

## PRIZE CASES, 67 U. S. 635 (1862)

U.S. Supreme Court

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67 U.S. (2 Black) 635

1. Neutrals may question the existence of a blockade, and challenge the legal authority of the party which has undertaken to establish it.
2. One belligerent, engaged in actual war, has a right to blockade the ports of the other, and neutrals are bound to respect that right.
3. To justify the exercise of this right, and legalize the capture of a neutral vessel for violating it, a state of actual war must exist, and the neutral must have knowledge or notice that it is the intention of one belligerent to blockade the ports of the other.
4. To create this and other belligerent rights as against neutrals, it is not necessary that the party claiming them should be at war with a separate and independent power; the parties to a civil war are in the same predicament as two nations who engage in a contest and have recourse to arms.
5. A state of actual war may exist without any formal declaration of it by either party, and this is true of both a civil and a foreign war.
6. A civil war exists, and may be prosecuted on the same footing as if those opposing the Government were foreign invaders, whenever the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts cannot be kept open.
7. The present civil war between the United States and the so-called Confederate States has such character and magnitude as to give the United States the same rights and powers which they might exercise in the case of a national or foreign war, and they have, therefore, the

right *jure bello*<sup>1</sup> to institute a blockade of any ports in possession of the rebellious States.

8. The proclamation of blockade by the President is, of itself, conclusive evidence that a state of war existed which demanded and authorized recourse to such a measure.

9. All persons residing within the territory occupied by the hostile party in this contest are liable to be treated as enemies, though not foreigners.

10. It is a settled rule that a vessel in a blockaded port is presumed to have notice of a blockade as soon as it commences.

11. The proclamation of blockade having allowed fifteen days for neutrals to leave, a vessel which overstays the time is liable to capture although she was prevented by accident from getting out sooner.

12. To make a capture lawful, it is not necessary that a warning of the blockade should have been previously endorsed on the register of the captured vessel.

These were cases in which the vessels named, together with their cargoes, were severally captured and brought in as prizes by public the proper District Attorneys on behalf of the United States and on behalf of the officers and crews of the ships by which the captures were respectively made. In each case, the District Court pronounced a decree of condemnation, from which the claimants took an appeal.

The *Amy Warwick* was a merchant vessel, and belonged to Richmond. Her registered owners were David and William Currie, Abraham Warwick, and George W. Allen, who resided at that place. Previous to her capture, she had made a voyage from New York to Richmond, and thence to Rio de Janeiro, Brazil. At the last named port, she shipped a cargo of coffee, 5,100 bags, to be delivered at New York, Philadelphia, Baltimore or Richmond, according to the orders which the master would receive at Hampton Roads. She was on her voyage from Rio to Hampton Roads and off Cape Henry when she was captured (July 10th,

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<sup>1</sup> Having to do with a natural right.

1861) by the Quaker City. At the time of the capture, the barque was sailing under American colors, and her commander was ignorant of the war. The Quaker City carried her into Boston, where she was libelled as enemy's property. The claimants of the vessel were the persons already named as owners. James Dunlap, Robert Edmonds, John L. Phipps, and Charles Brown claimed the cargo. The claimants in their several answers denied any hostility on their part to the Government or Laws of the United States, averred that the master was ignorant of any blockade, embargo or other interdiction of commerce with the ports of Virginia, and asserted generally that the capture was unlawful.

The *Crenshaw* was captured by the United States Steamer Star at the mouth of James River on the 17th of May, 1861. She was bound for Liverpool with a cargo of tobacco from Richmond, and was owned by David and William Currie, who admitted the existence of an insurrection in Virginia against the Laws and Government of the United States, but averred that they were innocent of it. The claimants of the cargo made similar answers, and all the claimants asserted that they had no such notice of the blockade as rendered the vessel or cargo liable to seizure for leaving the port of Richmond at the time when the voyage was commenced. She was condemned as prize on the ground that she had broken, or was attempting to break, the blockade at the time of her capture.

The *Hiawatha* was a British barque, and was on her voyage from Richmond to Liverpool with a cargo of tobacco. She left Richmond on the 17th of May, 1861, and was captured in Hampton Roads on the 20th by the Minnesota, and taken to New York. Her owners were Miller, Massman & Co., of Liverpool, who denied her liability to capture and condemnation on the ground that no sufficient notice had been given of the blockade. The claimants of the cargo put their right to restoration upon a similar basis.

The *Brillante* was a Mexican schooner, owned by Rafael Preciat and Julian Gual, residents of Campeche. She had on board a cargo of flour, part of which was owned by the owners of the vessel and part by the Seniores Ybana & Donde, who were also Mexican citizens. She had a regular clearance at Campeche for New Orleans, and had made the voyage between those ports. At New Orleans, she took in her cargo of

flour, part to be delivered at Sisal and part at Campeche, and took a clearance for both those places. On her homeward voyage, she anchored in Biloxi Bay, intending to communicate with some vessel of the blockading fleet and get a permit to go to sea, and, while so at anchor, she was taken by two boats sent off from the Massachusetts. She was carried into Key West, where the legal proceedings against her were prosecuted in the District Court of the United States for the District of Florida.

The minuter circumstances of each case, and the points of fact, as well as law, on which all the cases turned, in this Court and in the Court below, are set forth with such precision in the opinions of both Mr. Justice Grier and Mr. Justice Nelson that more than the brief narrative above given does not seem to be necessary.

Mr. Justice GRIER.

There are certain propositions of law which must necessarily affect the ultimate decision of these cases, and many others which it will be proper to discuss and decide before we notice the special facts peculiar to each.

They are, 1st. Had the President a right to institute a blockade of ports in possession of persons in armed rebellion against the Government, on the principles of international law, as known and acknowledged among civilized States?

2d. Was the property of persons domiciled or residing within those States a proper subject of capture on the sea as "enemies' property?"

I. Neutrals have a right to challenge the existence of a blockade de facto, and also the authority of the party exercising the right to institute it. They have a right to enter the ports of a friendly nation for the purposes of trade and commerce, but are bound to recognize the rights of a belligerent engaged in actual war, to use this mode of coercion, for the purpose of subduing the enemy.

That a blockade de facto actually existed, and was formally declared and notified by the President on the 27th and 30th of April, 1861, is an admitted fact in these cases.

That the President, as the Executive Chief of the Government and Commander-in-chief of the Army and Navy, was the proper person to make such notification has not been, and cannot be disputed.

The right of prize and capture has its origin in the "jus belli," and is governed and adjudged under the law of nations. To legitimate the capture of a neutral vessel or property on the high seas, a war must exist de facto, and the neutral must have knowledge or notice of the intention of one of the parties belligerent to use this mode of coercion against a port, city, or territory, in possession of the other.

Let us enquire whether, at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing the hostile force.

War has been well defined to be, "That state in which a nation prosecutes its right by force."

The parties belligerent in a public war are independent nations. But it is not necessary, to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents claims sovereign rights as against the other.

Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government. A civil war is never solemnly declared; it becomes such by its accidents -- the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory, have declared their independence, have cast off their allegiance, have organized armies, have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war. They claim to be in arms to establish their liberty and independence, in order to become a sovereign State, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason.

The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars.

"A civil war," says Vattel,

"breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as constituting, at least for a time, two separate bodies, two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest and have recourse to arms."

"This being the case, it is very evident that the common laws of war -- those maxims of humanity, moderation, and honor -- ought to be observed by both parties in every civil war. Should the sovereign conceive he has a right to hang up his prisoners as rebels, the opposite party will make reprisals, &c., &c.; the war will become cruel, horrible, and every day more destructive to the nation."

As a civil war is never publicly proclaimed, *eo nomine*<sup>2</sup>, against insurgents, its actual existence is a fact in our domestic history which the Court is bound to notice and to know.

The true test of its existence, as found in the writings of the sages of the common law, may be thus summarily stated:

"When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts of Justice cannot be kept open, civil war exists, and hostilities may be prosecuted on the same footing as if those opposing the Government were foreign enemies invading the land."

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<sup>2</sup> By the name; used in the context of sovereign immunity.

By the Constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole Executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare a war either against a foreign nation or a domestic State. But, by the Acts of Congress of February 28th, 1795, and 3d of March, 1807, he is authorized to called out the militia and use the military and naval forces of the United States in case of invasion by foreign nations and to suppress insurrection against the government of a State or of the United States.

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader or States organized in rebellion, it is nonetheless a war although the declaration of it be "unilateral." Lord Stowell (1 Dodson 247) observes,

"It is not the less a war on that account, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only is not a mere challenge to be accepted or refused at pleasure by the other."

The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the Act of Congress of May 13th, 1846, which recognized "*a state of war as existing by the act of the Republic of Mexico.*" This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the Act of the President in accepting the challenge without a previous formal declaration of war by Congress.

This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war. The President was bound to meet it in the shape it

presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.

It is not the less a civil war, with belligerent parties in hostile array, because it may be called an "insurrection" by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or State be acknowledged in order to constitute it a party belligerent in a war according to the law of nations. Foreign nations acknowledge it as war by a declaration of neutrality. The condition of neutrality cannot exist unless there be two belligerent parties. In the case of the *Santissima Trinidad*, 7 Wheaton 337, this Court said:

"The Government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed her determination to remain neutral between the parties. Each party is therefore deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war."

See also 3 Binn. 252.

As soon as the news of the attack on Fort Sumter, and the organization of a government by the seceding States, assuming to act as belligerents, could become known in Europe, to-wit, on the 13th of May, 1861, the Queen of England issued her proclamation of neutrality,

"recognizing hostilities as existing between the Government of the United States of American and certain States styling themselves the Confederate States of America."

This was immediately followed by similar declarations or silent acquiescence by other nations.

After such an official recognition by the sovereign, a citizen of a foreign State is estopped to deny the existence of a war with all its consequences as regards neutrals. They cannot ask a Court to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the



human race, and thus cripple the arm of the Government and paralyze its power by subtle definitions and ingenious sophisms.

The law of nations is also called the law of nature; it is founded on the common consent, as well as the common sense, of the world. It contains no such anomalous doctrine as that which this Court are now for the first time desired to pronounce, to-wit, that insurgents who have risen in rebellion against their sovereign, expelled her Courts, established a revolutionary government, organized armies, and commenced hostilities are not enemies because they are traitors, and a war levied on the Government by traitors, in order to dismember and destroy it, is not a war because it is an "insurrection."

Whether the President, in fulfilling his duties as Commander-in-chief in suppressing an insurrection, has met with such armed hostile resistance and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure under the circumstances peculiar to the case.

The correspondence of Lord Lyons with the Secretary of State admits the fact and concludes the question.

If it were necessary to the technical existence of a war that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861, which was wholly employed in enacting laws to enable the Government to prosecute the war with vigor and efficiency. And finally, in 1861, we find Congress "*ex majore cautela*"<sup>3</sup> and in anticipation of such astute objections, passing an act

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<sup>3</sup> Deliberately, and cautiously, in passing an act.

"approving, legalizing, and making valid all the acts, proclamations, and orders of the President, &c., as if they had been issued and done under the previous express authority and direction of the Congress of the United States. "

Without admitting that such an act was necessary under the circumstances, it is plain that, if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, that, on the well known principle of law, "omnis rati habitio retrotrahitur et mandato equiparatur<sup>4</sup>," this ratification has operated to perfectly cure the defect. In the case of *Brown vs. United States*, 8 Cr. 131, 132, 133, Mr. Justice Story treats of this subject and cites numerous authorities to which we may refer to prove this position, and concludes,

"I am perfectly satisfied that no subject can commence hostilities or capture property of an enemy when the sovereign has prohibited it. But suppose he did, I would ask if the sovereign may not ratify his proceedings, and thus, by a retroactive operation, give validity to them?"

Although Mr. Justice Story dissented from the majority of the Court on the whole case, the doctrine stated by him on this point is correct, and fully substantiated by authority.

The objection made to this act of ratification, that it is *ex post facto* and therefore unconstitutional and void, might possibly have some weight on the trial of an indictment in a criminal Court. But precedents from that source cannot be received as authoritative in a tribunal administering public and international law.

On this first question, therefore, we are of the opinion that the President had a right, *jure belli*, to institute a blockade of ports in possession of the States in rebellion which neutrals are bound to regard.

II. We come now to the consideration of the second question. What is included in the term "enemies' property?"

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<sup>4</sup> Every consent given to what has already been done has a retrospective effect and equals a command.

Is the property of all persons residing within the territory of the States now in rebellion, captured on the high seas, to be treated as "enemies' property," whether the owner be in arms against the Government or not?

The right of one belligerent not only to coerce the other by direct force, but also to cripple his resources by the seizure or destruction of his property, is a necessary result of a state of war. Money and wealth, the products of agriculture and commerce, are said to be the sinews of war, and as necessary in its conduct as numbers and physical force. Hence it is that the laws of war recognize the right of a belligerent to cut these sinews of the power of the enemy by capturing his property on the high seas.

The appellants contend that the term "enemy" is properly applicable to those only who are subjects or citizens of a foreign State at war with our own. They quote from the pages of the common law, which say

"that persons who wage war against the King may be of two kinds, subjects or citizens. The former are not proper enemies, but rebels and traitors; the latter are those that come properly under the name of enemies."

They insist, moreover, that the President himself, in his proclamation, admits that great numbers of the persons residing within the territories in possession of the insurgent government are loyal in their feelings, and forced by compulsion and the violence of the rebellious and revolutionary party and its "de facto government" to submit to their laws and assist in their scheme of revolution; that the acts of the usurping government cannot legally sever the bond of their allegiance; they have, therefore, a co-relative right to claim the protection of the government for their persons and property, and to be treated as loyal citizens till legally convicted of having renounced their allegiance and made war against the Government by treasonably resisting its laws.

They contend also that insurrection is the act of individuals, and not of a government or sovereignty; that the individuals engaged are subjects of law. That confiscation of their property can be effected only under a municipal law. That, by the law of the land, such confiscation cannot

take place without the conviction of the owner of some offence, and finally that the secession ordinances are nullities, and ineffectual to release any citizen from his allegiance to the national Government, and consequently that the Constitution and Laws of the United States are still operative over persons in all the States for punishment, as well as protection.

This argument rests on the assumption of two propositions, each of which is without foundation on the established law of nations. It assumes that where a civil war exists, the party belligerent claiming to be sovereign cannot, for some unknown reason, exercise the rights of belligerents, although the revolutionary party may. Being sovereign, he can exercise only sovereign rights over the other party. The insurgent may be killed on the battlefield or by the executioner; his property on land may be confiscated under the municipal law; but the commerce on the ocean, which supplies the rebels with means to support the war, cannot be made the subject of capture under the laws of war, because it is "unconstitutional!!!" Now it is a proposition never doubted that the belligerent party who claims to be sovereign may exercise both belligerent and sovereign rights (see 4 Cr. 272). Treating the other party as a belligerent and using only the milder modes of coercion which the law of nations has introduced to mitigate the rigors of war cannot be a subject of complaint by the party to whom it is accorded as a grace or granted as a necessity. We have shown that a civil war such as that now waged between the Northern and Southern States is properly conducted according to the humane regulations of public law as regards capture on the ocean.

Under the very peculiar Constitution of this Government, although the citizens owe supreme allegiance to the Federal Government, they owe also a qualified allegiance to the State in which they are domiciled. Their persons and property are subject to its laws.

Hence, in organizing this rebellion, they have acted as States claiming to be sovereign over all persons and property within their respective limits, and asserting a right to absolve their citizens from their allegiance to the Federal Government. Several of these States have combined to form a new confederacy, claiming to be acknowledged by the world as a sovereign State. Their right to do so is now being decided

by wager of battle. The ports and territory of each of these States are held in hostility to the General Government. It is no loose, unorganized insurrection, having no defined boundary or possession. It has a boundary marked by lines of bayonets, and which can be crossed only by force -- south of this line is enemies' territory, because it is claimed and held in possession by an organized, hostile and belligerent power.

All persons residing within this territory whose property may be used to increase the revenues of the hostile power are, in this contest, liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their Government, and are nonetheless enemies because they are traitors.

But in defining the meaning of the term "enemies' property," we will be led into error if we refer to Fleta and Lord Coke for their definition of the word "enemy." It is a technical phrase peculiar to prize courts, and depends upon principles of public policy, as distinguished from the common law.

Whether property be liable to capture as "enemies' property" does not in any manner depend on the personal allegiance of the owner.

"It is the illegal traffic that stamps it as 'enemies' property.' It is of no consequence whether it belongs to an ally or a citizen. 8 Cr. 384. The owner, *pro hac vice*<sup>5</sup>, is an enemy."

3 Wash.C.C.R. 183.

The produce of the soil of the hostile territory, as well as other property engaged in the commerce of the hostile power, as the source of its wealth and strength, are always regarded as legitimate prize, without regard to the domicil (sic) of the owner, and much more so if he reside and trade within their territory.

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<sup>5</sup> For this occasion" or for this event

III. We now proceed to notice the facts peculiar to the several cases submitted for our consideration. The principles which have just been stated apply alike to all of them.

I. The case of the brig *Amy Warwick*.

This vessel was captured upon the high seas by the United States gunboat *Quaker City*, and, with her cargo, was sent into the district of Massachusetts for condemnation. The brig was claimed by David Currie and others. The cargo consisted of coffee, and was claimed, four hundred bags by Edmund Davenport & Co., and four thousand seven hundred bags by Dunlap, Moncure & Co. The title of these parties as respectively claimed was conceded. All the claimants at the time of the capture, and for a long time before, were residents of Richmond, Va., and were engaged in business there. Consequently, their property was justly condemned as "enemies' property."

The claim of Phipps & Co. for their advance was allowed by the Court below. That part of the decree was not appealed from, and is not before us. The case presents no question but that of enemies' property.

The decree below is affirmed with costs.

II. The case of the *Hiawatha*.

The Court below, in decreeing against the claimants, proceeded upon the ground that the cargo was shipped after notice of the blockade.

The fact is clearly established, and if there were no qualifying circumstances, would well warrant the decree. But after a careful examination of the correspondence of the State and Navy Departments, found in the record, we are not satisfied that the British Minister erred in the construction he put upon it, which was that a license was given to all vessels in the blockaded ports to depart with their cargoes within fifteen days after the blockade was established, whether the cargoes were taken on board before or after the notice of the blockade. All reasonable doubts should be resolved in favor of the claimants. Any other course would be inconsistent with the right administration of the law and the character of a just Government. But the record discloses

another ground upon which the decree must be sustained. On the 19th of April, the President issued a proclamation announcing his intention to blockade the ports of the several States therein named.

On the 27th of April, he issued a further proclamation announcing his intention to blockade the ports of Virginia and North Carolina in addition to those of the States named in the previous one. On the 30th of April, Commodore Pendergrast issued his proclamation announcing the blockade as established. These proclamations were communicated to the British Minister as soon as they were issued. On the 5th of May, the British Consul at Richmond wrote to Lord Lyons that he had advised those representing the owners of the *Hiawatha* that there would be no difficulty in her leaving in ballast. He added, "*but to this they will not consent.*" On the 8th of May, Lord Lyons made an application to the Secretary of State relative to this vessel. The matter was referred to the Navy Department. On the same day, the Secretary of the Navy replied:

"Fifteen days have been specified as a limit for neutrals to leave the ports after actual blockade has commenced, with or without cargo, and there are yet five or six days for neutrals to leave; with proper diligence on the part of persons interested, *I see no reason for exemption to any.*"

Here was a distinct warning that the vessel must leave within the time limited after the commencement of the blockade. On the 10th of May, she completed the discharge of her cargo.

On the next day she commenced lading for her outer voyage, and, by working night and day, on the 15th of May, she had taken in a full cargo of cotton and tobacco. On that day, the British Consul gave her a certificate, wherein he referred to the proclamation of the 27th of April, "in which it was announced that a blockade would be enforced of the ports of Virginia," and added, that "the best information attainable" "pointed to the 2d of May as the day when an efficient blockade was supposed to have been established."

On the 16th of May, she was ready for sea, but there was no steam-tug in port to tow her down the river. At six o'clock (sic) P.M. on the 17th, she was taken in tow by the steam-tug *David Currie*. The tug had not sufficient power, and the *Hiawatha* came to anchor again. On the 18th,

at six o'clock (sic) A.M. she was taken in tow by the steam-tug *William Allison* and towed out to sea. On the 20th of May, she was captured in Hampton Roads, off Fortress Monroe, and taken with her cargo into the Southern District of New York for condemnation.

The energy with which the labor of lading her was pressed evinces the consciousness of those concerned of the peril of delay beyond the time limited by the proclamation for her departure. The time was fifteen days *from the establishment of the blockade*. The blockade was effectual on the 30th of April.

There is no controversy upon the subject. The fifteen days expired on the 15th of May -- the day she completed her lading. A vessel being in a blockaded port is presumed to have notice of the blockade as soon as it commences. This is a settled rule in the law of nations.

The certificate of the Consul states that, according to his information, the blockade commenced on the 2d of May. It is not easy to imagine how he could have arrived at this conclusion. The James river is a great commercial thoroughfare. It would seem that news of so important an event must have swept up its waters to Richmond, as news of interest spreads along the streets of a city. Such circumstances must have immediately become known to the parties as were sufficient to put them upon inquiry, and were therefore equivalent to full notice. But, conceding the 2d of May to be the day from which the computation is to be made, then, the fifteen days expired on the 17th of May. Her voyage down the river was not effectively begun until the 18th of May. This was after the expiration of the time allowed. In either view, she became delinquent, and was guilty of a breach of the blockade. The proclamation allowed fifteen days -- not fifteen days *and until a steam-tug could be procured*. The difficulty of procuring a tug was one of the accidents which must have been foreseen, and should have been provided for. Those concerned, notwithstanding the warnings they received, in their eagerness to realize the profits of a full cargo, took the hazards of the adventure, and must now bear the consequences. If she could overstay the time limited for a short period, she could for a long one. Whatever the excess of time, the principle involved is the same.



It is insisted for the claimants that, according to the President's proclamation on the 19th of April, the Hiawatha was not liable to capture until "the commander of one of the blockading vessels" had "duly warned" her, endorsed "on her register the date and fact of such warning," and she had again attempted "to leave the blockaded port." To this proposition there are several answers:

1st. There is no such provision in the proclamation of the 27th of April touching the *ports of Virginia*. It simply announces that a blockade of those ports would be established.

2d. The proclamation of Commodore Pendergrast limits the warning to those who should approach the line of the blockade in ignorance of its existence. This action of the naval commander has not been disavowed by his Government, and is conclusive in a Prize Court. The warning proposed by this proclamation is according to the law of nations, and it is all that the law requires.

3d. If the provision referred to in the Proclamation of the 19th of April be applicable to the ports of Virginia, it must be considered in the light of the surrounding circumstances.

It was intended for the benefit of the innocent, not of the guilty. It would be absurd to warn parties who had full previous knowledge. According to the construction contended for, a vessel seeking to evade the blockade might approach and retreat any number of times, and, when caught, her captors could do nothing but warn her and endorse the warning upon her registry. The same process might be repeated at every port on the blockaded coast. Indeed, according to the literal terms of the proclamation, the Alabama might approach, and, if captured, insist upon the warning and endorsement of her registry, and then upon her discharge. A construction drawing after it consequences so absurd is a "*felo de se*<sup>6</sup>."

The cargo must share the fate of the vessel.

The decree below is affirmed with costs.

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<sup>6</sup> Felon of himself; an archaic legal term meaning suicide.

II. The case of the *Brillante*, No. 134, presents but little difficulty. This was a Mexican vessel with a cargo belonging to Mexican citizens, seized on the 23d of June, 1861, in Biloxi Bay, in an attempt to escape from New Orleans by running the blockade, which had been established there by an efficient force on the 15th of May preceding. She was carried by the captors to Key West, where she was libelled in the District Court of the United States for the Southern District of Florida, and condemned with her cargo as prize of war.

III.

From the deposition of Don Rafael Preciat, who was part owner of the vessel and partner in the ownership of the cargo, and also was on board from the time she left her home port at Campeche until her capture, the following facts may be gathered.

In approaching New Orleans with a cargo from Sisal, she found the United States ship-of-war *Brooklyn* blockading the mouth of the Mississippi River at Pass a Loutre, and was by the officer of that vessel informed of the blockade and forbid to enter. The witness had a son at Spring Hill College, near Mobile, whom he desired to get away, and the Commander of the *Brooklyn* gave him a letter to the Commander of the *Niagara* recommending that he should be permitted to land and get his son. On leaving the *Brooklyn*, she started along the coast in the direction of the *Niagara*, but instead of seeking that vessel, she evaded her and went to New Orleans by way of Lake Ponchartrain. At New Orleans, she discharged her cargo and took in another, and, in attempting to escape by the way she intended, was captured as already stated.

Some attempt has been made to excuse her entrance to New Orleans by showing that the crew refused to proceed towards Mobile, but this is immaterial, as her condemnation is not for her successful entrance, but for her unsuccessful attempt to escape.

It is also urged that she was entitled to warning at the time of her capture by virtue of the provision in the President's proclamation establishing the blockade. But whatever may be the sound construction of that provision in reference to warning vessels in its application to

vessels which had notice of the blockade, the question does not arise in this case, because, from the statement of the owner of the vessel herself, she was warned by the officer of the Brooklyn.

The fact that the vessel's register was not produced by either party to show a warning endorsed on it can make no difference. It cannot be supposed that such endorsement on the ship's register is to be the only evidence of warning, for if this were admitted, the vessel would only have to destroy her register, and with it the only evidence in which she could be condemned, or she would only need to keep several registers and destroy the one having the endorsement.

We entertain no doubt that this vessel and cargo were justly condemned as neutral property for running the blockade, of which she had been fairly warned, and which she had once successfully violated.

The judgment is therefore affirmed.

The case of the *Crenshaw*, No. 163, on the other hand, presents the question of "enemies' property" pure and simple. This vessel was seized in Hampton Roads on the 17th of May, 1861, by the blockading force at that point under flag-officer Stringham, and was carried as a prize of war into New York. The vessel and the larger part of the cargo were, at the time of the capture, owned by citizens of the State of Virginia, residing in Richmond, and the vessel had on board, among her papers, a clearance signed on the 14th of May by R. H. Lortin, Collector of the Port of Richmond, of the Confederate States of America.

Upon the principles already settled, the vessel and such parts of her cargo as came within the description of enemies' property were rightfully condemned. It is, however, claimed that ten tierces of tobacco strips shipped by Ludlam & Watson at Richmond, to be delivered to shipper's order at Liverpool, and thirty tierces of tobacco strips shipped by W. O. Clark at Richmond, to order of Messrs. Sam'l Irven or assigns, Liverpool, are not enemies' property, and should be restored to claimants.

The claim for the ten tierces, as interposed by Henry Ludlam in behalf of himself and others, and the statement of the claimant's petition, are

sworn to by Gustave Henikin, who holds the bill of lading which is endorsed -- "deliver to Ludlam & Henikin, for Chas. Lear & Sons, Liverpool. Ludlam & Watson."

Mr. Henikin states that his partner, Henry Ludlam, was in Europe, that Watson (the partner of Ludlam & Watson, resident in Richmond) was out of the jurisdiction of the Court, and that his knowledge of the facts embraced in the petition is derived from his connections with it as partner of Ludlam, and from correspondence and business relations with the shippers. The extent of his knowledge thus set forth is not very satisfactory, nor is the claim stated in a manner to relieve it of any embarrassment growing out of this fact. He sets forth substantially that Ludlam & Watson, the shippers, was a firm composed of Henry Ludlam, a citizen and resident of Rhode Island, and G. F. Watson, a citizen and resident of Richmond, Va., doing business in Richmond, and that Henry Ludlam was also doing business in New York in partnership with Gustave Henikin, under the style of Ludlam & Henikin, and that Lear & Sons were a mercantile partnership composed of British subjects residing in Liverpool. Then, speaking in behalf of all these parties, the petitioner says, they are owners of the ten tierces of tobacco, and *bona fide* owners of the bill of lading for the same, and that said tobacco was, from the time of the shipment, on board of the Crenshaw in the Port of Richmond, and still is the property of the claimants.

It will be seen at once that the statement does not profess to set out what are the distinct interests of each individual in this property, nor the separate interests of the three partnership firms thus claiming it. Nor is there any attempt to show how any person beside Ludlam & Watson of Richmond, who were the shippers, acquired any interest in it. It is a joint claim on the part of all the persons mentioned, all of whom are asserted to be *bona fide* holders of the bill of lading. It is perfectly consistent with all that was stated that Ludlam & Watson were the real owners of the property. The bill of lading, which is to shipper's order or assigns, throws no light on the subject, and there is not a particle of other testimony in reference to the claim in the record. The Court decreed that the interest of Lear & Sons in the ten tierces of tobacco be restored to them, and that they pay costs, unless they furnished further proof that the property was *bona fide* neutral. They failed to furnish better proof, and appealed on account of the costs.

We are of the opinion that the decree does them no injustice, and, in the doubtful circumstances in which this claim stands, on their own statement, should have had great hesitation in giving them the property if the captors had appealed.

In reference to the claim of Ludlam, we are not sufficiently advised of what it is by his pleading or by the proof to set apart for him, if it were just. But we are of the opinion that the firm of Ludlam & Watson, doing business in Richmond, where Watson, the active member of the firm, resided, must be ruled by his status in reference to the property of the firm under his control in the enemy country.

The property was, through his residence in that country, subjected to the power of the enemy, and comes within the category of "enemies' property."

There is more difficulty in reference to the claim of Irvin & Co. to the thirty tierces of tobacco strips.

It very clearly appears that Irvin & Co., claimants, purchased this tobacco before the war broke out, with their own means, which were then in Richmond, and that they are citizens and residents of New York.

It is claimed that the property should be condemned on the ground that the transaction constitutes an illegal traffic with the enemy. This certainly cannot be held to apply to the purchase of the tobacco which was bought and paid for before hostilities commenced. If it is intended to apply the principle of illegal traffic to the attempt to withdraw the property from the enemy country, it would seem that the order of the Secretary of the Navy allowing fifteen days for all vessels to withdraw from the blockaded ports, with or without cargo, should be held to apply to the property of one of our own citizens, residing in New York, already bought and paid for, as well as to any neutral cargo. If this be correct, it would seem that the property of Irvin & Co. should be restored to them as that of Laurie, Son & Co. was.

The right of Scott & Clarke to commissions on profits really constituted no interest in the property, and presents no cognizable feature in the case.

This property will therefore be restored to the claimants.

Mr. Justice NELSON, dissenting.

The property in this case, vessel and cargo, was seized by a Government vessel on the 20th of May, 1861, in Hampton Roads for an alleged violation of the blockade of the ports of the State of Virginia.

The *Hiawatha* was British vessel, and the cargo belonged to British subjects. The vessel had entered the James River before the blockade, on her way to City Point, upwards of one hundred miles from the mouth, where she took in her cargo. She finished loading on the 15th of May, but was delayed from departing on her outward voyage till the 17th for want of a tug to tow her down the river. She arrived at Hampton Roads on the 20th, where, the blockade in the meantime having been established, she was met by one of the ships and the boarding officer endorsed on her register, "ordered not to enter any port in Virginia, or south of it." This occurred some three miles above the place where the flagship was stationed, and the boarding officer directed the master to heave his ship to when he came abreast of the flag ship, which was done, when she was taken in charge as prize.

On the 30th April, flag officer Pendergrast, U.S. ship *Cumberland*, off Fortress Monroe, in Hampton Roads, gave the following notice:

"All vessels passing the capes of Virginia, coming from a distances and ignorant of the proclamation (the proclamation of the President of the 27th of April that a blockade would be established) will be warned off, and those passing Fortress Monroe will be required to anchor under the guns of the fort and subject themselves to an examination."

The *Hiawatha*, while engaged in putting on board her cargo at City Point, became the subject of correspondence between the British Minister and the Secretary of State, under date of the 8th and 9th of May, which drew from the Secretary of the Navy a letter of the 9th in which, after referring to the above notice of the flag officer Pendergrast,

and stating that it had been sent to the Baltimore and Norfolk papers, and by one or more published, advised the Minister that fifteen days had been fixed as a limit for neutrals to leave the ports after an actual blockade had commenced, with or without cargo. The inquiry of the British Minister had referred not only to the time that a vessel would be allowed to depart, but whether it might be laden within the time. This vessel, according to the advice of the Secretary, would be entitled to the whole of the 15th of May to leave City Point, her port of lading. As we have seen, her cargo was on board within the time, but the vessel was delayed in her departure for want of a tug to tow her down the river.

We think it very clear upon all the evidence that there was no intention on the part of the master to break the blockade, that the seizure under the circumstances was not warranted, and, upon the merits, that the ship and cargo should have been restored.

Another ground of objection to this seizure is that the vessel was entitled to a warning endorsed on her papers by an officer of the blockading force, according to the terms of the proclamation of the President, and that she was not liable to capture except for the second attempt to leave the port.

The proclamation, after certain recitals not material in this branch of the case, provides as follows: the President has

"deemed it advisable to set on foot a blockade of the ports within the States aforesaid (the States referred to in the recitals) in pursuance of the laws of the United States and of the law of nations, in such case made and provided. . . . If, therefore, with a view to violate such blockade, a vessel shall approach or shall attempt to leave either of said ports, she will be duly warned by the commander of one of the blockading vessels, who will endorse on her register the fact and date of such warning, and if the same vessel shall again attempt to enter or leave the blockaded port, she will be captured and sent to the nearest convenient port for such proceedings against her and her cargo, as prize, as may be deemed advisable."

The proclamation of the President of the 27th of April extended that of the 19th to the States of Virginia and North Carolina.

It will be observed that this warning applies to vessels attempting to enter or leave the port, and is therefore applicable to the *Hiawatha*.

We must confess that we have not heard any satisfactory answer to the objection founded upon the terms of this proclamation.

It has been said that the proclamation, among other grounds, as stated on its face, is founded on the "law of nations," and hence draws after it the law of blockade as found in that code, and that a warning is dispensed with in all cases where the vessel is chargeable with previous notice or knowledge that the port is blockaded. But the obvious answer to the suggestion is that there is no necessary connection between the authority upon which the proclamation is issued and the terms prescribed as the condition of its penalties or enforcement, and, besides, if founded upon the law of nations, surely it was competent for the President to mitigate the rigors of that code and apply to neutrals the more lenient and friendly principles of international law. We do not doubt but that considerations of this character influenced the President in prescribing these favorable terms in respect to neutrals, for, in his message a few months later to Congress (4th of July), he observes: "a proclamation was issued for closing the ports of the insurrectionary districts" (not by blockade, but) "by proceedings in the nature of a blockade."

This view of the proclamation seems to have been entertained by the Secretary of the Navy, under whose orders it was carried into execution. In his report to the President, 4th July, he observes, after referring to the necessity of interdicting commerce at those ports where the Government were not permitted to collect the revenue, that,

"in the performance of this domestic municipal duty, the property and interests of foreigners became to some extent involved in our home questions, and with a view of extending to them every comity that circumstances would justify, the rules of blockade were adopted, and, as far as practicable, made applicable to the cases that occurred under this embargo or nonintercourse of the insurgent States. The commanders, he observes, were directed to permit the vessels of foreigners to depart within fifteen days as in case of actual effective blockade, and their



vessels were not to be seized unless they attempted, after having been once warned off, to enter an interdicted port in disregard of such warning."

The question is not a new one in this Court. The British Government had notified the United States of the blockade of certain ports in the West Indies, but

"not to consider blockades as existing, unless in respect to particular ports which may be actually invested, and, then not to capture vessels bound to such ports unless they shall have been previously warned not to enter them."

The question arose upon this blockade in *Mar. In. Co. vs. Woods*, 6 Cranch 29.

Chief Justice Marshall, in delivering the opinion of the Court, observed,

"The words of the order are not satisfied by any previous notice which the vessel may have obtained, otherwise than by her being warned off. This is a technical term which is well understood. It is not satisfied by notice received in any other manner. The effect of this order is that a vessel cannot be placed in the situation of one having notice of the blockade until she is warned off. It gives her a right to inquire of the blockading squadron, if she shall not receive this warning from one capable of giving it, and, consequently, dispenses with her making that inquiry elsewhere. While this order was in force a neutral vessel might lawfully sail for a blockaded port, knowing it to be blockaded, and being found sailing towards such port, would not constitute an attempt to break the blockade until she should be warned off."

We are of opinion, therefore, that, according to the very terms of the proclamation, neutral ships were entitled to a warning by one of the blockading squadron, and could be lawfully seized only on the second attempt to enter or leave the port.

It is remarkable also that both the President and the Secretary, in referring to the blockade, treat the measure not as a blockade under the

law of nations, but as a restraint upon commerce at the interdicted ports under the municipal laws of the Government.

Another objection taken to the seizure of this vessel and cargo is that there was no existing war between the United States and the States in insurrection within the meaning of the law of nations, which drew after it the consequences of a public or civil war. A contest by force between independent sovereign States is called a public war, and, when duly commenced by proclamation or otherwise, it entitles both of the belligerent parties to all the rights of war against each other, and as respects neutral nations. Chancellor Kent observes,

"Though a solemn declaration, or previous notice to the enemy, be now laid aside, it is essential that some formal public act, proceeding directly from the competent source, should announce to the people at home their new relations and duties growing out of a state of war, and which should equally apprise neutral nations of the fact, to enable them to conform their conduct to the rights belonging to the new state of things. . . . Such an official act operates from its date to legalize all hostile acts in like manner as a treaty of peace operates from its date to annul them."

He further observes,

"as war cannot lawfully be commenced on the part of the United States without an act of Congress, such act is, of course, a formal notice to all the world, and equivalent to the most solemn declaration."

The legal consequences resulting from a state of war between two countries at this day are well understood, and will be found described in every approved work on the subject of international law. The people of the two countries become immediately the enemies of each other -- all intercourse commercial or otherwise between them unlawful -- all contracts existing at the commencement of the war suspended, and all made during its existence utterly void. The insurance of enemies' property, the drawing of bills of exchange or purchase on the enemies' country, the remission of bills or money to it, are illegal and void. Existing partnerships between citizens or subjects of the two countries are dissolved, and, in fine, interdiction of trade and intercourse direct or indirect is absolute and complete by the mere force and effect of war

itself. All the property of the people of the two countries on land or sea are subject to capture and confiscation by the adverse party as enemies' property, with certain qualifications as it respects property on land, (Brown vs. United States, 8 Cranch 110), all treaties between the belligerent parties are annulled, the ports of the respective countries may be blockaded, and letters of marque and reprisal granted as rights of war, and the law of prizes as defined by the law of nations comes into full and complete operation, resulting from maritime captures, jure belli. War also effects a change in the mutual relations of all States or countries, not directly, as in the case of the belligerents, but immediately and indirectly, though they take no part in the contest, but remain neutral.

This great and pervading change in the existing condition of a country, and in the relations of all her citizens or subjects, external and internal, from a state of peace, is the immediate effect and result of a state of war, and hence the same code which has annexed to the existence of a war all these disturbing consequences has declared that the right of making war belongs exclusively to the supreme or sovereign power of the State.

This power in all civilized nations is regulated by the fundamental laws or municipal constitution of the country.

By our constitution, this power is lodged in Congress. Congress shall have power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

We have thus far been considering the status of the citizens or subjects of a country at the breaking out of a public war when recognized or declared by the competent power.

In the case of a rebellion or resistance of a portion of the people of a country against the established government, there is no doubt, if in its progress and enlargement the government thus sought to be overthrown sees fit, it may by the competent power recognize or declare the existence of a state of civil war, which will draw after it all the consequences and rights of war between the contending parties as in the case of a public war. Mr. Wheaton observes, speaking of civil war,

"But the general usage of nations regards such a war as entitling both the contending parties to all the rights of war as against each other, and even as respects neutral nations."

It is not to be denied, therefore, that if a civil war existed between that portion of the people in organized insurrection to overthrow this Government at the time this vessel and cargo were seized, and if she was guilty of a violation of the blockade, she would be lawful prize of war. But before this insurrection against the established Government can be dealt with on the footing of a civil war, within the meaning of the law of nations and the Constitution of the United States, and which will draw after it belligerent rights, it must be recognized or declared by the war-making power of the Government. No power short of this can change the legal status of the Government or the relations of its citizens from that of peace to a state of war, or bring into existence all those duties and obligations of neutral third parties growing out of a state of war. The war power of the Government must be exercised before this changed condition of the Government and people and of neutral third parties can be admitted. There is no difference in this respect between a civil or a public war.

We have been more particular upon this branch of the case that would seem to be required not on account of any doubt or difficulties attending the subject in view of the approved works upon the law of nations or from the adjudication of the courts, but because some confusion existed on the argument as to the definition of a war that drew after it all the rights of prize of war. Indeed, a great portion of the argument proceeded upon the ground that these rights could be called into operation -- enemies' property captured -- blockades set on foot and all the rights of war enforced in prize courts -- by a species of war unknown to the law of nations and to the Constitution of the United States.

An idea seemed to be entertained that all that was necessary to constitute a war was organized hostility in the district of country in a state of rebellion -- that conflicts on land and on sea -- the taking of towns and capture of fleets -- in fine, the magnitude and dimensions of the resistance against the Government -- constituted war with all the belligerent rights belonging to civil war. With a view to enforce this idea,

we had, during the argument, an imposing historical detail of the several measures adopted by the Confederate States to enable them to resist the authority of the general Government, and of many bold and daring acts of resistance and of conflict. It was said that war was to be ascertained by looking at the armies and navies or public force of the contending parties, and the battles lost and won -- that, in the language of one of the learned counsel,

"Whenever the situation of opposing hostilities has assumed the proportions and pursued the methods of war, then peace is driven out, the ordinary authority and administration of law are suspended, and war in fact and by necessity is the status of the nation until peace is restored and the laws resumed their dominion."

Now, in one sense, no doubt this is war, and may be a war of the most extensive and threatening dimensions and effects, but it is a statement simply of its existence in a material sense, and has no relevancy or weight when the question is what constitutes war in a legal sense, in the sense of the law of nations, and of the Constitution of the United States? For it must be a war in this sense to attach to it all the consequences that belong to belligerent rights. Instead, therefore, of inquiring after armies and navies, and victories lost and won, or organized rebellion against the general Government, the inquiry should be into the law of nations and into the municipal fundamental laws of the Government. For we find there that to constitute a civil war in the sense in which we are speaking, before it can exist in contemplation of law, it must be recognized or declared by the sovereign power of the State, and which sovereign power by our Constitution is lodged in the Congress of the United States -- civil war, therefore, under our system of government, can exist only by an act of Congress, which requires the assent of two of the great departments of the Government, the Executive and Legislative.

We have thus far been speaking of the war power under the Constitution of the United States, and as known and recognized by the law of nations. But we are asked, what would become of the peace and integrity of the Union in case of an insurrection at home or invasion from abroad if this power could not be exercised by the President in the recess of Congress, and until that body could be assembled?

The framers of the Constitution fully comprehended this question, and provided for the contingency. Indeed, it would have been surprising if they had not, as a rebellion had occurred in the State of Massachusetts while the Convention was in session, and which had become so general that it was quelled only by calling upon the military power of the State. The Constitution declares that Congress shall have power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions." Another clause, "that the President shall be Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of United States;" and, again, "He shall take care that the laws shall be faithfully executed." Congress passed laws on this subject in 1792 and 1795. 1 United States Laws, pp. 264, 424.

The last Act provided that whenever the United States shall be invaded or be in imminent danger of invasion from a foreign nation, it shall be lawful for the President to call forth such number of the militia most convenient to the place of danger, and, in case of insurrection in any State against the Government thereof, it shall be lawful for the President, on the application of the Legislature of such State, if in session, or if not, of the Executive of the State, to call forth such number of militia of any other State or States as he may judge sufficient to suppress such insurrection.

The 2d section provides that when the laws of the United States shall be opposed, or the execution obstructed in any State by combinations too powerful to be suppressed by the course of judicial proceedings, it shall be lawful for the President to call forth the militia of such State, or of any other State or States as may be necessary to suppress such combinations; and by the Act 3 March, 1807 (2 U.S.Laws, 443), it is provided that, in case of insurrection or obstruction of the laws, either in the United States or of any State or Territory, where it is lawful for the President to call forth the militia for the purpose of suppressing such insurrection, and causing the laws to be executed, it shall be lawful to employ for the same purpose such part of the land and naval forces of the United States as shall be judged necessary.

It will be seen, therefore, that ample provision has been made under the Constitution and laws against any sudden and unexpected disturbance

of the public peace from insurrection at home or invasion from abroad. The whole military and naval power of the country is put under the control of the President to meet the emergency. He may call out a force in proportion to its necessities, one regiment or fifty, one ship-of-war or any number at his discretion. If, like the insurrection in the State of Pennsylvania in 1793, the disturbance is confined to a small district of country, a few regiments of the militia may be sufficient to suppress it. If of the dimension of the present, when it first broke out, a much larger force would be required. But whatever its numbers, whether great or small, that may be required, ample provision is here made, and whether great or small, the nature of the power is the same. It is the exercise of a power under the municipal laws of the country and not under the law of nations, and, as we see, furnishes the most ample means of repelling attacks from abroad or suppressing disturbances at home until the assembling of Congress, who can, if it be deemed necessary, bring into operation the war power, and thus change the nature and character of the contest. Then, instead of being carried on under the municipal law of 1795, it would be under the law of nations, and the Acts of Congress as war measures with all the rights of war.

It has been argued that the authority conferred on the President by the Act of 1795 invests him with the war power. But the obvious answer is that it proceeds (sic) from a different clause in the Constitution and which is given for different purposes and objects, namely, to execute the laws and preserve the public order and tranquillity (sic) of the country in a time of peace by preventing or suppressing any public disorder or disturbance by foreign or domestic enemies. Certainly, if there is any force in this argument, then we are in a state of war with all the rights of war, and all the penal consequences attending it every time this power is exercised by calling out a military force to execute the laws or to suppress insurrection or rebellion; for the nature of the power cannot depend upon the numbers called out. If so, what numbers will constitute war and what numbers will not? It has also been argued that this power of the President from necessity should be construed as vesting him with the war power, or the Republic might greatly suffer or be in danger from the attacks of the hostile party before the assembling to Congress. But we have seen that the whole military and naval force are in his hands under the municipal laws of the country. He can meet the adversary upon land and water with all the forces of the Government. The truth is,

this idea of the existence of any necessity for clothing the President with the war power, under the Act of 1795, is simply a monstrous exaggeration, for, besides having the command of the whole of the army and navy, Congress can be assembled within any thirty days, if the safety of the country requires that the war power shall be brought into operation.

The Acts of 1795 and 1805 did not, and could not under the Constitution, confer on the President the power of declaring war against a State of this Union, or of deciding that war existed, and upon that ground authorize the capture and confiscation of the property of every citizen of the State whenever it was found on the waters. The laws of war, whether the war be civil or *inter gentes*<sup>7</sup>, as we have seen, convert every citizen of the hostile State into a public enemy, and treat him accordingly, whatever may have been his previous conduct. This great power over the business and property of the citizen is reserved to the legislative department by the express words of the Constitution. It cannot be delegated or surrendered to the Executive. Congress alone can determine whether war exists or should be declared, and until they have acted, no citizen of the State can be punished in his person or property unless he has committed some offence against a law of Congress passed before the act was committed which made it a crime and defined the punishment. The penalty of confiscation for the acts of others with which he had no concern cannot lawfully be inflicted.

In the breaking out of a rebellion against the established Government, the usage in all civilized countries, in its first stages, is to suppress it by confining the public forces and the operations of the Government against those in rebellion, and at the same time extending encouragement and support to the loyal people with a view to their cooperation in putting down the insurgents. This course is not only the dictate of wisdom, but of justice. This was the practice of England in Monmouth's rebellion in the reign of James the Second, and in the rebellions of 1715 and 1745, by the Pretender and his son, and also in the beginning of the rebellion of the Thirteen Colonies of 1776. It is a personal war against the individuals engaged in resisting the authority

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<sup>7</sup> The body treaties; agreements between nations



of the Government. This was the character of the war of our Revolution till the passage of the Act of the Parliament of Great Britain of the 16th of George Third, 1776. By that act, all trade and commerce with the Thirteen Colonies was interdicted, and all ships and cargoes belonging to the inhabitants subjected to forfeiture as if the same were the ships and effects of open enemies. From this time, the war became a territorial civil war between the contending parties, with all the rights of war known to the law of nations. Down to this period, the war was personal against the rebels, and encouragement and support constantly extended to the loyal subjects who adhered to their allegiance, and although the power to make war existed exclusively in the King, and of course this personal war carried on under his authority, and a partial exercise of the war power, no captures of the ships or cargo of the rebels as enemies' property on the sea, or confiscation in Prize Courts as rights of war, took place until after the passage of the Act of Parliament. Until the passage of the act, the American subjects were not regarded as enemies in the sense of the law of nations. The distinction between the loyal and rebel subjects was constantly observed. That act provided for the capture and confiscation as prize of their property as if the same were the proper "of open enemies." For the first time, the distinction was obliterated.

So the war carried on by the President against the insurrectionary districts in the Southern States, as in the case of the King of Great Britain in the American Revolution, was a personal war against those in rebellion, and with encouragement and support of loyal citizens with a view to their cooperation and aid in suppressing the insurgents, with this difference, as the warmaking (sic) power belonged to the King, he might have recognized or declared the war at the beginning to be a civil war, which would draw after it all the rights of a belligerent, but in the case of the President, no such power existed; the war therefore, from necessity, was a personal war until Congress assembled and acted upon this state of things.

Down to this period, the only enemy recognized by the Government was the persons engaged in the rebellion, all others were peaceful citizens, entitled to all the privileges of citizens under the Constitution. Certainly it cannot rightfully be said that the President has the power to convert a

loyal citizen into a belligerent enemy or confiscate his property as enemy's property.

Congress assembled on the call for an extra session the 4th of July, 1861, and among the first acts passed was one in which the President was authorized by proclamation to interdict all trade and intercourse between all the inhabitants of States in insurrection and the rest of the United States, subjecting vessel and cargo to capture and condemnation as prize, and also to direct the capture of any ship or vessel belonging in whole or in part to any inhabitant of a State whose inhabitants are declared by the proclamation to be in a state of insurrection, found at sea or in any part of the rest of the United States. Act of Congress of 13th of July, 1861, secs. 5, 6. The 4th section also authorized the President to close any port in a Collection District obstructed so that the revenue could not be collected, and provided for the capture and condemnation of any vessel attempting to enter.

The President's Proclamation was issued on the 16th of August following, and embraced Georgia, North and South Carolina, part of Virginia, Tennessee, Alabama, Louisiana, Texas, Arkansas, Mississippi and Florida.

This Act of Congress, we think, recognized a state of civil war between the Government and the Confederate States, and made it territorial. The Act of Parliament of 1776, which converted the rebellion of the Colonies into a civil territorial war, resembles, in its leading features, the act to which we have referred. Government, in recognizing or declaring the existence of a civil war between itself and a portion of the people in insurrection, usually modifies its effects with a view as far as practicable to favor the innocent and loyal citizens or subjects involved in the war. It is only the urgent necessities of the Government, arising from the magnitude of the resistance, that can excuse the conversion of the personal into a territorial war, and thus confound all distinction between guilt and innocence; hence the modification in the Act of Parliament declaring the territorial war.

It is found in the 44th section of the Act, which for the encouragement of well affected persons, and to afford speedy protection to those desirous of returning to their allegiance, provided for declaring such inhabitants

of any colony, county, town, port, or place, at peace with his majesty, and after such notice by proclamation there should be no further captures. The Act of 13th of July provides that the President may, in his discretion, permit commercial intercourse with any such part of a State or section, the inhabitants of which are declared to be in a state of insurrection (§ 5), obviously intending to favor loyal citizens and encourage others to return to their loyalty. And the 8th section provides that the Secretary of the Treasury may mitigate or remit the forfeitures and penalties incurred under the act. The Act of 31st July is also one of a kindred character. That appropriates \$2,000,000 to be expended under the authority of the President in supplying and delivering arms and munitions of war to loyal citizens residing in any of the States of which the inhabitants are in rebellion, or in which it may be threatened. We agree, therefore, that the Act 13th July, 1861, recognized a state of civil war between the Government and the people of the State described in that proclamation.

The cases of the *United States v. Palmer*, 3 Wheat. 610, *Divina Pastora*, and 4 *ibid.* 52, and that class of cases to be found in the reports are referred to as furnishing authority for the exercise of the war power claimed for the President in the present case. These cases hold that, when the Government of the United States recognizes a state of civil war to exist between a foreign nation and her colonies, but remaining itself neutral, the Courts are bound to consider as lawful all those acts which the new Government may direct against the enemy, and we admit the President who conducts the foreign relations of the Government may fitly recognize or refuse to do so, the existence of civil war in the foreign nation under the circumstances stated.

But this is a very different question from the one before us, which is whether the President can recognize or declare a civil war, under the Constitution, with all its belligerent rights, between his own Government and a portion of its citizens in a state of insurrection. That power, as we have seen, belongs to Congress. We agree when such a war is recognized or declared to exist by the warmaking (sic) power, but not otherwise, it is the duty of the Courts to follow the decision of the political power of the Government.

The case of *Luther vs. Borden et al.*, 7 How. 45, which arose out of the attempt of an assumed new government in the State to overthrow the old and established Government of Rhode Island by arms. The Legislature of the old Government had established martial law, and the Chief Justice in delivering the opinion of the Court observed, among other things, that

"if the Government of Rhode Island deemed the armed opposition so formidable and so ramified throughout the State as to require the use of its military force and the declaration of martial law, we see no ground upon which this Court can question its authority. It was a state of war, and the established Government resorted to the rights and usages of war to maintain itself and overcome the unlawful opposition."

But it is only necessary to say, that the term "war" must necessarily have been used here by the Chief Justice in its popular sense, and not as known to the law of nations, as the State of Rhode Island confessedly possessed no power under the Federal Constitution to declare war. Congress, on the 6th of August, 1862, passed an Act confirming all acts, proclamations, and orders of the President after the 4th of March, 1861, respecting the army and navy, and legalizing them, so far as was competent for that body, and it has been suggested, but scarcely argued, that this legislation on the subject had the effect to bring into existence an *ex post facto* civil war, with all the rights of capture and confiscation, *jure belli*, from the date referred to. An *ex post facto*<sup>8</sup> law is defined when, after an action, indifferent in itself or lawful, is committed, the Legislature then, for the first time, declares it to have been a crime and inflicts punishment upon the person who committed it. The principle is sought to be applied in this case. Property of the citizen or foreign subject engaged in lawful trade at the time, and illegally captured, which must be taken as true if a confirmatory act be necessary, may be held and confiscated by subsequent legislation. In other words, trade and commerce authorized at the time by acts of Congress and treaties may, by *ex post facto* legislation, be changed into illicit trade and commerce with all its penalties and forfeitures annexed and enforced. The instance of the seizure of the Dutch ships in 1803 by Great Britain before the war, and confiscation after the declaration of

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<sup>8</sup> From after the action; retroactive law.

war, which is well known, is referred to as an authority. But there, the ships were seized by the war power, the orders of the Government, the seizure being a partial exercise of that power, and which was soon after exercised in full.

The precedent is one which has not received the approbation of jurists, and is not to be followed. See W. B. Lawrence, 2d ed. Wheaton's Element of Int. Law, pt. 4, ch. 1. sec. 11, and note. But, admitting its full weight, it affords no authority in the present case. Here, the captures were without any Constitutional authority and void, and, on principle, no subsequent ratification could make them valid.

Upon the whole, after the most careful consideration of this case which the pressure of other duties has admitted, I am compelled to the conclusion that no civil war existed between this Government and the States in insurrection till recognized by the Act of Congress 13th of July, 1861; that the President does not possess the power under the Constitution to declare war or recognize its existence within the meaning of the law of nations, which carries with it belligerent rights, and thus change the country and all its citizens from a state of peace to a state of war; that this power belongs exclusively to the Congress of the United States, and, consequently, that the President had no power to set on foot a blockade under the law of nations, and that the capture of the vessel and cargo in this case, and in all cases before us in which the capture occurred before the 13th of July, 1861, for breach of blockade, or as enemies' property, are illegal and void, and that the decrees of condemnation should be reversed, and the vessel and cargo restored.

Mr. Chief Justice TANEY, Mr. Justice CATRON and Mr. Justice CLIFFORD, concurred in the dissenting opinion of Mr. Justice Nelson.