

9FED.CAS.—43

Case No. 5,034.

THE FRANCIS.

{1 Gall. 614.}¹

Circuit Court, D. Rhode Island.

Nov. Term, 1813.²

WAR—CONFISCATION—NATURALIZED CITIZEN DOMICILED IN FOREIGN COUNTRY—ENEMY PROPERTY.

1. A naturalized citizen of the United States, domiciled in the enemy country at the breaking out of war, is deemed an enemy, and his property is confiscable as such. *The Chester*, 2 Dall. [2 U. S.] 41; *Murray v. The Betsey*, 2 Cranch [6 U. S.] 64; *Maley v. Shattuck*, 3 Cranch [7 U. S.] 488; *Livingston v. Maryland Ins. Co.*, 7 Cranch [11 U. S.] 506; *The Venus*, 8 Cranch [12 U. S.] 253.

{See note at end of case.}

2. If a party so domiciled, puts himself in itinere, to resume his acquired country, he is deemed to have returned to its domicil. Story, Conn. Law, § 48.

{The ship *Francis*, Joseph Boyer, master, having sailed from Scotland for New York, July 19, 1812, with a British cargo on board, was captured by the *Yankee*, an American privateer, and libeled as enemy's property. Claims to portions of the cargo were interposed by various American citizens. See Cases Nos. 5,032, 5,033, 5,035, and 5,036.}

Mr. Colin Gillespie, whose claim was now under consideration, was born in Glasgow in Scotland, came to the United States in 1793, and was naturalized as a citizen thereof at New York, in 1798. In 1799, he married in Scotland, and returned with his wife to New York, where he resided until 1802, When, on account of the ill health of his wife, he went to Scotland. In 1805 he came again to New York, and having formed a mercantile copartnership with Mr. John Graham of that city, it was then agreed, for the benefit and mutual interest of the copartnership, that Mr. Gillespie should reside in Great Britain, and there transact the business of the copartnership, under the firm of Colin Gillespie & Co. and that Mr. Graham should transact their business at New York, under the firm of John Graham & Co. In pursuance of this agreement, Mr. Gillespie went in the same year to Scotland; established his house of trade there, and continued to reside there with his family until the spring of 1813, doing business as a merchant, receiving consignments of American produce, selling the same, and purchasing goods in that market to ship to the United States. During this residence in Scotland, Mr. Gillespie accepted a commission from the British government, as an officer in the local and embodied militia, which, however, he resigned in 1810. Mr. Gillespie, in his affidavit, further stated, that it was always his intention to hold to his adopted allegiance, and to do no act inconsistent with his duties to the United States; and that, as soon as he could arrange his business in Great Britain, after knowledge of the war, he set sail with his family for the United States, and

The FRANCIS.

now resides with them at New York. The present shipment was made in July, 1812, and the capture took place on or about the—of August, 1812.

Crapo & Searle, for claimant

Burrill & Robbins, for captors.

STORY, Circuit Justice (after reciting the facts). Upon the foregoing facts, and the presumption that Mr. Gillespie's return to the United States is with a bona, fide intention of permanent residence, the case seems entitled to a very indulgent consideration. My duty, however, requires me to apply the rules of law, and though I may lament individual hardships, I am not permitted to relax general principles in favor of them. And I take it to be clear; that the facts of this case establish the position, that Mr. Gillespie, at the time of this shipment and capture, was a merchant domiciled in Great Britain, and of course affected with its national character. He was settled there with a house of trade, and for purposes of indefinite extent and duration. Had the facts been equivocal, the circumstance, that it was his native country, would undoubtedly have been entitled to great weight, in deciding the question of domicil; for, as Sir William Scott justly observes, the native character easily reverts, and it requires fewer circumstances to constitute domicil, in case of a native subject, than to impress the national character on one, who is originally of another country. TheLa Virginie, 5 C. Rob. Adm. 98. Such then being the domicil and national character of Mr. Gillespie, he must,

according to the settled rules of public law, be deemed to partake of the advantages and the hazards of a British merchant, in peace and in war. For all commercial purposes, it is quite immaterial, what is the native or adopted country of a party. He is deemed a merchant of that country, where he resides, and carries on trade. *The Indian Chief*, 3 C. Rob. Adm. 12. Under such circumstances, Mr. Gillespie must be held, so far as the present transaction applies, to be completely invested with the hostile character of a British merchant.

But it is argued, that Mr. Gillespie, having become a naturalized citizen of the United States, could not be deemed an enemy merchant, unless he continued voluntarily to reside in Scotland after a full knowledge of the war, and that, as he had no such knowledge at the time of the shipment, he is entitled to all the benefits of his American character. I should have been glad to have seen an authority, which distinctly countenanced this exception. No such authority has been produced, and as the general rule is so often and so forcibly laid down in elementary works, it is difficult to conceive, that so important an exception, if it existed, should not have attracted public notice.

It is certainly true, that a character acquired by residence, ceases with the discontinuance of that residence. And, therefore, if a party, who has resided in an enemy country, puts himself in itinere to return to his native country, with an intention of bona fide residence there, he is deemed already to have resumed his native character, although he has not actually arrived in such country *The Indian Chief* [supra]. But, until he has actually so put himself in itinera the character of the country, where he resides, attaches indissolubly to him. He takes it with all its benefits and all its disadvantages. Undoubtedly, cases of hardship often arise on the breaking out of hostilities, as to native citizens, who are domiciled as merchants in the enemy country. The hardship is often forcibly pressed upon the prize court; but, as Sir William Scott observes, that the interest of friends may sometimes be involved in our vengeance upon enemies, is a matter, which it is natural to regret, but impossible to avoid. The administration of public rules admits of no private exceptions: he who clings to the profits of a hostile connexion must be content to bear its losses also. *The Phoenix*, 5 C. Rob. Adm. 21.

As to citizens domiciled in the enemy country, I hold it to be the established rule, that if they wish to avoid the hostile character, they must actually remove before the breaking out of hostilities. Otherwise their property then afloat will be liable to confiscation. If they do not so remove, the character of the country is completely impressed upon their property, wherever it is found, and remains until they have abandoned their residence, and then, as to all future transactions, the character of their native or adopted country returns. It is said, that there is no authority, which pointedly decides this doctrine. But it seems to me, that Dr. Robinson's note to *The Ocean*, 5 C. Rob. Adm. 91, fully shows the understanding of the prize courts on the subject; and the case of *The Osprey*, before

The FRANCIS.

the lords commissioners in 1795, cited in *The Vigilantia*, 1 C. Rob. Adm. 1, is a strong instance of its application to a neutral subject. There can be no well founded distinction in this respect between a neutral and a citizen. But independently of all authority, it seems to me that the principle obviously flows from the general rule, as to the effect of domicil, and cannot form an exception without shaking its foundations.

In the present case, if the doctrine of the claimant's counsel be true, Mr. Gillespie's property at the time of the capture, was completely protected from capture by British and American cruisers. He was certainly entitled to protection, as a British merchant domiciled in Scotland; and upon the argument of the counsel, as an American merchant also. I should have been glad to have learned, how this double character, this hostile and amicable character, could coalesce in the same person, as to the same transaction. I imagine it would be a *novus hospes* in the prize jurisdiction.

On the whole, I deem Mr. Gillespie, as to this shipment, an enemy merchant, and therefore reject his claim, and condemn the property as lawful prize to the captors.

[NOTE. On appeal this decree of condemnation was affirmed by the supreme court. Mr. Chief Justice Marshall delivering the opinion, in which it was held that the commercial domicile of a merchant at the time of the capture of his goods determines the character of those goods hostile or neutral. *The Frances*, 8 Cranch (12 U. S.) 363.]

¹ [Reported by John Gallison, Esq.]

² [Affirmed in 8 Cranch (12 U. S.) 363.]