left the vessels in the river, and they soon after sailed together, as concerts, upon a cruise; and that accordingly, before the capture of the *Magdalena,* they had jointly taken several prizes, and, particularly the *Greenock,* which was taken by them on 15 May, only two days before the capture of the *Magdalena,* and the *Fortune der Zee,* which was taken the very day after her capture. It appeared that the *Magdalena* was first taken possession of by Capt. Ballard, who left a part of his crew on board of her; but Capt. Talbot was then in sight, and, coming up in about an hour afterwards, he also took possession of the brigantine, and placed a prize master and some of his men on board. The two privateers continued together for several days, making signals occasionally to each other, and finally Capt. Ballard alone accompanied the prize into Charleston.

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On 22 August, 1795, the judges delivered their opinions *seriatim.*

PATERSON, JUSTICE.

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

1. By Ballard.

2. By Ballard and Talbot.

1. By Ballard. This ground, not being tenable, has been almost abandoned in argument. It is indeed impossible to suggest any reason in favor of the capture on

the part of Ballard. Who is he? A citizen of the United States. For although he had renounced his allegiance to Virginia or declared an intention of expatriation, and admitting the same to have been constitutionally done and legally proved, yet he had not emigrated to and become the subject or citizen of any foreign kingdom or republic. He was domiciliated within the United States, from whence he had not removed and joined himself to any other country, settling there his fortune, and family.

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From Virginia, he passed into South Carolina, where he sailed on board the armed vessel called the *Ami de la Liberte.* He sailed from and returned to the United States without so much as touching at any foreign port during his absence. In short, it was a temporary absence, and not an entire departure from the United States -- an absence with intention to return, as has been verified by his conduct and the event, and not a departure with intention to leave this country and settle in another. Ballard was and still is a citizen of the United States unless perchance he should be a citizen of the world. The latter is a creature of the imagination, and far too refined for any republic of ancient or modern times. If, however, he be a citizen of the world, the character bespeaks universal benevolence, and breathes peace on earth and good will to man; it forbids roving on the ocean in quest of plunder, and implies amenability to every tribunal.

But what is conclusive on this head is that Ballard sailed from this country with an iniquitous purpose, *cum dolo et culpa,* in the capacity of a cruiser against friendly powers. The thing itself was a crime. Now it is an obvious principle that an act of illegality can never be construed into an act of emigration, or expatriation. At that rate, treason and emigration, or treason and expatriation, would in certain cases be synonymous terms. The cause of removal must be lawful; otherwise the emigrant acts contrary to his duty, and is justly charged with a crime. Can that emigration be legal and justifiable which commits or endangers the neutrality, peace, or safety of the nation of which the emigrant is a member? As we have no statute of the United States on the subject of emigration, I have taken up the doctrine respecting it as it stands on the broad basis of the law of nations, and

have argued accordingly. That law is in no wise applicable to the present case, for Ballard, at the time of his taking the command of the *Ami de la Liberte* and of his capturing the *Magdalena,* was a citizen of the United States; he was domiciliated within the same, and not elsewhere, and besides, his cause of departure, supposing it to have been a total departure from and abandonment of his country, was unwarrantable, as he went from the United States in the character of an illegal cruiser. The act of the Legislature of Virginia does not apply. Ballard was a citizen of Virginia and also of the United States. If the Legislature of Virginia pass an act specifying the causes of expatriation and prescribing the manner in which it is to be effected by the citizens of that state, what can be its operation on the citizens of the United States? If the act of Virginia affects Ballard's citizenship so far as respects that state, can it touch his citizenship so far as it regards the United States? Allegiance to a particular state is one thing;

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

But there is another ground which renders the capture on the part of Ballard altogether unjustifiable. The *Ami de la Liberte* was built in Virginia, and is owned by citizens of that state; she was fitted out as an armed sloop of war, in, and as

such sailed from, the United States under the command of Ballard and cruised against and captured vessels belonging to the subjects of European powers at peace with the said states. Such was her predicament when she took the *Magdalena.* It is idle to talk of Ballard's commission; if he had any, it was not a commission to cruise as a privateer, and if so, it was of no validity, because granted to an American citizen by a foreign officer within the jurisdiction of the United States. We are not, however, to presume that the French Admiral or Consul would have issued a commission of the latter kind, because it would have been a flagrant violation of the sovereignty of the United States, and of course incompatible with his official duty. Therefore it was not and indeed could not have been a war commission. It is not necessary at present to determine whether acting under color of such a commission would be a piratical offense? Every illegal act or transgression committed on the high seas will not amount to piracy. A capture, although not piratical, may be illegal and of such a nature as to induce the court to award restitution.

It has been urged in argument that the *Ami de la Liberte* is the property of the French Republic. The assertion is not warranted by the evidence, and if it was, would not, perhaps, be of any avail so as to prevent restitution by the competent authority. The proof is clear and satisfactory that she was an American vessel owned by citizens of the United States, and

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still continues to be so. The evidence in support of her being French property is extremely weak and futile; it makes no impression; it merits no attention. But if the *Ami de la Liberte* be the property of the French Republic, it might admit of a doubt whether it would be available so as to legalize her captures and prevent restoration, because she was, after the sale (if any took place) to the republic, and before her departure from and while she remained in the United States fitted out as an armed vessel of war, from whence in such capacity, and commanded by Ballard, an American citizen, she set sail and made capture of vessels belonging to citizens of the United Netherlands. The United States would perhaps be bound both by the law of nations and an express stipulation in their treaty with the Dutch

to restore such captured vessels when brought within their jurisdiction, especially if they had not been proceeded upon to condemnation in the admiralty of France. On this, however, I give no opinion. The United States is neutral in the present war; it takes no part in it; it remains a common friend to all the belligerent powers, not favoring the arms of one to the detriment of the others. An exact impartiality must mark their conduct towards the parties at war, for if it favors one to the injury of the other, it would be a departure from pacific principles and indicative of a hostile disposition. It would be a fraudulent neutrality. To this rule there is no exception but what arises from the obligation of antecedent treaties, which ought to be religiously observed. If, therefore, the capture of the *Magdalena* was effected by Ballard alone, it must be pronounced to be illegal, and of course the decree of restitution is just and proper. This leads us

II. To consider the capture as having been made by Ballard and Talbot. Talbot commanded the privateer *L'Ami de la Point-a-Petre.* The question is, as the *Magdalena* struck to and was made prize of by Ballard, and as Talbot, who knew his situation, aided in his equipment and acted in confederacy with him, afterwards had a fort of joint possession, whether Talbot can detain her as prize by virtue of his French commission? To support the validity of Talbot's claim, it is contended that Ballard had no commission, or an inadequate one, and therefore his capture was illegal; that it was lawful for Talbot to take possession of the ship so captured, being a Dutch bottom, as the United Netherlands was at open war and enmity with the French Republic, and Talbot was a naturalized French citizen, acting under a regular commission from the Governor of Guadaloupe.

It has been already observed that Ballard was a citizen of the United States; that the *Ami de la Liberte,* of which he had the command, was fitted out and armed as a vessel of war in the United States; that as such she sailed from the United States and cruised against

nations at peace and in amity with the said states. These acts were direct and daring violations of the principles of neutrality, and highly criminal by the law of

nations. In effecting this state of things, how far was Talbot instrumental and active? What was his knowledge, his agency, his participation, his conduct in the business? It appears in evidence that Talbot expected Ballard at Tybee; that he waited for him there several days; that he set sail without him and in a short time returned to his former station. This indicates contrivance and a previous communication of designs. At length Ballard appeared. On his arrival, Talbot put on board the *Ami de la Liberte,* in Savannah River, and confessedly within the jurisdiction of the United States, four cannon which he had brought for the purpose. Were these guns furnished by order of the French consul? The insinuation is equally unfounded and dishonorable. They also fired a salute, and hailed Sinclair, a citizen of the United States, as an owner. An incident of this kind at such a moment has the effect of illumination. Talbot knew Ballard's situation, and in particular aided in fitting out the *Ami de la Liberte* by furnishing her with guns. Without this assistance, she would not have been in a state for war. An essential part of the outfit therefore was provided by Talbot.

The equipment being thus completed, the two privateers went to sea. When on the ocean they acted in concert; they cruised together, they fought together, they captured together. Talbot knew that Ballard had no commission; he so states it in his claim. The facts confirm the statement, for about an hour after Ballard had captured the *Magdalena,* he came up and took a joint possession, hoping to cover the capture by his commission, and thus to legalize Ballard's spoliation. How silly and contemptible is cunning -- how vile and debasing is fraud! In furnishing Ballard with guns, in aiding him to arm and outfit, in cooperating with him on the high seas and using him as the instrument and means of capturing vessels, Talbot assumed a new character, and instead of pursuing his commission, acted in opposition to it. If he was a French citizen, duly naturalized, and if, as such, he had a commission, fairly obtained, he was authorized to capture ships belonging to the enemies of the French Republic, but not warranted in seducing the citizens of neutral nations from their duty and assisting them in committing depredations upon friendly powers. His commission did not authorize him to abet the predatory schemes of an illegal cruiser on the high seas, and if he undertook to do so, he unquestionably deviated from the path of duty.

Talbot was an original trespasser, for he was concerned in the illegal outfit of the *Ami de la Liberte.* Shall he then reap any benefit from her captures when brought within

the United States? Besides, it is in evidence that Ballard took possession first of the *Magdalena,* and put on board of her a prize master and some hands; Talbot, in about an hour after, came up and also put on board a prize master and other men. The possession in the first instance was Ballard's; he was not ousted of it; the prey was not taken from him; indeed, it was never intended to deprive him of it. So far from it that it was an artifice to cover the booty. Talbot's possession was gained by a fraudulent cooperation with Ballard, a citizen of the United States, and was a mere fetch or contrivance in order to secure the capture. Ballard still continued in possession. The *Magdalena* thus taken and possessed, was carried into Charleston. Can there be a doubt with respect to restoration? Stating the case answers the question.

It has been said that Ballard had a commission and acted under it. The point has already been considered, and indeed is not worth debating; the commission, if any, was illegal, and of course the seizures were so. But then what effect has this upon Talbot? Does it make his case better or worse? The truth is that Talbot knew that Ballard had no commission, and he also knew the precise case and situation of the *Ami de la Liberte* -- to whom she belonged, where fitted out, and for what purpose. Talbot gave Ballard guns within the jurisdiction of the United States, and thus aided in making him an illegal cruiser; he consorted and acted with him, and was a participant in the iniquity and fraud. In short, Ballard took the *Magdalena,* had the possession of her, and kept it; Talbot was in under Ballard by connivance and fraud, not with a view to oust him of the prize, but to cover and secure it; not with a view to bring him into judgment as a transgressor against the law of nations, but to intercept the stroke of justice and prevent his being punished. If Talbot procured possession of the *Magdalena* through the medium of Ballard, a citizen of the United States, and then brought her within the jurisdiction of the said states, would it not be the duty of the competent authority to order her to be restored?

The principle deducible from the law of nations, is plain -- you shall not make use of our neutral arm to capture vessels of your enemies, but of our friends. If you do, and bring the captured vessels within our jurisdiction, restitution will be awarded. Both the powers, in the present instance, though enemies to each other, are friends of the United States, whose citizens ought to preserve a neutral attitude, and should not assist either party in their hostile operations. But if, as is agreed on all hands, Ballard first took possession of the *Magdalena,* and if he continued in possession, and brought her within the jurisdiction of the United States, which I take to be the case, then no question can arise with respect to the legality

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of restitution. It is an act of justice resulting from the law of nations to restore to the friendly power the possession of his vessel which a citizen of the United States illegally obtained, and to place Joost Jansen, the master of the *Magdalena,* in his former state, from whence he had been removed by the improper interference, and hostile demeanor of Ballard. Besides, it is right to conduct all cases of this kind in such a manner as that the persons guilty of fraud should not gain by it. Hence the efficacy of the legal principle that no man shall set up his own fraud or iniquity as a ground of action or defense. This maxim applies forcibly to the present case, which, in my apprehension, is a fraud upon the principles of neutrality, a fraud upon the law of nations, and an insult as well as a fraud against the United States and the Republic of France.

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

IREDELL, JUSTICE.

In delivering my opinion on the great points arising in this case, I shall divide the consideration of it under the following heads:

1. Whether the district court had jurisdiction *prima facie* upon the subject matter of the libel, taking for granted that the allegations in it were true.

2. Admitting that the court had jurisdiction *prima facie,* whether William Talbot had stated and supported a case sufficient to entitle him to hold the property as prize, exempt from the jurisdiction and control of the district court.

1. The first inquiry is whether the district court had jurisdiction *prima facie* upon the subject matter of the libel, taking for granted that the allegations in it were true.

These allegations in substance are

That the ship was taken on the high seas by a schooner called *L'Ami de la Liberte,* commanded by Edward Ballard, who had no lawful commission to take her as the property of an enemy of the French Republic, under whose authority the capture was alleged to be made.

That William Talbot, who came up after the surrender and put some men on board when the prize was in possession of Ballard, had also no lawful commission for the purpose of such a capture, being an American citizen and his owners American citizens likewise.

That there was fraud and collusion between Talbot and Ballard, both vessels being in fact the property of the same owners, Wilson and Sincliar, who were American citizens.

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

But it is objected that this is a question of prize or no prize, and whether the ship was lawfully a prize or not is for some court of the French Republic alone to

determine, under whose authority Ballard and Talbot allege they acted, and it is contended that the capture in question being of a Dutch ship, and not an American, the United States has no right to decide a dispute between the Dutch and the French in regard to a capture on the high seas claimed as lawful by one party and denied to be such by the other, since such an interposition would be equally a violation of the law of nations and of the 17th article of the treaty with France.

To this objection the following answers appear to me to be satisfactory:

1. That it is true, both by the law of nations and the treaty with France, if a French privateer brings an enemy's ship into our ports which she has taken as prize on the high seas, the United States, as a nation, has no right to detain her or make any inquiry into the circumstances of the capture.

But this exemption from inquiry by our courts of justice in this respect only belongs to a French privateer, lawfully commissioned, and therefore if a vessel claims that exemption but does not appear to be duly entitled to it, it is the express duty of the court, upon application, to make inquiry, whether she is the vessel she pretends to be, since her title to such exemption depends on that very fact.

Otherwise any vessel whatever, under a color of that kind, might capture with impunity and defy all inquiry, if she kept out of a French port, equally in violation of the law of nations and insulting to the French Republic, which, from a regard to its own honor and a principle of justice, would undoubtedly disdain all piratical assistance. She might say, now, I trust, with as much truth as dignity, *non tali auxilio, nec defensoribus istis tempus eget.*

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

3. That *prima facie* all piracies and trespasses committed

against the general law of nations are inquirable, and maybe proceeded against in any nation where no special exemption can be maintained either by the general law of nation, or by some treaty which forbids or restrains it.

It is expressly held in an authority quoted 1 Lex Mercatoria 252

"That if a Spaniard robs a Frenchman on the high seas, their princes being both then in amity with the Crown of England, and the ship is brought into a port in England, the Frenchman may proceed *criminaliter* against the Spaniard to punish him, and *civiliter,* to have restitution of his vessel."

The authorities referred to are Selden mare claus. Lib. 1 chap. 27; Grotius de Jure Belli et Pacis, b. 3. c. 9. s. 16, both books of very high authority.

What is called robbery on the land is piracy if committed at sea. 3 Inst. 113; 1 Com.Dig. 269. And as every robbery on land includes a trespass, so does every piracy at sea. 1 Com.Dig. 26. Consequently, if there be an unlawful taking, it may be piracy or trespass according to the circumstances of the case, both being equally unlawful, though one a higher species of offense than the other, which cannot alter the intrinsic illegality of the fact common to both, but only occasion a greater or less degree of punishment proportioned to the nature of the offense. It is therefore no answer to say, in bar of restitution, that no piracy has been committed, and therefore no restitution is to follow, since, if a trespass has been committed, though not a piracy, restitution is equally proper as if the offense had amounted to piracy itself.

4. That by a due consideration of the law of nations, whatever opinions may have prevailed formerly to the contrary, no hostilities of any kind, except in necessary self-defense, can lawfully be practiced by one individual of a nation against an individual of any other nation at enmity with it but in virtue of some public authority. War can alone be entered into by national authority; it is instituted for national purposes, and directed to national objects, and each individual on both sides is engaged in it as a member of the society to which he belongs, not from motives of

personal malignity and ill will. He is not to fly like a tiger upon his prey the moment he sees an individual of his enemy before him. Such savage notions, I believe, obtained formerly. Thank God, more rational ones have succeeded, and a liberal man can frequently see great integrity and honor on both sides, though different and irreconcilable views of national interest or principles may unfortunately engage two nations in hostility. Even in the case of one enemy against another enemy, therefore, there is no color of justification for any offensive hostile act unless it be authorized

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by some act of the government giving the public constitutional sanction to it.

5. That notwithstanding an apparent contrariety of opinions on this subject, it would be easy to show, upon principle if not by authority, that such hostility committed without public authority on the high seas is not merely an offense against the nation of the individual committing the injury, but also against the law of nations, and, of course, cognizable in other countries. But that is not material in the present stage of the inquiry, which affects only the conduct of our own citizens in our own vessels attacking and taking, under color of a foreign commission, on the high seas, goods of our friends.

This is so palpable a violation of our own law (I mean the common law, of which the law of nations is a part, as it subsisted either before the act of Congress on the subject, or since that has provided a particular manner of enforcing it) as well as of the law of nations generally; that I cannot entertain the slightest doubt but that upon the case of the libel, *prima facie* the district court had jurisdiction.

2. The next inquiry is

Whether William Talbot has stated and supported a case sufficient to entitle him to hold the property as prize, exempt from the jurisdiction of the district court.

This claim is grounded as follows:

1. That at the time of his receiving the commission and at the time of the capture, he was a real French citizen, and his vessel was French property, *viz.,* the property of Samuel Redick, a French citizen at Point-a-Petre in Guadaloupe.

2. That he had a lawful commission to cruise from the French Republic.

3. That whether Ballard had a lawful commission or not, he himself was lawfully entitled: 1. To part, if Ballard had a lawful commission, as having been in sight at the time of the capture, and therefore contributing to intimidate the enemy into a surrender upon the common principle. 2. If Ballard had no lawful commission, and is to be considered as a pirate, his capture did not change the property; of course, it remained Dutch, and he, as captain of a French privateer, had a right to seize and retain it.

The first point to be considered is whether Talbot, at the time of his receiving the commission and at the time of the capture, was a French citizen.

This involves the great question as to the right of expatriation, upon which so much has been said in this cause. Perhaps it is not necessary it should be explicitly decided on this occasion, but I shall freely express my sentiments on the subject.

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

The only difference of opinion is as to the proper manner of executing this right.

Some hold that it is a natural unalienable right in each individual; that it is a right upon which no act of legislation can lawfully be exercised, inasmuch as a legislature might impose dangerous restraints upon it; and of course it must be left to every man's will and pleasure to go off when and in what manner he pleases.

This opinion is deserving of more deference because it appears to have the sanction of the Constitution of this state, if not of some other states in the Union.

I must, however, presume to differ from it, for the following reasons:

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

2. Some writers on the subject of expatriation say a man shall not expatriate in a time of war so as to do a prejudice to his country. But if it be a natural unalienable right, upon the footing of mere private will, who can say this shall not be exercised in time of war, as well as in time of peace, since the

individual, upon that principle, is to think of himself only? I therefore, think, with one of the gentlemen for the defendant, that the principle goes to a state of war as

well as peace, and it must involve a time of the greatest public calamity as well as the profoundest tranquility.

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

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

5. The supposition that the power may be abused is of no importance if the public good requires its exercise. This feverish jealousy is a passion that can never be satisfied. No man denies the propriety of the legislature having a taxing power. Suppose it should be seriously objected to because the legislature might tax to the amount of 19s. in the pound? They have the power, but does any man fear the exercise of it? A legislature must possess every power necessary to the making of laws. When constructed as ours is, there is no danger of any material abuse. But a legislature must be weak to the extremest verge of folly to wish to retain any man as a citizen whose heart and affections are fixed on a foreign country in preference to his own. They would naturally wish to get rid of him as soon as they could, and therefore, perhaps, the proper precaution would be to restrain acts of banishment,

if such could be at all permitted, rather than to limit the legislative control over expatriation. But is there no danger of abuse on the other side? Have not all the contentions about expatriation in the courts arisen from a want of the exercise

of this very authority? For if the legislature had prescribed a mode, everyone would know whether it had or had not been pursued, and all rights, private as well as public, would be equally guarded; but upon the present doctrine, no rights are secured but those of the expatriator himself.

I therefore have no doubt that when the question is in regard to a citizen of any country whose constitution has not prohibited the exercise of the legislative power in this instance, it not only is a proper instance in which it may be exercised, but it is the duty of the legislature to make such provision, and for my part, I have always thought the Virginia Assembly showed a very judicious foresight in this particular.

Whether the Virginia act of expatriation be now in force is a question so important that I would not wish unnecessarily to decide it. If it be, I have no doubt that a citizen of that state cannot expatriate himself in any other manner. It seems most probable (but I think not certain) from this record that Talbot was a citizen of Virginia. We are, however, undoubtedly to consider him as a citizen of the United States. Admitting he had a right to expatriate himself, without any law prescribing the method of his doing so, we surely must have some evidence that he had done it. There is none but that he went to the West Indies and took an oath to the French Republic and became a citizen there. I do not think that merely taking such an oath and being admitted a citizen there in itself is evidence of a *bona fide* expatriation, or completely discharges the obligations he owes to his own country. Had there been any restrictions by our own law on his quitting this country, could any act of a foreign country operate as a repeal of these? Certainly not. When he goes there, they know nothing of him, perhaps, but from his own representation. He becomes a citizen of the new country, at his peril. The act is complete, if he has legally quitted his own; if not, it is subordinate to the allegiance he originally owed. By allegiance I mean that tie by which a citizen of the United States is

bound as a member of the society. Did any man suppose, when the rights of citizenship were so freely and honorably bestowed on the unfortunate Marquis de la Fayette, that that absolved him as a subject or citizen of his own country? It had only this effect, that whenever he came into this country and chose to reside here, he was *ipso facto* to be deemed a citizen, without anything further. The same consequence, I think, would follow in respect to rights of citizenship conferred by the French Republic upon some illustrious characters in our own and other countries. If merely intended, as ingeniously suggested at the bar, that upon going to France and performing the usual requisites, they should be then French citizens, where is the

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honor of it? Since any man may avail himself of an indiscriminate indulgence granted by law, some disagreeable dilemmas may be occasioned by this double citizenship, but the principles as I have stated them appear to me to be warranted by law and reason, and if any difficulties arise, they show more strongly the importance of a law regulating the exercise of the right in question.

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

from the guilt of piracy, it would not make such a contract lawful, because in this case even his intention was not to expatriate himself forever, and consequently he still remained an American citizen and had no authority to take a commission at all. It surely is impossible for us to say he meant a real expatriation when his conduct *prima facie* as much indicates a crime as anything else. If he had such an intention before he left this country, why not mention it? If a citizen of Virginia, and their act of expatriation was not in force yet, surely it prescribed as good a method of effecting it as any other, and his not pursuing this method (if he really meant an expatriation) can be accounted for in no other manner but that he was conscious the vessel he was fitting out was for the purpose of cruising, and would have been stopped by the government had his design of expatriation so plainly evinced it.

I therefore must say there is no evidence to satisfy me that he ceased to be an American citizen so as to be absolved from the duties he owed to his own country, and among others, that duty of not cruising against the Dutch in violation of the law of nations, generally and of the treaty with Holland in particular.

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

In addition to my other observations, I may add how is it possible upon this principle for the public to know in what situation it stands as to any one of these persons? It is not impossible (I believe instances indeed have already happened of it) that an American citizen may go to some of the dominions of the French, become a French citizen for a time, enjoy all the benefits of such, and afterwards

return to his own country and claim, and enjoy all the privileges of a citizen there without the least possibility of the public knowing otherwise than from accident whether he has become a citizen of another government or not. Suppose one of them was to insist on holding an estate in land devised to him after his new citizenship -- how could it be proved he was an alien?

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

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

I now proceed to inquire into the consequences of Ballard's capture, and Talbot's cooperation with him, tho' perhaps, upon my principles, it is not absolutely necessary.

1. Ballard's capture, I think, is clearly insupportable. Admitting him to have been expatriated (which, if the Virginia law was in force, I think he was), he did not become a French citizen at all. Only one of the crew was a Frenchman. I think all the rest were proved to be Americans or English. She

was fitted out in the United States. The commission, if good at all, was of a temporary and secret nature, and seems to have been confined to a special purpose, to be executed within the United States. She certainly had no authority to

cruise, that being specified in every commission of that nature. Whoever were her owners, she does not appear to have been French property. On the contrary, there is the highest possibility that Talbot's and Ballard's vessels had the same owners. So conscious was he of the illegality of his conduct that he even preferred no claim for the captured property.

2. Talbot (considering himself as master of a lawful privateer) claims upon two grounds:

1. upon supposition of Ballard's being a lawful commission, he claims as being in sight at the time of the capture. To this it is sufficient to say that it was not a lawful commission.

2. If Ballard had no lawful commission, he claims upon his independent right, alleging that if Ballard had no lawful commission, the property was not changed to Ballard, and therefore he had a right to take.

This claim (if Talbot's was a lawful privateer) would undoubtedly be good if he was not a confederate with Ballard. But it is clear that he was -- that he cruised before and after in company with him, that he put guns on board of his vessel -- and there is the strongest reason to believe that they both belonged to the same owners. It is true, if Talbot had come up, ignorant of Ballard's authority, and inadvertently put men on board the prize in conjunction with Ballard, supposing he had a lawful commission when in reality he had not, it might with some reason be contended that Talbot should hold the prize. But, willful ignorance is never excusable; when there is time to inquire, inquiry ought to be made. There is not, however, the least reason for supposing any ignorance in the case. He abetted Ballard's authority, such as it was. He acted in support of it, not in opposition to it. It does not appear that he ever questioned it until after his arrival in Charleston. It was therefore a mere afterthought. A man having a commission is authorized, but not compelled, to exercise it. His will must concur to make a capture under it. It does not appear that he relied at sea upon his own force, but upon Ballard's; at least, in this instance upon his own and Ballard's in conjunction. A man having a lawful commission is authorized to cruise himself and to cruise in company with others

having lawful authority. It does not authorize him to associate with pirates or any unlawful depredators on the high seas. If he does so, he departs from his commission, assumes a new character, which that does not authorize, and risks all the consequences of it. It is impossible that Ballard can be guilty of

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a crime, and Talbot, who associated with him in the willful commission of it, can be wholly innocent of it. A man can be guilty of no crime in obeying a lawful commission. He therefore, in this instance, if guilty of a crime, must be considered altogether detached from a rightful authority, which he abandoned in search of the profit of an illegal adventure. If, at sea, he acted in support of Ballard's claim, how can he claim now on the principle of that being insupportable? At sea was the place for him to make his option. He has no right, after the prize is brought into port, to say

"I made a bad option there; I supported Ballard's claim, whereas I ought to have opposed it and stood upon my own. I will now take this Dutch ship as a prize, by my own authority."

For such, in effect, I take to be the substance of any claim suggested after his arrival in port.

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

WILSON, JUSTICE.

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

CUSHING, JUSTICE.

The facts in this case, so far as they appear to me to be essential for forming an opinion, may be reduced to a very narrow compass. Ballard, the commander of a

vessel which was illegally fitted out in the United States, cruises in company with Talbot, who alleges that he is a French citizen, and produces a French commission. Ballard captures the *Magdalena,* a Dutch prize; then Talbot joins him, and both, having put prize masters on board, bring the prize into the harbor of Charleston. The questions arising on this statement are simply whether the capture under such circumstances is a violation of our treaty with Holland? And whether it is such a case of prize as the courts of the United States can take cognizance of consistently with the treaty between America and France?

Now the whole transaction at Guadaloupe as well as here presents itself to my mind as fraudulent and collusive. But even supposing that Talbot was *bona fide* a French citizen, the other circumstances of the case are sufficient to render the capture void. It was, in truth, a capture by Ballard, who had no authority or color of authority for his conduct. He was an American citizen; he had never left the United States; his vessel was owned by American citizens, and the commission, which he held by assignment, was granted by a French admiral, within the United States, to another person, for a particular purpose, but not for the purpose of capture. Then shall not the property, which he has thus taken from a nation at peace with the United States and

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brought within our jurisdiction, be restored to its owners? Every principle of justice, law, and policy unites in decreeing the affirmative, and there is no positive compact with any power to prevent it.

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

MR. CHIEF JUSTICE RUTLEDGE.

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

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

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

The Decree of the circuit court affirmed.

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

BY THE COURT: Ordered, that the decree of the Circuit Court of South Carolina District, pronounced on 6 November, 1794, affirming the decree of the district court of the same district, pronounced on 6 August, 1794, be in all its parts established and affirmed. And it is further considered, ordered, adjudged, and decreed that the said William Talbot, the plaintiff in error, do pay to the said Joost

Jansen, the defendant in error, in addition to the sum of $1755.53 for demurrage and interest, and $82 for costs in the decree of the said circuit court mentioned,

demurrage for the detention and delay, of the said brigantine *Vrouw Christina Magdalena,* at the rate of $9.33, lawful money of the United States, *per diem,* to be accounted from 5 November last past till 6 June last, the day of the actual sale of the said brigantine, under the interlocutory order of this Court, of the third day of March last past, to-wit, for two hundred and thirteen days, a sum of $1,987.29, and also interest at the rate of seven percentum per annum for two hundred and ninety days on the sum of $51,845, being the amount of the sales of the cargo of the said brigantine heretofore sold by order and permission of the said district court, and making a sum of $2,883.42, and also a like sum of seven percentum per annum on the amount of sales of the said brigantine *Vrouw Christina Magdalena,* under the order of this Court -- that is to say interest for seventy-seven days, on the sum of $1,810 from the said 6 June last, making the sum of $26.87, the whole of which interest to be accounted to this day, and making together the sum of $2,910.29, lawful money of the United States, and which said interest and demurrage, make together the sum of $4,897.58 in addition to and exclusive of the demurrage interest and costs adjudged in the said Circuit Court of the United States for South Carolina District; also $91.93 for his costs and charges, and that the said Joost Jansen have execution of this judgment and decree by special mandate to the said circuit court and process agreeable to the act of the Congress of the United States in that case made and provided.

* The words of the law are these:

"Whensoever any citizen of this Commonwealth shall, by deed in writing under his hand and seal, executed in the presence of and subscribed by three witnesses and by them or two of them proved in the General Court, any district court, or the court of the county or corporation where he resides or by open verbal declaration made in either of the said courts, to be by them entered of record, declare that he relinquishes the character of a citizen and shall depart out of this commonwealth, such person shall, from the time of his departure, be considered as having exercised his right of expatriation, and shall thenceforth be deemed no citizen."

Passed 23 Dec., 1792.

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