

Arthur E. J. Niles for his friend
NILES' *St. J. Niles*
U.S.N.

WEEKLY REGISTER,

CONTAINING

POLITICAL,
HISTORICAL,
GEOGRAPHICAL,
SCIENTIFICAL,

ASTRONOMICAL,
STATISTICAL,
AND
BIOGRAPHICAL,

DOCUMENTS, ESSAYS, AND FACTS;

TOGETHER WITH

NOTICES OF THE ARTS AND MANUFACTURES, AND A RECORD
OF THE EVENTS OF THE TIMES.

H. NILES, EDITOR.

Hæc olim meminisse juvabit.—VIRGIL.

FROM MARCH TO ~~SEPTEMBER~~ ^{April}, 1815.—VOL. VIII.

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military guard," an averment discredited on oath by many Americans and by all the testimony yet adduced."

We would also call the attention of our readers to a consideration of this fact—that of the *thirty-three* returned as killed or wounded, *FOURTEEN* are acknowledged to have been impressed American seamen. Only think on that!—*impressed men made PRISONERS—PRISONERS MASSACRED.* Magnanimous Englishmen!! While British subjects that came among us of their own free will, were residing in our cities and carrying on their businesses unmolested, if they demeaned themselves with common decency (as many of them did not) our unfortunate countrymen, who got into the power of the enemy by an infernal outrage before the war, were wasting out their lives in the famous prisons at *Juirtmoor*!—the history of the world presents us with no parallel atrocity. Justice, common justice would have caused the impressed seamen to have been paid wages for the services they had performed, and then to have landed them on the shores of their own country. It was vile, vile indeed, to make *prisoners* of such persons. No other power than that of *Algiers*, &c. would do this thing.

Vice-admiralty Decision.

[From the Halifax Arcadian Recorder.]
THE LEGAL TENDER, IRVIN, MASTER.
Decided 20th of April, 1815.

JUDGMENT, DR. CROKE.

This is a vessel originally British, and belonging to Messrs. Shannon and company, of Grenock—she was captured by an American privateer on the 8th of January, 1815, and recaptured on the 7th of March by the Spencer, captain Ragget.

There are three parties before the court. Captain Ragget claims salvage, as for a recapture of British property, being one eighth of the value.

Duncan McColl, of Halifax, has given a claim on behalf of Messrs. Shannon, the original owners, praying the vessel to be delivered to them on payment of salvage.

And there is the claim of Benjamin Smith, of Boston, for Winslow Lewis, and Henry Lewis, of Boston, the owners of the private armed ship the David Porter, and the commander, officers and crew thereof as owners of the Legal Tender, under and by virtue of the capture, and of the treaty of peace. He states in his affidavit, which is not contradicted, that the David Porter sailed from Boston the 13th December, 1814, lawfully commissioned; that on the 8th of January, 1815, off Lisbon, she captured the Legal Tender, put a crew on board, and ordered her to the United States; that she continued to proceed till the 7th of March, when being off Monhegan, in lat. 43, 44, N. long. 69, 13, W. she was captured by the Spencer and sent to Halifax. He pleads the second article of the treaty between Great Britain and America, which was signed on the 24th December, by which it was reciprocally agreed that all vessels and effects which should be taken after the space of twelve days from the ratification, upon all parts of the coast of North America, from the lat. 23, N. to 50, N. and as far eastward in the Atlantic ocean as the 36th deg. of west longitude, should be restored on either side. That the treaty was ratified on the 10th of February, and that the brigantine was not therefore liable to capture, within the said latitudes, after the 3d of March, or if recaptured, ought to be restored.

The article of the treaty upon which the present case depends, was introduced to prevent disputes, as a similar adjustment has been agreed upon in ma-

ny others. A treaty cannot be binding upon the subjects of a state, but so far as it is known and notified. In many cases it might be difficult to ascertain when the knowledge of it arrived at any particular part of the world, and therefore much litigation and management might occur. By fixing certain periods, according to the distance of the places and with reference to the time within which it would be probable that a communication would take place, a certain and invariable rule is obtained, clear from all probability of contention or chicane. It was admitted that this vessel was seized before the time limited for captures had expired, and was recaptured after that period. It is argued, therefore, on behalf of the owners of the American privateer, that this vessel became theirs by the original capture, that the subsequent recapture was not lawful under the treaty, and that therefore the vessel ought to be restored to them. The original British owners on the other hand contend, that the recapture was lawful, and claim restitution under their former title.

It has been objected by his majesty's advocate, that the person who appears here for the American privateer is not properly authorized to claim. But it is proved by an authenticated copy of the commission of the privateer, found on board the recaptured vessel, that Winslow and Henry Lewis are the owners of the privateer, and Smith has produced a proper warrant of attorney from them to claim. As to any right in the captain, officers and crew, that is mere matter of private agreement between the owners and themselves, which this court has no business to enter into, nor is it necessary to produce any authority from them. The ownership is a sufficient title to enable the parties to obtain restitution.

As little foundation is there for the argument deduced from the prize acts which direct that if any vessels taken as prize shall appear to have belonged to any of his majesty's subjects, and to have been before taken by the enemy, and retaken, they shall be restored to the former owner on salvage. That clause is merely a domestic regulation to settle the question which arises between the original owner and the recaptor. In general, the British owner recovers his property, and the recaptor receives a salvage. In some few cases, as where a vessel has been fitted out a ship of war, and consequently the danger of the recaptor is the greater, the recaptor is rewarded with the whole. The mere municipal regulation of an act of parliament cannot be intended to affect, nor can it legally affect, the right of nations. They must be decided by the general law of nations, and by particular treaties.

It has farther been argued, and a great deal of learning has been displayed to support the argument from civilians, writers upon the law of nations, and the English lawyers, that the first captors had no title or right to this vessel under their seizure, till a legal adjudication; and till then, no right whatever accrued, or attached to the state, and that therefore the owners of the privateer had no interest to entitle them to claim; that as hostilities were extended by the treaty, in some parts of the world to one hundred and twenty days after the ratification, within which period this recapture was made, that the state of war still subsisted, and this very privateer might have been actually employed in capturing British ships at the time when the owners appeared as claimants in a British court of prize; and finally, that the treaty not having specified recaptures, did not extend to them.

The rule as to the precise time when the right of the captors shall vest, and which is understood to be the same in the United States as in Great Britain, is chiefly a regulation as between the state and the cap-

tor. As capturing ships whether belonging to the state or to individuals, act as a part of the public force, it is not a question here merely with the individual captors themselves but with the nation at large, and it is not affected by any such internal regulation. The rule was moreover introduced to prevent the right of recapture from being defeated by transfer to neutrals immediately upon the seizure. To give the original owners the chance of recapture, it was held that such transfers were not valid till after condemnation. In truth, the right is complete upon the capture, as has been observed by writers of authority, since there is a just title, that of war, the *animus possidendi* under that title, and the actual possession, which is sufficient to constitute a perfect right, under all general principles of law. The extension of the time was introduced by mutual consent and practice for particular purposes, and is merely arbitrary, as is evident from the fluctuation which has prevailed relating to it, in the varying and successive rules of twenty-four hours, of *infra presidia*, and other such securities, till it finally settled down into the condemnation.

But, without entering farther into these nice and abstract questions, it is sufficient for the present purpose, that by the capture, the privateer acquired a legal right of *possession*, which is undeniable. It is admitted that the vessel was taken in time of war, from an enemy by a ship of war, regularly commissioned, a lawful possession is therefore admitted. After the time fixed by the treaty, within the respective limits assigned, a state of peace subsisted between the two countries as absolute and complete, as if no farther hostilities could be any where exercised, and as if the treaty had been concluded for a century.

The true question then is, whether a lawful possession can be divested by an hostile force in time of peace? Merely to put this question is sufficient to answer it. Peace is that state in which rights are discussed and claims made amicably, and by the ordinary proceedings of courts of law; to settle them by violence is peculiar to a state of war. The restoration of peace annuls all modes of force; they become unlawful. There can be no lawful fighting in time of peace. The question is not limited to this particular case. Here indeed there is no shedding of blood, but it was a seizure by force, a mere submission to a superior power. If it was lawful so to take a vessel, it would be equally lawful to apply force in case of resistance. A re-capture might equally be made by a battle. Any of our ships of war under the same circumstances, might be re-taken from the Americans, or any of theirs might be re-taken from us in the most sanguinary engagements. If nothing short of a sentence of condemnation could extinguish the right of recapture it might exist to a very long and indefinite period.—Ships taken in the East Indies might be a twelve-month or more before they could get home to be condemned. Can that be a state of peace in which ships might lawfully engage, or in which scenes of bloodshed between the vessels of two nations might lawfully be exhibited? Can such a state subsist after it has been expressly agreed by a treaty that all hostilities shall cease? Is the forcible capture of a vessel, or is it not, an act of hostility? If it is, it is prohibited by the treaty.

It is said that the treaty does not stipulate that vessels recaptured shall be restored. The words are as general as possible. The restitution is not confined to vessels "belonging to the subjects of the United States," expressions to be found in many treaties, and which, or something equivalent, would probably have been introduced, if such had been the

meaning of the two governments, but the words are, "all vessels and effects." To say that a recapture is not a capture is a mere finesse and equivocation.—Such captures, as well as other captures, are literally comprehended under the treaty; they are "vessels and effects which have been taken" since the time limited.

Independent of the hostility of the act of capture, and of any particular stipulations in the treaty, the right of possession in the captor was completed by the intervention of peace, and all right of recovering in the original owner was barred. The *uti possidetis* is the basis of every treaty of peace, unless so far as it is otherwise agreed. All things continue in the state in which they are found when the treaty takes effect, unless it is declared otherwise. Where the tree falls there it must lie. All the rules to determine when the title by capture is final, are founded upon one principle laid down by Grotius, that the capture is complete when all hope of recovery is lost—but all hope of recovery is certainly lost when the recovery becomes unlawful. The conclusion of a peace is therefore as effectual for that purpose, as carrying *infra presidia*, condemnation, or any other circumstances which have been fixed upon. St. Martens, and other writers, who have been already quoted, admits that peace gives the final and perfect title to captures. So sir William Scott, in the *sch. Sophie*, says expressly, that "the title of the former owner is completely barred by the intervention of peace, which has the effect of quieting all titles of possession arising from war." And with respect to a supposed recovery of this vessel to the former owner by a sort of *postliminium*, it is justly observed by Vattel (*Lib. III. ch. 14, sec. 226*) that "since the things of which the treaty of peace says nothing, continue in the state in which they were found at the moment when the peace was concluded, and are tacitly ceded to the possessor, the right of *postliminium* has no place after peace is concluded, it relates entirely to the state of war."

An argument has been raised, and much compassion excited, by a supposition, that if this prize is restored, the British master and crew found on board must be restored likewise to a state of captivity. For this there is no foundation whatever. The treaty provided that from the ratification there shall be a universal peace between the people of the respective countries, and they can no longer hold each other in a state of captivity.

Such is the construction which I am bound to give to this treaty, as applied to the present case. On behalf of the country which I in some measure represent, I think it my duty to give it an enlarged and liberal interpretation according to the true meaning of the parties, free from all sophistry and chicanery, and such as becomes a great nation to adopt. And I think that in so doing I consult the real advantage of my country, more than by any pecuniary benefits which individuals might acquire from a contrary mode of proceeding.

I, therefore, decree the restitution of this vessel and cargo to the owners of the American privateer, but as it seems in some measure to be a new question, and the nearness of the transaction to the limits assigned for recaptures might in some measure justify the recaptors in bringing the vessel in for inquiry, I shall direct all parties to bear their proportion of the expense incurred, by paying their own costs.

Washington Monument.

Agreeably to previous arrangement, the managers of the monument met in Howard's Park at 12 o'clock, on Tuesday, the 4th July, 1815, and, in the presence