

the crown, by voting for it in parliament, or by carrying it on in person, have made the *guilt properly their own*. That the whole British nation is not involved in this guilt, is evident from this circumstance, that its first trading city, and if I am not mistaken, some others, and a great number of individuals dispersed throughout the island, have publicly expressed their disapprobation and abhorrence of this war, and of the measures which led to it. If any of these should have property in this state, would it be generous, would it be just to confiscate it, on the two erroneous principles *a reparation of damages, and its belonging to aliens*? The feelings of every unprejudiced man must revolt at the thought.

All the cases adduced from Rutherford, and his reasoning on them, seem to apply solely to goods *forcibly taken from the enemy on the high seas, or during inroads made into their territory, and not to goods, moveable or immovable, which may happen to lie within the country of the injured, and be possessed by some of the members of the injuring nation*. Even the goods taken from the enemy *by force*, are not strictly the property of the captors, till a peace is concluded with the nation from the subjects of which they were taken; "if they," says Rutherford, *or an equivalent for them, should not be demanded, they become our own by the tacit consent of that nation*." Nor is this observation to be restricted to, and understood of such goods only, taken from the enemy, as may exceed the damages sustained by the injured party; for till a peace is concluded, it cannot be known whether satisfaction will not be made by the aggressor for the damages done, and consequently it cannot be determined before that event, whether the goods taken during the war will be more than equivalent or not, to those damages. Besides, the supposition is inadmissible, in fact, of course idle in theory, that the value of the goods taken from the enemy may exceed the damages and expences of the war incurred by the nation taking them, and consequently amount to *more than an equivalent* for such damages and expences. In modern wars this is never the case; to write therefore, and reason upon a thing which never does happen, is an unprofitable waste of time and paper, to say the least of it. The obligation on the injuring nation to repair the damages it has done, and the right the injured nation hath of doing itself justice by force of arms, in case this just satisfaction should be denied, veil a *temporary property* in the captors of the goods taken from the enemy withholding such satisfaction; but this property is not *complete and entire*, till the real amount of the damages can be ascertained; the expences of the war being a part of those damages, as these cannot be finally liquidated before the end of the war, and it cannot be known until that period, whether the enemy may not make some compensation for the losses it hath brought on the injured nation by an unjust war, the captors are to be esteemed, until peace, rather as the *precarious possessors* than the true and lawful owners of the goods taken by force, during hostilities; and the goods so taken ought to be considered rather as *pledges* in the hands of the captors, during the war, than as their *absolute property*. But that the reader may judge for himself, I shall give that author's own words.

"This opinion, that all goods which are taken in war are not *strictly our own by any law of nations*, till peace is concluded, that is, till some consent, *either express or tacit*, has made them our own by the law of nature, seems to be the general opinion of mankind, in respect of *immovable goods*, such as fortified towns which have been taken, or provinces which have been overrun in war. The captors are looked upon, whilst the war lasts, to be only in possession of them, and though this possession may help them to make a better bargain for themselves in a treaty of peace than they could do otherwise, yet the property which they have in things of this sort is deemed to be *precarious*, till a treaty of peace has ascertained and established it. It is usual in treaties of peace to mention such immovable goods particularly, and the captors, if they acquire property in them, acquire it by *express consent*. We may therefore reasonably conclude, that the property which the captors have in all *moveable goods taken in war*, is likewise acquired in the same manner. The only difference is, that immovable goods are generally of the most importance, are in the hands of the public, and can readily be returned; whilst *moveable goods* are of less consequence, are in private hands, and because they have either been consumed, or have not been kept together, cannot be returned so readily. For this reason, whilst the property in the former is adjusted by *express consent*, the property in the latter is left to pass from the original owners to the captors by *tacit consent*."

The quotation from Vattel discovers, what is the *present, approved, and general practice* of all the civilized nations of Europe, with respect to moveable or immovable private property, owned by the subjects of a state at war with another state. And here I cannot refrain from repeating the question which was asked by the senate, whether we would not wish to follow, in this particular, the example of the European nations, rather than that of the piratical states of Barbary? The question was proper and pertinent, but remains unanswered.

It may be said, indeed, that there is no compact or treaty between these states and Great-Britain, and therefore we are left to govern ourselves solely by the law of nations. To judge from the passage cited from Vattel, there does not appear to be any treaty by which the above described property is secured to individuals among the several nations of Europe; such individuals owe the preservation of such property to the usage or custom merely of those nations, and not to any particular or special treaty; a *custom* which does them honour, and is more conformable to the genuine spirit of the law of nations, than that rigour which is inflicted on by the delegates. If we are to govern ourselves solely by the rigour of that law in one instance, why not in all? This, at least, would be acting consistently; and were we to act up to the supposed rigour of that law in all cases, to preserve consistency, we must make slaves of the British prisoners of war: For Rutherford observes, "the law of nature will allow those who are prisoners to be made slaves by the nation which takes them," by way of reparation for damages done; "In Europe, indeed, prisoners of war are not slaves, but their slavery is prevented by the law of each particular nation, and not by any law which all the nations of Europe have agreed to establish among themselves as the common rule of their conduct towards one another. The civil law of each particular nation does not allow of slavery." But the civil law of all, or of most of these United States, allows of slavery, and therefore, if we act up to this misconceived rigour of the law of nations, and in conformity to the subtle reasoning, founded on a reparation of damages, so much relied on by the delegates, we may make slaves of the British prisoners of war. The right, however, has been prudently waived, because the exercise of it would lead to those horrors and cruelties, so justly condemned by reason and humanity. It would neither be fate or honourable to this state to be instrumental in renewing some of those dreadful scenes which disgrace the times of Marius and Sylla; confiscations were a part of their cruel system; I hope they never will be a part of ours, in the extent contended for by the delegates. A confiscation of British property, on their principles, if followed by no other bad consequences, would probably diffuse through the British nation a greater rancour, and a much more general spirit for continuing the war, than what at present appears to prevail in it.

But what British subjects are to be deemed, upon legal principles, *aliens* in this state? These are not yet ascertained, tho' ascertained they must be, before we can possibly seize and confiscate the property of such, upon the foundation of its belonging to *aliens*, and *alien enemies*. Is the acceptance of a person from the king of Great-Britain, the not coming into this, or some one of the United States, before a particular day, and not remaining in some one of those states, from that time, to the present, to render the person, and the persons not coming over, and residing as aforesaid, *British subjects, and alien enemies*? If so, they would be punished for the want of foresight: for surely the deprivation, of a natural, and valuable privilege, is a severe punishment. Is the departure from this state on or since a certain day, the 14th of August 1775, for instance, when there was no law declaring such a departure unlawful, to make the persons, so departing, *British subjects and aliens*? A law declaring them so, would be retrospective, and consequently, contrary to our bill of rights: and without such a law, the individuals last mentioned, could not be deemed British subjects, and aliens; they have not been deemed such hitherto, because there is a subsisting law, considering them as our own subjects, and tribly taxing some of them, as *such*. The absentees from this state, who have taken up arms against us, or done any other act, to subject themselves to our treason law, may be dealt with, in the manner already pointed out, and their property, should they be found guilty on trial, or be outlawed, will be confiscated to the use of the state. More than this; 'tis apprehended, has not been done by any state in the union, notwithstanding the positive assertion to the contrary by the delegates. No confiscation of *British property*, as *such*, has, I believe, taken place in any of these states; what property has been confiscated be-

longed to the disaffected refugees, who were considered as *traitors* to their country; but the bill for confiscating British property, within this state, rejected by the senate, confiscated that property, on the principle of its belonging to *British subjects, and aliens*, and not as the property of *traitors*. If mere residence in the enemy's country, or any one of the above recited incidents or predicaments, is to constitute the residents *British subjects*, and alien enemies, what court is to try the persons guilty of, or taking under, any of those predicaments? What time is to be allowed, and what evidence admitted, for the proof of the offence and establishment of the facts? As we were formerly all one people, born under the same allegiance, due to one and the same sovereign, and capable of acquiring and holding property in every part of the British dominions, if mere residence in the enemy's country is to constitute the residents *British subjects* and *alien enemies*, it seems but reasonable, that this state should have issued a proclamation, ordering all, who might have property within it, or chusing to become members of it, to repair hither by a fixed day, allowing a reasonable time, and announcing the consequences of not complying with the summons. As no such proclamation was issued, to pass a law, declaring the persons under any of the predicaments already mentioned, *British subjects* and *alien enemies*, and in so doing to strip them of the birthright of natural born subjects, is not consistent to the principles either of natural or common law. All British subjects, born before the declaration of independence in any part of the British dominions, are *natural born subjects*, and consequently cannot be *aliens* to each other, and cannot be divested, by act of assembly, of that natural inherent, and indelible character. "For tho' it be said (see 2d Ventries 6) that an act of parliament may do any thing, that must be understood as to civil things, which are but the creatures of men, therefore may be altered, and disposed of, at the will of the supreme authority: but natural things are not within its power, for an act of parliament cannot make a man to be born in any other place than where he was really born;" and consequently cannot make a man cease to be a natural born subject who really is one; but a natural born subject cannot be an alien, therefore an act of assembly cannot make an alien. The messages, indeed, of the delegates, and the preamble to the rejected bill assert, that by the declaration of independence, *all British subjects* became *aliens* in this state, and the British nation being at war with us, *alien enemies*, and therefore incapable of holding any property within this state. Although I have but little knowledge of the law, yet will I venture to pronounce, the delegates have in this point mistaken the law. While the duchies of Normandy, Guienne, Anjou, and Britain, were under the actual obedience of the kings of England, persons born within those duchies, according to lord Coke, (see Calvin's case) "could inherit within the realm of England, as well as *Englishmen*, because, says that great lawyer, they were under one allegiance, due to one sovereign." It was determined in the same case, that the ante-nati in Scotland, that is, persons born there before the accession of king James the first to the crown of England, remained aliens as to the crown of England, because, as my lord Coke observes, "they were born when there were several kings of the several kingdoms, and the uniting of the kingdoms by descent subsequent, cannot make him a subject to that crown to which he was an alien at the time of his birth; so albeit, the kingdoms (England and Scotland) should by descent be divided and governed by several kings, yet it was resolved, that all those, that were born under one natural obedience, whilst the realms were united under one sovereign, should remain natural born subjects, and no aliens; for that naturalization due and vested by birth-right, cannot by any separation of the crowns afterwards, be taken away; nor be, that was by judgement of law a natural subject, at the time of his birth, become an alien by such matter *ex post facto*."

Whenever therefore, a kingdom, commonwealth, or an empire, comes to be divided into two, or more separate and independent states (whether the separation be made by the descent of the crown to different persons, or by a civil and public war, as in our case, is immaterial) I should apprehend the same law ought to obtain; for where there is the same reason, there the law should be the same. Wherefore, as both the British and Americans, born before the declaration of independence took place, were under one allegiance, due to the same sovereign, none of those can be considered as *aliens*, either in Great-Britain, or in this state, but may inherit within the several countries as the natural born subjects of both, and may sue in the respective courts of either, to recover their debts, lands and tenements.