PRIZE JURISDICTION: ARGUMENT OF ISAIAH T. WILLIAMS, ESQ. BEFORE HIS HONOR, JUDGE BETTS, UPON THE QUESTION OF THE JURISDICTION OF THE PRIZE COURT

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Prize Jurisdiction: Argument of Isaiah T. Williams, Esq. Before His Honor, Judge Betts, upon the question of the Jurisdiction of the prize court by Isaiah T. Williams

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ISAIAH T. WILLIAMS

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In Admiralty,

BEFORE JUDGE BETTS.

HARLAN, HOLLINGSWORTH, & CO.

against

THE STEAMSHIP NASSAU, &c.

Monday, 22nd September, 1862.

In this case Mr. I. T. WILLIAMS appeared for the Libellants, Messrs. HARLAN, HOLLINGSWORTH, & Co., of Wilmington, Del.

Mr. UPTON for the UNITED STATES; and

Mr. EDWARDS for BRITISH SUBJECTS, claiming as owners.

Mr. EDWARDS now moved that the libellants' suit should be dismissed in the Instance Court, on the ground that the Nassau was the subject of a suit in the Prize Court, the jurisdiction of which superseded that of the Instance Court.

Mr. WILLIAMS, in opposing the motion, said:

MAY IT PLEASE THE COURT:

On the 2d day of June last, the Steamship Nassau was brought into this Port by persons claiming to be a *Prize Crew*, and delivered into the custody of persons known as the "Prize Commissioners" of this District. While she was so in the possession of the Prize Commissioners and on the 17th day of June, aforesaid, the libellants filed their libel in this action claiming a Maritime Lien upon this Vessel for repairs done thereto, at the request of the Captain thereof, in the month of July, 1860, at Wilmington, in the State of Delaware.

The libel sets forth that the Vessel, while upon a voyage upon the high seas and engaged in trade and commerce between ports and places in different states and countries, put into the Port of Wilmington in distress. That she was owned by persons residing in the State of South Carolina, who had no credit in the Port of Wilmington. That application was made to the libellants by the Captain of the Vessel to do such necessary repairs as would enable

her to proceed upon the voyage in which she was then engaged, upon the credit of the Vessel. That the libellants acceded to this request, and did and performed such necessary repairs as the Vessel then stood in need of, relying upon the maritime lien given by the general maritime law, as their security therefor.

On her arrival in this Port the libellants filed their libel upon which process was issued out of this Court to the Marshal of this District, commanding him, in the name of the President of the United States, to arrest the Vessel, and detain her in his custody to abide the decision of the Court in this case.

The Marshal, under this process, arrested the Vessel, and on the same day, (June 17th) made his return to this Court, in substance, that he had, in obedience to the process of this Court, arrested the said Vessel, her tackle, &c., "the same being at the time of the arrest in the custody of the Prize Commissioners."

On the 12th of July, the United States District Attorney for this District filed a libel in the Prize Court in behalf of the Government and captors, claiming the Vessel as *Prize of war*.

On the 29th day of July, the United States District Attorney perfected his appearance in this suit in the Admiralty intervening on behalf of the Government and the "Prize Captors," claiming the Vessel as Prize of war.

On the day of the British Consul perfected his appearance in this suit in the admiralty intervening on the part of the owners of said Vessel, claiming that she is owned by British subjects, and disputing the claim of the Libellants.

Both these parties now move to dismiss the libel so filed by these libellants on the ground that the Vessel having been captured by a Prize crew as Prize of war, it is not competent for a private suitor to interfere with or molest such military possession except through the authority of the Prize Court.

I am therefore required to show good and sufficient cause why this suit, instituted for the purpose of enforcing a claim due to material men, which, under the general maritime law of the United States, constitutes an undoubted lien on the Steamship Nassau, should not be dismissed without a hearing. I am not ignorant, sir, that in thus appearing, I stand on somewhat delicate ground—that I am in danger of being thrust out of court on the strength of an array of textual and judicial authority bearing on the arbitrary question of prize law. I am not deterred, however, by these considerations, for we are not in a Prize Court. We are here in the Instance Court of the Admiralty, and I wish to be informed on what ground that Court refuses me its legitimate jurisdiction.

The claim of Messrs. Harlan, Hollingsworth, & Co., constitutes an indisputable lien on the Vessel by the municipal law of the United States. The Court of Admiralty is the jurisdiction which takes special cognizance of and enforces such liens. We have appealed to that jurisdiction in strict form of law. I am told, however, that a suit of Prize, subsequently instituted, must be held to override the jurisdiction of this Court, and that unless I can make good my claim in the Prize Court my clients can have no remedy.

The libellants' claim is one which appeals strongly to the Equity

of the Court, and our position is not without powerful legal precedents to sustain it. I shall be told, however, as indeed I have been already told in this place, that the "Nassau" is now within the control of the Prize Court, and that Prize Courts take no cognizance of *latent* liens. If the "Nassau" be a Prize of war, in the strict and recognized interpretation of the term, I admit that there are precedents that go to that extent, although the rule is not without exceptions based on strong equities. Is the Nassau, then, Prize of war? To render her Prize of war, there must be war within the meaning of the law of nations. Prize of war is the offspring of legitimate war—*justi belli;* and it has no other parent. There may be prizes of forfeiture, there may be revenue prizes—but prizes of war exist only by right of war. The Prize Court is a Court of the Law of Nations. (The Walsingham Packet, 2 C. Rob., 83.)

International law, and not the municipal law of a country, governs its judgments. (Mitchell *vs.* Rodney, 2 Bro. P. C., 423; Le Caux *vs.* Eden, 2 Doug., 608; Lindo *vs.* Rodney, 2 Doug., 613.

It is upon this principle that Prize Courts have declined to take notice of latent liens. A lien is given by municipal law. The law of nations has no such word in its vocabulary. A Prize Court, sitting to enforce the law of nations—taking no cognizance of municipal law, save incidentally—cannot well be asked to enforce a right given solely by the municipal law. In the terse language of Sir William Scott, in "*The Hoffnung,*" Hardrath, 6 C. Rob., 383, "the *right of war* is a right *in re*, and a Court of Prize attends only to the *res ipsa*, and the *onera* attaching on the property in right of possession."

International law, *ex vi termini*, means the law which governs the relations of different states with each other. Vattel designates it "the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights." Blackstone describes it (4 Com. 66) as "a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the earth, in order to decide all disputes, to regulate all ceremonies and civilities, and to ensure the observance of justice and good faith in that intercourse which, must frequently occur between two or more independent states." A nation, then, to be within the provisions of international law, must be an independent power, established and recognized as such. A section of a nation, in rebellion against its constituted government, and unrecognized by that or any other government, is not a nation, and the law of nations does not apply to it. Foreign governments may, for the sake of convenience, adopt a principle of neutrality in their own relations with another power and its revolted subjects or citizens, but that does not constitute these subjects or citizens a nation, nor does it, save in terms simply conventional, invest the domestic or intestine contests of another people with the character of war. Lord Palmerston, during a late debate in the House of Commons, has placed this in a light so clear as to be unanswerable. "The right honorable gentleman," said his lordship, "had argued that we had taken a step towards the acknowledgment of the independence of the South by admitting

that the South had belligerent rights, but Vattel, and all the best authorities on the law of nations, hold that when a civil war breaks out in a country, and is firmly established there, other nations have a right to deal with those two parties as belligerents, *without acknowledging the independence of the revolted portion of the country.* Admitting that the war had been established on such a footing that each party is entitled to be regarded by other countries as belligerents, *the mere fact of our having acknowledged that those parties are belligerents in the international sense of the word, does not imply a step towards acknowledging one or other of them as an independent nation.*" Now, what other nations call "civil war," the government, against which its citizens revolt, designates "Rebellion." "War," says Blackstone, "is an appeal to the God of hosts to punish such infractions of public faith as are committed *by one independent people against another.*"

Is the Southern Confederation an independent nation at war with the United States, or is it a rebellious conspiracy, armed treasonably against the Constitution? If it be an independent power at war with the United States, then this ship is a Prize of war, amenable, *jure belli*, to the jurisdiction of a Prize Court. If not, if the Confederates be merely citizens in rebellion, what law, either international or municipal, constitutes the "Nassau" a Prize of war? "Prize of war" is not an empty, unmeaning phrase; it has a settled and determinate meaning within the purview of international law. It is the strict right of a belligerent in a legitimate war to seize, *jure belli*—by right of war—the ships and property of the enemy, and to confiscate them by a court specially constituted for that purpose under the law of nations. This right to capture enemy's property is an inherent one, as old as the time of the Romans. The Prize Court is a creation to enforce that right by confiscation.

What is an enemy within the meaning of the law of nations? Blackstone, (4 Com., 83,) in defining treason, says: "If a man be adherent to the king's enemies in his realm, giving them aid and comfort in the realm or elsewhere," he is guilty of treason. "By enemies," he goes on to say, "are here understood the subjects of foreign powers with whom we are at open war." "A rebel," he adds, "is not an enemy; an enemy being always the subject of some foreign power with whom we are at open war." So Chancellor Kent (1 Kent, 64) describes an enemy to be one who "owes permanent allegiance to the adverse belligerent, and whose hostility is commensurate in point of time with his country's quarrel."

This doctrine has already received the sanction of our own courts. A man named Chenowith was indicted in the United States Circuit Court at Cincinnati for the crime of treason—the overt act alleged being a purchase of arms for the use of the Southern rebellion. The indictment charged that on the 20th June, 1861, and thence hitherto, an open and public insurrection and war was and had been waged against the government of the United States by certain persons owing it allegiance, but styling themselves "The Confederate States of America;" and that Chenowith adhered to those persons,

being enemies of the United States, giving them aid and comfort. Chenowith was acquitted; the Court, (Swayne, J.,) holding that the overt act charged amounted to "levying war" against the United States under the first branch of treason, as defined by the Constitution, and was not "an adhering to their enemies, giving them aid and comfort," under the second. The reasons on which this decision was based may be shortly summed up as follows: Treason was a crime to which there could be no accessary. Its very nature demanded that a person accused, if guilty at all, should be guilty as a principal. Sympathizing with rebels was not a crime within the reach of the criminal law; but to supply rebels with arms, equipments, or provisions, or to assist them with military information, was not only to approve the design, but to participate in and contribute towards carrying that design into execution. Such acts amounted to a levying of war, and marching with it. (4 Cranch, App., 469, 470.) Persons so acting might—although the case did not call for any actual decision on that point—be indicted for substantive treason in levying war against the United States. But the term "enemies," employed in Art. 3, Sec. 3 of the Constitution, referred exclusively to *foreign enemies in time of open war*, and could not be made to embrace those aiding insurgents and rebels. From all the authorities it was clear that a rebel was not, in contemplation of law, an enemy, and as an inevitable consequence the United States could not exercise *belligerent rights*, so called, in respect either of the persons or property *of their own citizens*. The Confederate States might be belligerent *de facto* in the estimation of European powers, but they could not be so regarded by the government of the United States in any of its departments without thereby, and necessarily, acknowledging their independence.

A rebel, then, is not an enemy within the meaning of international law, and his ships and property are not liable to capture, *jure belli*, and to forfeiture by a Prize Court under the law of nations. And for the same reason, namely, that there is no war within the meaning of that term as used in the law of nations, ships of other countries, however connected with the rebellion, are not liable to capture, *jure belli*, or to condemnation by a Prize Court under the law of nations, and can only be held liable to capture under some municipal law specially provided to meet the emergency. Rebellion, which is neither more nor less than the treasonable act of *levying war* within the meaning of the criminal law, (4 Cranch, 473–4,) must be punished in the person and property of the rebel by the municipal law of a country, or it cannot be lawfully punished at all. The act of "levying war" against a government will hardly be confounded, by any one cognizant of the most simple elements of general jurisprudence, with that of waging an open war, *justum bellum*, within the meaning of the law of nations. "Levying war," says Bouvier, "is a *technical* term borrowed from the English law, and its meaning is the same as when it is used in Stat. 25, Edw. 3;" (4 Cranch, 471; *U. S. v. Fries*, Pamph. trial; 1 East P. C., 62 to 77; Alis. Cr. Law of Scot., 606; 9 C. and P., 129.) It is a term applicable only to the crime of high treason, and is unknown to the law of nations. War levied against the king, under the criminal

law of England, is of two kinds, direct and constructive ; direct, when the war is levied directly against the king or his forces, with intent to do some injury to his person, to imprison him, or the like, (1 Hale, 131, 132,)—such, for instance, as *open rebellion*, (1 Hale, 152,)—constructive, when it is levied for the purpose of effecting innovations of a public nature by an armed force, or any similar purpose, (Fost., 211 ; 1 Hawk., c. 17, s. 25 ; 1 Hale, 153 ; Rex *v.* Lord G. Gordon, Doug. 590.) An indictment for treason, under the criminal law of England, against a person compassing the king's death—for shooting at the king, for example, as in the case of Hadfield—charges him specifically with "levying war within the kingdom, against the king," (Arch. Crim. Plead., 379.) To compass the king's death includes every act deliberately done or attempted, whereby the king's life may be endangered, (Foster, 195.) Going armed for the purpose of killing the king is to compass his death, and is a "levying war" within the meaning of the criminal law, (Fost, 195.) When, therefore, the term "levying war" is used, it points to an overt act of treason committed against the government by a citizen owing allegiance to it, and not to waging a war by a foreign power under the general terms of the law of nations.

Ours, may it please the Court, is no doubt a remarkable case ; but it is not without precedent. The independence of the United States was achieved by armed revolt against the British government. The struggle which ensued on our declaration of independence is designated in history as "the Revolutionary War ;" but England treated it, as we treat the insurrection in the South, as rebellion ; which, indeed, it was as well in law as in fact, so long as our independence was not achieved.

By the laws of England, (Black. Com., vol. 3, pp. 250, 384, 387,) the crime of treason involves severe penalties. Real estate escheats to the crown *on attainder*, and the finding of office for the crown vests the forfeiture. It is different with respect to personal estate, which is only forfeited *on the conviction* for treason. When the revolt of the American colonies occurred, therefore, there was no law by which the ships and property of the Americans could be seized on the high seas, and lawfully confiscated. They could not have been captured as enemy property, *jure belli*, because a rebel is not an enemy, and war can only exist between foreign and independent powers. They could not be confiscated as the property of traitors, because, being personal property, a conviction for treason must *precede* forfeiture. What course did the government pursue ? They introduced, and carried through Parliament, a special act to meet the case. We have all heard of the British Prohibitory Act, which forms so important a feature in the history of the Revolution. That act, and that act alone, enabled British cruisers to make prize of American ships, as well as the ships of foreign countries trading with the revolted colonies, on the high seas, or wherever found, and enabled the British Prize Court to condemn them "as if they were the property of an open enemy." Without that act no capture would have been lawful ; without that act, which conferred special jurisdiction for that purpose, no *Prize Court* could have assumed or lawfully exercised jurisdiction over them. That act, (16, Geo. 3, Cap.

5,) provided, among other things, "That all ships and vessels of, or belonging to, the inhabitants of the colonies therein specified, together with their cargoes, apparel, and furniture, and all other ships and vessels whatsoever, with their cargoes, apparel, and furniture, which should be found trading in any port or place of the said colonies, or going to trade, or coming from trading in any such port or place, (except as therein after excepted,) should become forfeited to his majesty, *as if the same were the ships and effects of open enemies*, and should be so adjudged, deemed, and taken in all courts of admiralty, and in all other courts whatsoever." And further, "That, for the encouragement of the officers and seamen of his majesty's ships of war, the flag officers, captains, commanders, and other commissioned officers in his majesty's pay, and also all the seamen, marines, and soldiers on board, should have the sole interest and property of and in all and every such ship, vessel, goods, and merchandise, which they should seize and take, (being first adjudicated lawful prize in any of his majesty's courts of admiralty,) to be divided in such proportions, and after such manner, as his majesty should think fit to order by proclamation thereafter to be issued."

This act, it will be observed, closed the ports of the colonies against all external intercourse, and the jurisdiction, to which the ships and property captured under its provisions were expressly subjected, was not the ordinary Prize Court constituted under the law of nations, but the Court of Admiralty specially empowered to condemn vessels captured under its provisions as "lawful prize." "The Prohibitory Act itself," said Sir Jas. Marriott, in his judgment in the case of the *Louisa*, "regulates the mode of procedure." (See also *The Dickenson*, H. & M., 1. The *William & Grace*, H. & M., 76.)

It was *not*, therefore, under the law of nations that Great Britain made capture of the ships and property of the revolted colonists, or of foreign or neutral ships trading with them, or that her courts undertook to condemn either the one or the other, but under the act of Parliament to which I have just called your Honor's attention; by the provisions of which their capture and their condemnation were authorized in the same manner as the ships and property of "an open enemy." Had they been, in point of law, "open enemies" by the mere fact of their armed rebellion, such an act would have been unnecessary. No one can read the provisions of that act without being convinced that the Prize Court, adjudicating under its authority, was not a court of the law of nations, but a court specially empowered in aid of the municipal law of England, to punish treason by the confiscation of the property of those who, under that act, were attainted as traitors. The strong analogy existing in their abstract features between the present relations of the Federal Government to the States in insurrection, and that of Great Britain to the revolted Colonies in 1776, no doubt suggested to Congress the necessity of making similar provision for the confiscation of rebel property, and the prohibition of external trade with the ports of the insurrectionary States. I find such an act on the Statute book. On the 13th July, 1861, Congress passed an act "further to provide for the collection of duties on imports." By the fourth section of that act the President is empowered, whenever the duties on