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REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

IN FEBRUARY TERM 1815.

By WILLIAM CRANCH,

CHIEF JUDGE OF THE CIRCUIT COURT OF THE DISTRICT OF COLUMBIA.

Potius ignoratio juris litigiosa est, quam scientia.
CIC. DE LEGIBUS, DIAL. 1.

VOL. IX.

THIRD EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

FREDERICK C. BRIGHTLY,

AUTHOR OF THE "FEDERAL DIGEST," ETC.

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1883.

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE PERIOD OF THESE REPORTS.

Hon. JOHN MARSHALL, Chief Justice.

" BUSHROD WASHINGTON,
" WILLIAM JOHNSON,
" BROCKHOLST LIVINGSTON,
" THOMAS TODD,
" GABRIEL DUVALL,
" JOSEPH STORY,

} Associate Justices.

RICHARD RUSH, Esquire, Attorney-General.

A TABLE

OF THE

NAMES OF THE CASES REPORTED IN THIS VOLUME.

The references are to the STAR *pages.

A TABLE

OF THE

CASES CITED IN THIS VOLUME.

The references are to the STAR *pages.

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CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1815.

MANDEVILLE *v.* UNION BANK OF GEORGETOWN. (*a*)

Promissory note.—Set-off.—Estoppel.

By making a note negotiable in a bank, the maker authorizes the bank to advance on his credit, to the owner of the note, the sum expressed on its face; and it would be a fraud upon the bank, to set up off-sets against this note, in consequence of any transactions between the parties.

ERROR to the Circuit Court for the district of Columbia, for the county of Alexandria, in an action of *debt*, by the Union Bank against Mandeville, upon his promissory note to C. I. Nourse, indorsed to the bank. On the trial below, a special verdict was found which stated the following facts:

On the 15th of January 1811, Mandeville, then and always an inhabitant of the town of Alexandria (in the county of Alexandria), for a valuable consideration, made his promissory note, at the said town, payable to C. I. Nourse (or order), sixty days after date, negotiable at the Union Bank of Georgetown, payable at the bank of Potomac, in Alexandria, for $410.51.

The note was delivered to C. I. Nourse, and on the same day, indorsed by him, and offered for discount at the Union Bank, where it was regularly discounted for his use. On the 30th of the same month, Mandeville being informed that his note had been discounted, made no objection, and said, that he had funds to meet it. The note was not paid when it became due, and was protested for non-payment.

*10] *On the 16th of the same month (the day after the date of Mandeville's note), Charles I. Nourse, for a full and valuable consideration, executed and delivered to Mandeville, his note of that date, payable in 60 days, for $400, negotiable at the Bank of Alexandria, payable at the Bank of Columbia (in Georgetown). On the 30th of the same month, C. I. Nourse became further indebted to Mandeville, by the acceptance of his order of that date, drawn at sight, and by acceptance made payable on the

(*a*) February 8th, 1815. Absent, LIVINGSTON, TODD and STORY, Justices.

16th of February following, in favor of C. Page, for the use of Mandeville, for $64; neither of which had been paid. The Union Bank transacts its business in Georgetown, in the county of Washington. On the 2d of February 1811, Mandeville inserted an advertisement in the Alexandria Gazette, cautioning all persons against receiving assignments of any notes given by him to Nourse, as he had discounts against them.

Mandeville, in the court below, offered to set-off the note and acceptance of Nourse, against his own note upon which the suit was brought; but upon the special verdict, the court below rendered judgment against him for its whole amount; and he brought his writ of error.

By the laws of Virginia, in force in the county of Alexandria, the defendant is allowed to set-off against the assignee of a promissory note any just claim which he had against the original payee, before notice of the assignment of the note. But by the laws of Maryland, in force in the county of Washington, a promissory note, payable to order, is subject to the same rules as in England, under the statute of Anne.

On behalf of the plaintiff in error, it was contended, that the note, being made at Alexandria, and to be paid there, was to be governed by the laws of Virginia, and that, as he held Nourse's note, before he had notice of
*11] *the assignment of his own, he had a right to set it off in this suit. On the other side, it was said, that it was immaterial by which law the note was to be governed; for it was made with a view, expressed on its face, to be discounted by the plaintiffs; whereby the defendant had waived any set-off to which he might have a right. Besides which, upon being informed that the note was discounted by the plaintiffs, he did not object, nor insist upon his set-off, but said he had funds (meaning funds of Nourse's) to meet it. By which conduct also, he waived his right to the set-off.

February 9th, 1815. MARSHALL, Ch. J., delivered the opinion of the court, as follows:—It is entirely immaterial, whether this question be governed by the laws of Virginia or of Maryland. By neither of them can the discounts claimed by the plaintiff in error be allowed. By making a note negotiable in bank, the maker authorizes the bank to advance on his credit, to the owner of the note, the sum expressed on its face. It would be a fraud on the bank, to set up off-sets against this note, in consequence of any transactions between the parties. These off-sets are waived, and cannot, after the note has been discounted, be again set up. The judgment is to be affirmed, with damages at the rate of six per cent. per annum.

Judgment affirmed.

MEIGS *et al. v.* MCCLUNG'S LESSEE. (*a*)

Military reservation.

In the treaty of the 25th of October 1805, with the Cherokees, the reservation of three miles square, for a garrison, lies below, and not above, the mouth of the Highwassee, where the United States have placed the garrison.

ERROR to the Circuit Court for the district of East Tennessee, in an action of ejectment, brought by McClung's lessee against Meigs and others. *On the trial in the court below, a bill of exceptions was taken, which states the case, as follows : [*12

The plaintiff's lessor claims the land, under a grant from the state of North Carolina, to John Donelson, dated the 11th of July 1788, for 1500 acres, lying on the north side of Tennessee river, opposite to a high bluff of rocks of diverse colors. The defendants resided on the land, as officers, and under the authority of the United States, who had a garrison there, and had erected works at an expense of $30,000. The place where the defendants resided was two miles, at least, above the termination of the treaty line, opposite the mouth of the Highwassee. In 1805, the line between the United States and the Cherokee Indians was ran, according to the treaty, under the direction of the defendant, Meigs, who was an agent of the United States for that purpose ; and afterwards, the garrison reserve of three square miles was laid off, by the direction of the defendant, Meigs, opposite and above the mouth of the Highwassee river, making the treaty line from the three forks of Duck river, to the point on Tennessee river, opposite the mouth of Highwassee, the lower line of said reservation, and the Tennessee river the southern line, meandering the river and reducing it to a straight line of three miles in length.

The defendants read a copy of a letter written by D. Smith and the defendant, Meigs, who were commissioners on the part of the United States, at the treaty holden with the Cherokee Indians, on the 25th of October 1805, dated at Washington, January 10th, 1806, and addressed to the secretary at war ; in which they say : "By the treaty with the Indians, concluded at Tellico, on the 25th day of October 1805, there was reserved three square miles of land, for the particular disposal of the United States, on the north bank of the Tennessee, opposite to and below the mouth of Highwassee. This reservation is ostensibly predicated on the supposition, that the garrison at South-West Point, and the United States factory now at Tellico, would be placed on the reserve, during the pleasure of the United States. But it was stipulated with Doublehead, that whenever the United States should find this land unnecessary for the purposes mentioned, then it is to revert to Doublehead ; provided, as a condition, that he retain one of the square miles to his own use, *and that he is to relinquish his right and claim to the other two sections of one mile square each, in favor of John D. Chisholm and John Riley, son to Samuel Riley, one of the interpreters in the Cherokee nation, in equal shares. As it is proper that this be recognised, we have made this statement for your information, and have the honor to be, &c., [*13

DANIEL SMITH,
RETURN J. MEIGS."

(*a*) February 11th, 1815. Absent, JOHNSON and TODD, Justices.

When the defendant and the other officers of the United States went to look for the place to erect the garrison, in pursuance of the reserve, they went first below the mouth of Highwassee; but it was a low and marshy country, affording no good site for a garrison, and no water or spring was to be had there.

The plaintiff's counsel insisted, that the Indian title to the land was extinguished, and that he had a right to recover, and prayed the court so to instruct the jury; to which the defendant's counsel objected, and insisted, that the defendants were entitled to recover against the plaintiff, because the Indian title was not extinguished; and because the land was occupied by the United States' troops, and the defendants, as officers of the United States, for the benefit of the United States, and by their direction; and because the garrison was erected on the land really reserved for that purpose by the treaty, as they insisted it was, out of the land ceded that the reserve was made. That it must, by the letter of the treaty, be understood to be land reserved to the Indians, out of the part ceded, and not a reserve in favor of the United States, out of the land not ceded by the Indians; and that the term "reserve" in the treaty, controlled the other expressions, "opposite and below the mouth of Highwassee." That the United States had a right, by the constitution, to appropriate the property of individual citizens; and that the line run, was the true line of the reservation.

But the court overruled the objections of the defendants' counsel, and charged the jury, that the land reserved *for a garrison was opposite to and below the mouth of the Highwassee, and that the land opposite to and above was ceded to the United States by the Indians, by the treaty of Tellico, and that the United States had no right to appropriate the land mentioned in the plaintiff's declaration. And that the plaintiff was authorized by law to recover, if the land covered by his grant lay opposite to and above the mouth of the Highwassee. That if the treaty had expressly reserved the three miles square, for the disposal of the United States, opposite and above the mouth of Highwassee, the Indian title would be thereby extinguished, as that reserve would be north of the treaty line. That if the land thus reserved was, at the time, vacant land, the United States could appropriate it as they pleased; but if it was private property, the United States could not deprive the individual of it, without making him just compensation therefor. And further, that by the expressions used in the said treaty, the Indian title to all land north of the treaty line, from the point opposite the mouth of Highwassee to Fort Nash, except such tracts as were expressly reserved for the Indians, was extinguished; and that the three square miles, reserved for the United States, must, according to the treaty, be situate opposite and below the mouth of Highwassee. To this opinion, the counsel for the defendants excepted.

*14]

By the 2d article of the treaty of 25th October 1805 (7 U. S. Stat. 93), "the Cherokees quit-claim and cede to the United States, all the land which they have heretofore claimed, lying to the north of the following boundary line: beginning at the mouth of Duck river, running thence up the main stream of the same, to the junction of the fork, at the head of which Fort Nash stood, with the main south fork; thence a direct course to a point on the Tennessee river bank, opposite the mouth of Highwassee river," &c. After describing the other lines of the cession, the treaty proceeds thus:

"And whereas, from the present cession made by the Cherokees, and other circumstances, the site of the garrisons at South-West Point and Tellico are become not the most convenient and suitable places for the accommodation of the Indians, it may become *expedient to remove the said garrisons and factory to some more suitable place; three other square [*15 miles are reserved for the particular disposal of the United States, on the north bank of the Tennessee, opposite to and below the mouth of the Highwassee."

C. Lee, for the plaintiffs in error.—The points in dispute in this cause are stated in the bill of exceptions. The principal question is, whether the three miles reserved for the use of United States are to lie below or above the mouth of the Highwassee?

We say, that it was the intention of the parties that they should lie above. The expression "reserved" imports an exception to the cession. The reservation must have been out of the land ceded. The United States could not reserve what was not theirs before; but for the accommodation of the Indians, they reserve three miles square for the use of the United States. It was intended to prevent the extinguishment of the Indian title to so much, in order to prevent individuals from purchasing it. The letter of Smith and Meigs to the secretary of war shows that the land was to revert to Doublehead and two others, whenever the United States should cease to have a use for it. It was, therefore, clearly a reserve, or exception from the general operation of the grant. It would be inconsistent with the faith of the treaty, to suffer any individual to possess it.

Jones, contrà, relied upon the plain words of the treaty. The word "reserve" is the only thing that can justify a question; but it means "to appropriate" to "set apart" to hold it for the use of United States, for the purpose of a garrison, but not to make an absolute grant or cession of the land. The expression "three other square miles," shows that they meant other than the land ceded.

The letter is not evidence; it is no part of the treaty; it was never ratified by the senate; and is unimportant, if it was. It, however, shows that there was no mistake in the word "below" in the treaty.

**C. Lee*, in reply.—The word "reserve" was used to keep individuals from appropriating to themselves, the lands supposed most [*16 convenient for the mutual accommodation of the Indians and the United States. It means the same as the word "retain." The word "other" is put in opposition to the former site of the garrison and factory. It is straining the word "reserve" very far, to make it mean a new grant.

MARSHALL, Ch. J.—Does the question arise in this case, whether a grant is good, before extinguishment of the Indian title?

C. Lee.—That question does not come up in this case.

STORY, J.—That question has been decided in the case of *Fletcher* v. *Peck* (6 Cr. 87).

February 13th, 1815. (Absent, Johnson, J., and Todd, J.) MARSHALL, Ch. J., delivered the opinion of the court, as follows:—

The land for which this ejectment was brought, lies within the territory ceded to the United States by the state of North Carolina, and was claimed by a patent anterior to that cession. At the date of the grant, the Indian title had not been extinguished. On the 25th day of October 1805, a treaty was made between the United States and the Cherokee Indians, in which the Indians ceded to the United States "all the land lying to the north of the following boundary line: beginning at the mouth of Duck river, running thence, up the main stream of the same, to the junction of the fork, at the head of which Fort Nash stood, with the main south fork; thence a direct course to a point on the Tennessee river bank, opposite the mouth
*17] of the Highwassee river." *The question on which the cause has been placed is this: Is the land, claimed by the plaintiff in the court below, within the ceded territory?

The line mentioned in the treaty has been run, and the land in controversy lies on the north side of it, and consequently, within the limits ceded to the United States; but there was a further stipulation in the treaty, which the plaintiffs in error say, comprehends the lands for which this suit is brought. After describing the ceded territory, the treaty proceeds to say: "And whereas, from the present cession made by the Cherokees, and other circumstances, the sites of the garrisons at South-West Point, and Tellico, are become not the most convenient and suitable places for the accommodation of the said Indians, it may become expedient to remove the said garrisons and factory to some more suitable place,"—three other square miles are reserved for the particular disposal of the United States, on the north bank of the Tennessee, opposite to and below the mouth of Highwassee.

The ceded territory lies above the mouth of Highwassee, as does the land in controversy; yet the plaintiffs in error contend, that this land is within the stipulation for a reserve of three square miles to lie below the mouth of Highwassee. They attempt to sustain this proposition, by alleging that the word "below" was inserted in the treaty by mistake, when the word "above" was intended. This mistake ought certainly to be very clearly demonstrated, before the courts of the United States can found upon its existence a judgment which shall deprive a citizen of his property.

The argument, so far as it is drawn from the treaty itself, rests on the word "reserved." It is said, that the lands "reserved for the particular disposal of the United States," must necessarily be a part of the ceded territory, or the term would not aptly express the idea of the parties.
*18] *The court cannot accede to this reasoning. The treaty is the contract of both parties, each having lands. The words are the words of both parties, and the term might, without any strained construction, be applied to the lands of either. No great violence is done to the known import of the term, as used in the treaty, if it be considered as equivalent to the words "set apart." This construction is rendered necessary by the word "other." "Three other square miles," that is, other than those before ceded, are reserved for the particular disposal of the United States. The context, instead of proving that the word, "below" was used by mistake in the treaty, would rather induce the court to put that construction on an ambiguous term, had one been employed.

The counsel for the plaintiffs in error also rely on a letter written by the

commissioners who negotiated the treaty, to the secretary of war, on the 10th day of January 1806. But without inquiring into the weight to which such a letter is entitled, in such a case, it is to be observed, that the letter agrees with the terms of the treaty. It says, that the three square miles reserved for the particular disposal of the United States, were "opposite to and below the mouth of the Highwassee." It is unnecessary to make a further comment on this letter, than to say, that there is no expression in it which appears to the court to countenance, in the slightest degree, the idea, that the word "below" in the treaty was used by mistake instead of the word "above."

The facts, that the agents of the United States took possession of this land lying above the mouth of the Highwassee, erected expensive buildings thereon, and placed a garrison there, cannot be admitted to give an explanation to the treaty, which would contradict its plain words and obvious meaning. The land is certainly the property of the plaintiff below; and the United States cannot have intended to deprive him of it, by violence, and without compensation. This court is unanimously and clearly of opinion, that the circuit court committed no error in instructing the jury, that the Indian title was extinguished to the land in controversy, and that the plaintiff below might sustain his action. The judgment is affirmed, with costs.

Judgment affirmed.

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*Simms *v.* Guthrie *et al.* (*a*) [*19

Land law of Virginia.—Pre-emption right.—Injunction bill.—Relief in equity.

The land law of Virginia, which gives a right of pre-emption to those who had marked and improved land, before the year 1778, refers that right to the time when the improvement was made, and to the time of the passage of the act, and not to the time when the claim for such pre-emption was made before the court of commissioners.

If an entry be made, by the assignee of a pre-emption right, it will be good, although the name of the assignor be not mentioned in the entry, if the entry refer to the warrant, and it mention an improvement; provided, the place be described with sufficient certainty, in other respects.

A bill in equity to enjoin a judgment at law, is not to be considered as an original bill, and therefore, it is not necessary, in a court of limited jurisdiction, to make other parties, if the introduction of those parties should create a doubt as to the jurisdiction of the court.[1]

A complainant in equity cannot obtain a decree for more than he has asked in his bill.

Error to the Circuit Court for the district of Kentucky, in a suit in chancery. The facts of the case, as stated by the Chief Justice, in delivering the opinion of the court, were as follows:

Charles Simms, the plaintiff in error, having obtained a judgment in ejectment, for certain lands lying in Kentucky, in possession of the defendants, for which the said Simms held a patent, prior to that under which the defendants claimed, a bill of injunction was filed by them, praying that he might be decreed to convey to them so much of the land in their possession, as was included within his patent.

(*a*) February 8th, 1815. Absent, Livingston, Story and Todd, Justices.

[1] Where a bill does not relate to some matter already litigated in the same court, by the same persons, and which is not either in addition to, or a continuance of, an original suit, it is an original bill, not an ancillary one. Christmas *v.* Russell, 14 Wall. 69.

It appeared in evidence, that in the year 1776, a company, of whom John Ash was one, marked and improved several parcels of land, lying on the waters of Salt river. John Ash made an improvement on the waters of the Town fork of Salt river, soon after which, William McCollom, another member of the same company, made an improvement, at a spring on the same stream, about 700 yards below him. Ash complained that McCollom had encroached on his rights, by approaching too near him; upon which, they agreed to decide by lot, who should be entitled to both improvements. Fortune determined in favor of Ash, and McCollom relinquished his rights, and improved elsewhere. Ash afterwards settled both improvements, and planted peach stones at that which was made by himself.

In April 1780, before the court of commissioners appointed in conformity with the act generally denominated the "previous title law," John Ash obtained a certificate in the following words: "John Ash, sen., claimed a pre-emption of 1000 acres of land, in the district of Kentucky, on account of marking and improving the same, in the year 1776, lying on the waters of
*20] the *Town fork of Salt river, about two miles nearly east from Joseph Cox's land, to include his improvement. Satisfactory proof being made to the court, they are of opinion, that the said Ash has a right to a pre-emption of 1000 acres of land, to include the above location, and that a certificate issue accordingly."

This certificate was assigned to Terrell and Hawkins, who, in April 1781, made the following entry thereon, in the surveyor's office of the county in which the lands lie: "Terrell and Hawkins entered 1000 acres, No. 1226, on the waters of the Town fork of Salt river, about two miles nearly east from Joseph Cox's land, to include his improvement." This entry was surveyed and patented, and the defendants claim under it. The date of this patent was on the 6th of March 1786.

The entry of Charles Simms was made on the 13th of April 1780, his survey on the 25th of the same month, and his patent issued on the 19th of April 1783.

The claim under an improvement being of superior dignity to that of Charles Simms, his title must yield to that of the defendants in error, if theirs be free from objection. The land law of Virginia, under which all parties claim, requires that locations shall be made so specially and precisely, that other persons may be enabled with certainty to locate the adjacent residuum. The situation of Kentucky, covered with conflicting titles to land, has made it necessary that this requisition of the law should be enforced with some degree of rigor, while the ignorance of early locators, the dangers to which they were exposed, and the difficulty of describing, with absolute precision, lands which were held by a very slight improvement, made on a single spot, and which could not be immediately surveyed, induced the courts of that country, for the purpose of preserving entries so far as was consistent with law, to frame certain general rules, of very extensive application to cases which occurred. One was, that the designation of any particular spot of general notoriety, or such a description of it, in relation to
*21] some place of general notoriety, *as would clearly point it out to subsequent locators, would give sufficient notice of the place intended to be appropriated, and that a failure to describe the external figure of the land should be supplied, by placing the improvement in the centre, and

drawing round it a square, with the lines to the cardinal points, which should comprehend the quantity claimed by the location.

The court below was of opinion, that there was sufficient certainty in the certificate of John Ash, sen., and in the entry afterwards made with the surveyor, by Terrell and Hawkins; that the improvement intended to be claimed by Ash was that which he won of McCollom, and that the land should be surveyed in a square form, with the lines to the cardinal points, including the improvement won of McCollom in the centre. A survey having been made in conformity with this interlocutory decree, the court ordered the defendant below to convey severally to the plaintiffs in that court, so much of the land claimed by them, as was included in his patent. To this decree, Charles Simms sued out a writ of error.

Swann, for the plaintiff in error, contended: 1. That Simms having the first entry and first patent and judgment at law in ejectment, his title must prevail. The entry of Terrell and Hawkins in 1781 cannot be connected with the settlement of Ash. It does not refer to it, and the want of such reference cannot be aided by any extrinsic evidence. The entry must be in itself sufficient, or it can avail nothing. *Patterson's Devisees* v. *Bradford*, Hardin 108.

2. The entry, if it can be connected with the certificate of the commissioners in favor of Ash, is still void for uncertainty. There were two settlements by Ash, and it does not appear to which the commissioners alluded; or if it does appear to which they alluded, it was to the first settlement of Ash, and not to that which was begun by McCollom. *Myers* v. *Speed*, Hughes 95; *Craig* v. *Doran*, Hardin 140. The land ought to have been surveyed from Ash's first settlement, and not from that which he won from McCollom.

**Jones*, contrà.—1. The first objection is, that the right of pre-emption never belonged to this land, because it is said that Simms had a prior claim. But the act only excludes from the right of pre-emption, lands to which a legal title had been acquired, prior to the date of the act. The law refers back to the improvement, and gives the pre-emption, notwithstanding an intermediate title. Simms must show that his title commenced before the passing of the land law. [*22

2. The second objection relates to the vagueness of the entry. The entry of Terrell and Hawkins was made upon warrant No. 1226, and refers to it. That warrant was lodged with the surveyor, and refers to the pre-emption certificate of Ash. The cases cited to show that you cannot make a vague entry certain, by reference to another paper, are of recent date, and if they are to be understood as the opposite counsel contends, would be in opposition to the analogous cases. In the case of *Patterson's Devisees* v. *Bradford*, Hardin 108, it is said, that if the entry calls for an improvement, you may refer to the certificate to show where the improvement was. So, in *Greenup* v. *Kenton*, Hardin 16, the court decided, that you might refer to another paper, to show what was ambiguous in the entry.

It is also said, that it appears by extraneous evidence, that there were two improvements by Ash, and therefore, that the entry is uncertain. The question is, whether the improvement was sufficiently notorious to give notice to subsequent locators. It might have been as notorious as any other

object. The cabin, the spring, the run and the location of Joseph Cox were all well known. But it is in proof, that one of the improvements was abandoned. They were near each other, and formed only one plantation or settlement. The evidence is, that Ash's improvement means the cabin where his widow now lives.

*23] *Swann*, in reply.—The pre-emption of Ash ought to be laid off from his first improvement. Ash renewed both improvements, viz., Ash's and McCollom's, as such. The question is, which was Ash's settlement, at the time referred to in the certificate of the court of commissioners? What did he mark and improve, in the year 1776? It is the improvement made in 1776 only, to which the commisioners refer. The cabin was built after the certificate.

February 14th, 1815. (Absent, Johnson, J., and Todd, J.) MARSHALL, Ch. J., after stating the facts of the case, delivered the opinion of the court, as follows :—

The first error assigned is, that the entry and survey of the plaintiff in error being prior to the claim made by Ash before the court of commissioners, gave him a legal right to the land so entered and surveyed, not to be affected by the subsequent claim of Ash. The words of the act of assembly are, "That all those who, before the said first day of January 1778, had marked out or chosen for themselves any waste or unappropriated lands, and built any house or hut, or made other improvements thereon, shall also be entitled, on the like terms, to any quantity of land, to include such improvements, not exceeding 1000 acres, and to which no other person hath any legal right or claim."

The court is clearly of opinion, that the words of the law refer to the time when the improvement was made, and to the time of the passage of the act; not to the time when the claim, founded on that improvement, was made to the court of commissioners. If the land, when improved, was waste and unappropriated, if, at the passage of the act, no other person had "any legal right or claim" to the land so improved, such right could not be acquired, until that of the improver should be lost.

The second error is, that the entry made by Terrell and Hawkins with the surveyor has no reference to the *pre-emption certificate of Ash, *24] and is, therefore, not a good and valid entry of Ash's pre-emption right. Terrell and Hawkins were assignees of Ash; and this ought to have been expressed in the entry. Those words are omitted. In consequence of their omission, it does not appear whose improvements is to be included.

Upon this point, the court has felt a good deal of difficulty. If the entry with the surveyor could be connected with the certificate of the commissioners, this difficulty would be entirely removed. But the court is not satisfied, that according to the course of decisions in Kentucky, such reference is allowable. The court, however, is rather inclined to sustain the location, because its terms are such as to suggest to any subsequent locator the nature of the omision which had been made.

Terrell and Hawkins enter 1000 acres of land, "to include his improvement." It was, then, a warrant founded on the improvement; and that improvement was made, not by them, but by a single person. Of that single person, Terrell and Hawkins were, of course, the assignees. The

place was described with such certainty as would have been sufficient, had the assignment been stated. On coming to the place, Ash's improvement would have been found. The mistake, therefore, does not mislead subsequent locators: it does not point to a different place. They are as well informed as they would have been by the insertion of the omitted words. The entry, too, contains a reference to the warrant which the law directed to be lodged with the surveyor, and to remain there, until it should be returned, with the plat and certificate of survey, to the land-office.

3. It is also objected, that some of the defendants in error do not show a complete legal title under Terrell and Hawkins, for which reason, they have not entitled themselves to a conveyance from Charles Simms; and that one of them, John Meigs, has obtained a decree for 140 acres of land, although in the bill he claimed only 100 acres. *Regularly, the claimants who have only an equitable title ought to make those whose title they assert, as well as the person from whom they claim a conveyance, parties to the suit.[1] For omitting to do so, an original bill might be dismissed. But this is a bill to enjoin a judgment at law, rendered for the defendant in equity against the plaintiffs. The bill must be brought in the court of the United States, the judgment having been rendered in that court. Its limited jurisdiction might possibly create some doubts of the propriety of making citizens of the same state with the plaintiff, parties defendants. In such a case, the court may dispense with parties who would otherwise be required, and decree as between those before the court, since its decree cannot affect those who are not parties to the suit. [*25

It is certainly a correct principle, that the court cannot decree to any plaintiff, whatever he may prove, more than he claims in his bill. Nothing further is in issue between the parties. It is not necessary to inquire, whether anything appears in this cause, which can prevent the plaintiff from availing himself of this principle; because the decree will be opened on another point, in consequence of which, this objection will probably be removed.

4. The fourth error is, that John Ash having two improvements, it is uncertain, which he claimed before the commissioners, and his entry is, on this account, void; or if not so, then his claim was for the improvement made by himself, and not for that won from McCollom. It is admitted, that if the terms of the entry are such as to leave Ash at liberty to select either improvement, it is void; and that if the terms of the entry confine him to either, he must abide by his original election. Upon considering the testimony on this point, the court is of opinion, that the entry may be construed to refer to one improvement in exclusion of the other; but that the improvement referred to is the one first made by himself. Let the several members of this description be examined.

*John Ash, sen., claimed 1000 acres of land, &c., "on account of marking and improving the same, in the year 1776." They were *both* marked and improved in the year 1776, the one by Ash himself, the other by McCollom. The description proceeds, "lying on the waters of the Town [*26

[1] But see Kerr *v.* Watts, 6 Wheat. 559, where it is ruled, that no one need be made a party complainant, in whom there exists no interest; and no one a party defendant, from whom nothing is demanded.

fork of Salt river, about two miles nearly east from Joseph Cox's land." Both improvements are on the same water-course; but that made by Ash is nearer the distance and the course from Joseph Cox's land, mentioned in the certificate, than that made by McCollom. If, then, it be not absolutely uncertain, to which improvement reference is made in the certificate, this court is of opinion, that the improvement made by Ash himself is designated.

Is there any testimony in the cause which can control the meaning of the terms of the certificate, when viewed independent of that testimony? There is evidence that the improvement at McCollom's spring was generally known in the neighborhood. But there is no reason to believe, that the improvement originally made by Ash himself was not also known, nor is there any reason to believe, that he had abandoned it. On the contrary, he added to it, by planting peach stones, after having won that made by McCollom. It is also in proof, that at the court of commissioners, in April 1780, in conversation with Thomas Polk, whom he then designed to call on to prove his improvement, he said, that he intended to settle at McCollom's spring. Supposing this to amount to a declaration of his intent to found his claim to a pre-emption on the improvement commenced by McCollom, and completed by himself, that intent, not appearing in the certificate and entry, could not control those documents. But the court is not of opinion, that the conversation will warrant this *inference. The whole case *27] shows that Ash retained his claim to both improvements, and designed to include both in his pre-emption. They are both included in his survey. His declaration, therefore, that he meant to settle at McCollom's spring, and the subsequent building of a cabin at that spring, no more proves which improvement was the foundation of his title, than if he had declared a design to settle at any other place on the same tract of land, and had carried that intention afterwards into execution, by building at such a place.

This court is of opinion, that there is error in so much of the decree of the circuit court as directs the survey of Ash's pre-emption to be made on the improvement commenced by McCollom, which is at black A. in the plat to which the decree refers; and that the said pre-emption right ought to be surveyed on the improvement originally made by Ash himself, which is at figure 2, in the said plat. The decree, therefore, must be reversed, and the cause remanded to the circuit court, with directions to conform their decree to the opinion given by this court.

The Decree of this Court is as follows:—This cause came on to be heard on the transcript of the record from the circuit court, and was argued by counsel; on consideration whereof, the court is of opinion, that there is error in so much of the interlocutory and final decrees of the said court, as directs Charles Simms to convey to the plaintiffs in that court the land included in his patent and in the survey directed to be made by that court, of the claim of the said plaintiffs, which survey was ordered to be made in a square form, including the improvement at McCollom's spring, which is designated in the plat by the black letter A in the centre; and that the said decrees ought to be reversed and annulled, and the cause remanded to the circuit court, with directions to cause the said pre-emption right of the said Ash to be surveyed in a square form with the lines to the cardinal points, and in-

cluding improvement originally made by the said John Ash, sen., which is designated in the plat filed in the said cause by figure 2, in the centre; and with further directions *to order the said Charles Simms to convey to the plaintiffs in the circuit court, respectively, the land included in his patent, and lying within their several claims as made in their bill, and as sustained by the evidence in the cause. All which is ordered and decreed accordingly. [*28

Speake and others *v.* United States. (*a*)

Embargo-bond.—Estoppel.—Alteration.

A bond taken by virtue of the 1st section of the embargo law of January 9th, 1808, is not void, although taken by consent of parties, after the vessel had sailed.

The obligors are estopped to deny that the penalty of such a bond is double the true value of the vessel and cargo.

The name of an obligor may be erased from a bond, and a new obligor inserted, by consent of all the parties, without making the bond void; such consent may be proved by parol evidence; and it is immaterial, whether the consent be given before or after the execution of the deed.[1]

Error to the Circuit Court for the district of Columbia, in an action of debt for $8787, upon a bond dated 14th April 1808, taken by the collector of the port of Georgetown, with condition to be void, if the brig Active "should not proceed to any foreign port or place, and the cargo should be relanded in some port of the United States." The bond was executed by Speake, the master of the vessel, and by Beverly and Ober the owners of the cargo, in compliance with the 1st section of the act of congress of the 9th of January 1808, entitled "an act supplementary to the act, entitled an act laying an embargo on all ships and vessels in the ports and harbors of the United States." (2 U. S. Stat. 453.)

The defendants having pleaded, severally, sundry pleas, upon which issues in fact were joined, pleaded jointly (after *oyer*): 1st. "That they ought not to be charged with the debts aforesaid, by virtue of the writing obligatory aforesaid, because they say, that the said writing obligatory was required and taken, by one John Barnes," collector, &c., "by color of his said office as collector as aforesaid, and by pretence of an act of congress, entitled," &c. (the act of January 9th, 1808, 2 U. S. Stat. 453), "which said writing obligatory and the condition thereof were not taken by the said *John Barnes, collector," &c., "pursuant to the said act of congress, but contrary thereto in this, viz., that the said writing obligatory was not sealed or delivered by the said Robert Ober, until after the vessel in the condition of the said writing obligatory mentioned, had received a clearance in due form from the said collector, and after she had been allowed to depart, and had actually departed from the said port of Georgetown, under the clearance so as aforesaid granted to her, by reason whereof, the said writing obligatory is void and of no effect in law; and this, the said defendants are ready to verify; wherefore, they pray judgment, if they ought to be charged with the debts aforesaid, by virtue of the writing obligatory aforesaid." To this plea, there was a general demurrer and joinder. [*29

(*a*) February 10th, 1815. Absent, Todd, Justice.

[1] Knapp *v.* Maltby, 13 Wend. 587; s. p. Penny *v.* Corwithe, 18 Johns. 499.

2d Joint plea. That they ought not to be charged, &c., "because they say, that the said writing obligatory was required and taken by one John Barnes," collector, &c., "by color of his said office as collector, and by pretence of an act of congress," &c. (the act of 9th January 1808), "which said writing obligatory and the condition thereof were not taken by the said John Barnes, collector as aforesaid, pursuant to the said act of congress, but contrary thereto, in this, to wit, that the said writing obligatory was taken in a sum more than double the value of the vessel and cargo in the condition of the said writing obligatory mentioned; by reason whereof, the said writing obligatory became void and of no effect in law; and this, the said defendants are ready to verify; wherefore," &c. To this plea also, there was a general demurrer and joinder.

3d Joint plea. The defendants say, that the plaintiffs ought not to maintain their action against them, "because they say, that on the 14th day of April 1808, at," &c., "the said writing obligatory was signed and sealed by the said defendants, Josias M. Speake and Robert Beverly, and a certain Ebenezer Eliason, and was then and there delivered to one John Barnes," collector, &c., "for the purpose of obtaining a clearance for the
*30] vessel in the condition of the said writing obligatory *mentioned, under the authority of an act of congress, entitled," &c., "and the said defendants say, that after the said writing obligatory was so executed and delivered as aforesaid, a clearance was granted in due form of law to the said vessel, and after she had departed from the port of Georgetown, under the said clearance, and while the said writing obligatory was in the custody and keeping of the said John Barnes," collector &c., "the said writing obligatory, by the authority, consent and direction of the said John Barnes, collector as aforesaid, was materially altered and changed in this, to wit, that the name and seal of the said Ebenezer Eliason were cancelled and erased from the said writing obligatory, and the name, signature and seal of the said defendant, Robert Ober, substituted and inserted therein, without the license, consent or authority of the said defendant, Robert Beverly, whereby the said writing obligatory was of no force or effect whatever, as the joint deed of them, the said defendants, Josias M. Speake, Robert Beverly and Robert Ober; and so the said defendants say, that the writing obligatory is not their joint deed; and this they are ready to verify; wherefore, they pray judgment, if the United States ought to have or maintain their action aforesaid against them."

Replication. "That the said writing obligatory was so altered and changed," &c., "with the assent and by the concurrent license, direction and authority of all the said defendants and of the said Ebenezer Eliason, and not without the license, consent and authority of the said Josias M. Speake, Robert Beverly and Robert Ober, in manner and form," &c. To this replication, there was a general demurrer and joinder.

4th Joint plea. This plea was exactly like the 3d, except that it did not aver that the substitution of Ober for Eliason was without the consent of
*31] any of the defendants. *To this plea also, there was a replication like that to the 3d plea, and a general demurrer and joinder.

The court below decided all the demurrers in favor of the United States. At the trial of the issues of fact, a bill of exception was taken by the defendants, which stated, that the attorney for the United States produced the

bond in the declaration mentioned, and proved its execution by the subscribing witness, who, being cross-examined by the counsel for the defendants, testified, that the defendants, Speake and Beverly, came to the collector's office, and executed the bond, but the collector would not grant a clearance, without another obligor, when the name of the defendant, Ober, was mentioned by the other defendants, but as he was then absent, they proposed that one Ebenezer Eliason should be added as the third obligor, and that he should sign and seal the obligation; but that a blank should be left in its body, to be filled afterwards with the name of Eliason or Ober, and that it should remain in the possession of the collector for some time, to give an opportunity to Ober to execute the same; and it was understood and agreed between the parties aforesaid, that upon the return of Ober, if he should execute the same, the name and seal of Eliason should be striken out, and that of Ober should be signed in his stead, and that his name should be inserted in the body of the bond. Accordingly with this understanding, the bond was executed by Speake and Beverly, in the forenoon, and in the afternoon of the same day, by Eliason, in the absence of Speake and Beverly, but upon the condition agreed upon between the collector and himself, and Speake and Beverly, that his name should be erased from the bond, upon Ober's executing the same. After the bond was so executed, a clearance was granted, and after the vessel had sailed, the defendant, Ober, came to the office and executed the bond, and the blank in the body of the bond was filled with his name, when that of Eliason, with his seal, was erased; at which time, neither Speake nor Beverly was present, nor had they given any assent to the said transaction other that what had taken place at the time of their execution of the bond. The witness further testified, that it appeared from the papers in the collector's office, that Speake was the sole owner of the vessel and resided in Washington county, * in the district of Columbia, and that Beverly and Ober were the owners and shippers of the cargo. [*32

Whereupon, the counsel for the defendants prayed the court to instruct the jury, that if they should believe that the bond aforesaid was executed and erased, at the periods and under the circumstances stated by the witness, on his cross-examination, and that at the time of such execution, Speake was the sole owner of the vessel, and the other defendants, Beverly and Ober, the owners and shippers of the cargo, they ought to find the issues for the defendants, on the joint and several pleas of *non est factum;* which instruction the court refused to give as prayed; but at the instance of the attorney of the United States, instructed them, that if they should find from the evidence, that the erasure of the signature and seal of Eliason, and the substitution of the signature and seal of Ober, and the insertion of his name in the body of the obligation, was done with the assent and in pursuance of the request and agreement of all the parties to the bond, expressed and well understood at the time they respectively executed the same, then the jury ought to find all the issues of *non est factum,* joined in this cause, for the United States, notwithstanding it should appear that such alteration of the bond was not made until after the vessel had cleared out and sailed from Georgetown. To which refusal and instruction, the defendants excepted, and brought their writ of error.

Swann and *C. Lee,* for the plaintiffs in error.—1. As to the first joint

plea, that the bond was not executed by Ober, until after the vessel had sailed. The collector was bound to take the bond, before the sailing of the vessel. When an officer is authorized by law to do an act, he can only do it as the law requires. The law must be construed strictly, and strictly pursued. 3 Call 421. If the defect had appeared upon the face of the bond, this case would be clearly in our favor. Our case is analogous to that of a sheriff, who may take bail before the return of the writ, but not afterwards. 2 Chitty's Pleading 478. So, in the case of a sheriff's bond, in England, if not taken according to the statute, it is void. 2 Saund. 60. After the
*33] departure of the vessel, *the power of the collector to take the bond ceased. The cases all show that such an averment may be made. *Pullein* v. *Benson*, 1 Ld. Raym. 349; *Collins* v. *Blantern*, 2 Wils. 347.

2. The same argument applies to the second joint plea. The law authorizes a bond to be taken in only double the value of the vessel and cargo. If the officer requires a bond in a larger sum, he exceeds his authority and the bond is void.

3. The third joint plea, and the bill of exception, present a question of great importance—shall a parol agreement authorize an officer to make a material alteration in a sealed instrument? The consequences of such a doctrine would be most dangerous. If one party can be thus substituted for another, why may not the sum be altered? Why not the whole instrument be changed? Why may it not be discharged by parol? Why may not an entirely different contract be substituted? It is in direct hostility to the rule of law, that a sealed contract cannot be denied, nor varied, nor discharged by parol. The bond was not delivered as an escrow. It was delivered to the only agent of the United States authorized to receive it. It then became completely executed. No material alteration could be made, even by the consent of all the parties, if that consent was evidenced merely by parol. Even if it had been expressly delivered as an escrow, yet, if delivered to the collector, it could not be as an escrow. A bond cannot be delivered to the obligee as an escrow. *Moss* v. *Riddle*, 5 Cr. 351.

By the delivery, it became absolute and binding upon all the parties. A discharge of one was the discharge of all. *Thoroughgood's Case*, 9 Co. 137; *Henry Pigot's Case*, 4 Ibid. 27. It is of no consequence, whether the name of Eliason be material or not. An immaterial alteration by the obligee avoids the bond. No parol understanding or agreement of the parties can prevent a material alteration from making the deed void. *Markham* v. *Gonaston*, Cro. Eliz. 627. The replication admits the erasure and alteration, but relies on the fact, that it was done by the consent of all the parties. No subsequent parol consent can vary a written instrument under seal. There would be no
*34] safety, if such a doctrine *should prevail as is necessary to support this replication. There would be no safety in a sealed instrument, if the subsequent agreement, or even the understanding of the parties, at the time of its execution, could be given in evidence by parol, to vary the instrument.

Jones, contrà.—1. As to the first plea. The law does not require the bond to be given, before the departure of the vessel. By consent of the parties, it may be given afterwards. The plea states that one of the oblig-

ors executed the bond, after the vessel had sailed. There is nothing in the law to make the deed void for that cause.

2. As to the second plea. The obligors are estopped by their bond from denying the value of the vessel and cargo. The bond is their own voluntary act. They have agreed to the value. If the question of value were open, after giving the bond, it would lead to endless litigation.

3. As to the erasure. There is no authority which forbids such an alteration by the consent of all parties. In the case in Croke, the alteration was made without consent of parties. It is immaterial, whether the consent be prior or subsequent.

February 16th, 1815. (Absent, Todd, J.) STORY, J., delivered the opinion of the court, as follows :—This is an action of debt, brought upon a bond given under the first section of the embargo act of the 9th of January 1808, ch. 8. After *oyer* of the bond and condition, various pleas were pleaded by the defendants ; but it is unnecessary to consider any others than those upon which questions have been argued at the bar.

The second separate plea of the defendant, Robert Ober, and the first joint plea of all the defendants allege, in substance, that the bond was taken by the collector of the customs, at Georgetown, by color of his office, and by pretence of the act of congress aforesaid, *and that the bond and condition were not taken pursuant to the act of congress, but contrary thereto, in this, to wit, that the bond was not sealed or delivered, until after the vessel in the same condition mentioned had received a clearance in due form, and after she had actually departed from the port of Georgetown, under the clearance, by reason whereof the bond is void. To this plea, there was a general demurrer and joinder in demurrer ; on which the court below gave judgment for the United States. [*35

It is argued by the plaintiffs in error, that the act of congress of the 9th of January 1808, § 1, having declared that no vessel licensed for the coasting trade shall be allowed to depart from any port of the United States, or shall receive a clearance, until the owner, &c., shall give bond to the United States, in a sum double the value of the vesssel and cargo, &c., the time of giving the bond is of the essence of the provision ; and that if the bond be not taken, until after the clearance or departure of the vessel, it is illegal and void. We cannot yield assent to this argument. In our opinion, the statute, as to the time of taking the bond and granting a clearance, is merely directory to the collector. It is, undoubtedly, his duty to comply with the literal requirements of the statute. If he neglect so to do, it is an irregularity which may subject him to personal peril and responsibility. If the state of facts has existed, to which the statute provision is applicable, the authority to require and the duty to give, the bond attaches ; and by the voluntary consent of the parties, it may well be given *nunc pro tunc*. Upon any other construction, the owner of the vessel might be involved in great difficulties. If the collector be not authorized to receive the bond, after a clearance, neither is he authorized to grant a clearance, before he has received the bond. A clearance, therefore, granted before such bond should be given, would be illegal and void ; and a departure from port, under such void clearance, would subject the owner, vessel and cargo to the forfeiture

inflicted by the third section of the act. There is no error in the judgment of the court below on this plea.

*36] *The second joint plea of the defendants alleges, that the bond was not taken pursuant to the act of congress, but contrary thereto, in this, that the bond was taken in a sum more than double the value of the vessel and cargo, whereby the bond became void. On demurrer to this plea and joinder in demurrer, the court below gave judgment for the United States; and we are of opinion, that the judgment so given ought to be affirmed. There is no allegation or pretence that the bond was unduly obtained by the collector, *colore officii*, by fraud, oppression or circumvention. It must, therefore, be taken to have been a voluntary *bonâ fide* bond. The value was a matter of uncertainty, and the ascertaining of that value was the joint act and duty of both parties. When once that value was ascertained and agreed to by the parties, and a bond executed in conformity to such agreement, the parties were estopped to deny that it was not the true value. If an issue had been taken upon the fact, the evidence on the face of the bond would have been conclusive to the jury; and if so, it is not less conclusive upon demurrer. It would be dangerous in the extreme, to admit the parties to avoid a sealed instrument, by averring that there was an error in the value, by an innocent mistake, or by accident, or by circumstances against which no human foresight could guard. A mistake of one dollar would be as fatal as of ten thousand dollars. Suppose, the double value were underrated, could the United States avoid the bond, and thereby subject the party to the penalties of the third section? Where the law provides that the penal sum of a bond shall be equal to the double value, and the parties, voluntarily, and without fraud, assent to the insertion of a given sum, it is as much an estoppel, as if the bond had specially recited that such sum was the double value.

The third joint plea, in substance, alleges, that after the execution of the bond, and after the clearance and departure of the vessel and cargo, the bond was, by the authority, consent and direction of the collector, materially altered and changed, in this, that the name of Ebenezer Eliason was cancelled and erased from the bond, and the name, signature and seal of the defendant, Robert Ober, substituted and inserted therein, without the

*37] license, consent or authority of the defendant, *Robert Beverly, whereby the bond became of no force. To this plea, the United States replied, that the bond was so altered and changed, with the assent and by the concurrent license, direction and authority of all the defendants, and of the said Ebenezer Eliason, and not without the license, consent and authority of the defendants, and prayed that the same might be inquired of by the country. To this replication, there was a general demurrer and joinder in demurrer, on which the court below gave judgment for the United States: and we are of opinion, that the judgment was right. It is clear, at the common law, that an alteration or addition in a deed, as by adding a new obligor, or an erasure in a deed, as by striking out an old obligor, if done with the consent and concurrence of all the parties to the deed, does not avoid it. And this principle equally applies, whether the alteration or erasure be made in pursuance of an agreement and consent, prior or subsequent to the execution of the deed; and the cases in the books in which erasures, interlineations and alterations in deeds have been held to

avoid them, will be found, on examination, to have been cases in which no such consent had been given.

It has been objected, that this principle of letting in parol evidence to prove alterations in a deed, to be made by consent, exposes all the mischiefs against which the statute of frauds was intended to guard the public. If this objection were valid, it would equally apply to such alterations, when made before the execution of the deed ; for if not taken notice of by memorandum on the deed itself, they must be proved in the same manner. But it is to be considered, that the parol evidence is not admitted to explain or contradict the terms of the written contract, but only to ascertain what those written terms are. On *non est factum*, the present validity of the deed or contract is in issue ; and every circumstance that goes to show that it is not the deed or contract of the party, is provable by parol evidence. It is of necessity, therefore, that the other party should support it by the same evidence. The fact, that there is an erasure or interlineation, apparent on the face of the deed, does not, of itself, avoid it. To produce this effect, it must be shown to have been made under circumstances that the law does not warrant. Parol evidence *is let in, for this purpose ; and the mischief, if any, would equally press on both sides. The principle, however, which has already been stated, is too firmly fixed to be shaken by any reasoning *ab inconvenienti*. [*38

The decision upon the third joint plea renders it unnecessary to examine the bill of exceptions taken at the trial, on the issue of *non est factum*. That bill presents the same point as the third joint plea, with this difference only, that the alteration in the deed, by the addition of a new obligor, was, in fact, made in pursuance of an agreement entered into between the parties, prior to the original execution of the deed.

On the whole, the majority of the court are of opinion, that the judgment of the court below must be affirmed.

Livingston, J. (*dissenting.*)—In dissenting from the court in its judgment on the issue of law arising out of the third joint plea, I can only say, that I am not prepared to admit that every alteration whatever in a deed, after its execution, for such is the extent of the opinion just given, may be proved by parol testimony. After perfecting a deed in one form, no material alteration should be set up, unaccompanied by a new delivery, and a note or memorandum thereof ; otherwise, a bond, which is proved by a subscribing witness to have been actually given for only one hundred dollars, may be converted into one for as many thousands, if the obligee can only produce a witness who will say that he understood the obligor as assenting to it. The only case which I have been able to find, of those cited, such is the difficulty of procuring books in this place, is the one in Levinz, p. 11, 35, which establishes, that after the delivery of a bond, a new obligor may be added in this way ; not that the name of one may be struck out, and another substituted in his place. Without denying the authority of the case, my answer to it is, that such addition might be of benefit, but could not injure the first set of obligors ; and therefore, the court might feel less difficulty in admitting such fact to be proved. It is, therefore, no interference with this decision, to say, that no change whatever in a sealed instrument, after its execution, which may increase the liability, or be, in

any way, to the prejudice of the party whose deed it is (and such *is the case here), should be palmed on him by parol testimony; and so, *vice versâ*, that no alteration which may be, in any way, injurious to the grantee or obligee, should be set up by the other party; but that the terms in which the deed is originally executed should alone be binding, until alterations are introduced into it by the same solemnities which gave existence to the first. Such, in my opinion, is the salutary rule of the common law; and therefore, I think, that the judgment of the circuit court ought to be reversed.

Marshall, Ch. J., was rather inclined to think, that the plea was good, which stated that the bond was given for more than double the value of the vessel and cargo. If the bond was given for more than double that value, he thought it was void in law. He should not, however, have intimated his opinion on this point, if a dissenting opinion had not been given on another point in the cause, and his silence might have been construed into an assent to the entire opinion of the court as it had been delivered.

Judgment affirmed.

Taber *v.* Perrott & Lee. (*a*)

Competency of witness.

A. being sole owner of a bill of exchange, indorsed it in blank, and delivered it to B., to deliver to C. for collection, and when collected, to place the amount to the credit of A. and B., in account; C. collected the amount, but refused to place it to the credit of A. and B., who settled their account with C. and paid him the balance; A. afterwards sued C. for the amount received upon the bills: *held*, that B. was a competent witness for A.

Error to the Circuit Court for the district of Rhode Island, in an action of *assumpsit*, to recover from the defendants, Perrott & Lee, the amount of certain bills of exchange put into their hands to collect, by the plaintiff Taber, and his deceased partner, Gardner. At the trial below, several exceptions were taken, in which the following facts apeared:

The plaintiff produced a witness, John L. Boss, who being duly admitted and sworn, testified, that Messrs. Taber & Gardner, merchants, of Rhode
*40] Island, were *holders and owners of French government bills to a large amount, which were by them indorsed in blank, and given to their agent, the said John L. Boss, to take to France for collection. That he, Boss, had no interest in the bills, and received them as agent for the plaintiffs, and this was known to Perrott & Lee. That he carried them to France, in 1802, in a vessel of the plaintiffs, with a cargo consigned to the defendants, Perrott & Lee, of Bordeaux, in which cargo, Boss had an interest. That he delivered the bills to Perrott & Lee, to negotiate and receive the amount. That Boss went to Paris, in October 1802, and while there, received a letter, on the 26th October, from Perrott & Lee, informing him that Hotel, Thomas & Co., of Paris, were the house to whom the bills were sent, and introducing him to that house, and they wrote a letter to Hotel, Thomas & Co. directing them, when the bills were paid, to place the money to the credit of Perrott & Bineau, a banking-house at Bordeaux, which Per-

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(*a*) February 14th, 1815. Absent, Todd, Justice.

rott is one of the defendants. On the 12th of January 1803, Boss called on Hotel, Thomas & Co., and was informed that the bills had been paid by the French government, on the 7th of January preceding, and Boss saw the proceeds of the bills credited on the books of Hotel, Thomas & Co., to the said Perrott & Bineau, according to the directions of Perrott & Lee. That Boss, on the 14th January, advised the defendants that the bills were paid, and directed the proceeds to be applied to the credit of the account of Taber, Gardner & Boss with them. On the 29th of January, at Paris, Boss saw bills of exchange, drawn by Perrott & Bineau on Hotel, Thomas & Co., and accepted by them, at 30 or 40 days' sight, which were acknowledged by the defendant, Perrott, to have been drawn for the said proceeds. That the said bills so drawn and accepted were in the hands of one Charles Bodin, but whether they had been further negotiated or not, or paid or not, Boss could not tell. That Boss returned to Bordeaux, on the 26th of February, and left Bordeaux, about the 6th of April 1803. That until the day before he left Bordeaux, he had no intimation from the defendants that they would not credit the amount of the said bills to the account of Taber, Gardner & Boss. That the defendants refused to give such credit.

Perrott & Lee, who provided the return-cargo, *brought Taber, Gardner & Boss largely in their debt in account-current; and Boss, [*41 on the 6th of April 1803, signed the account, stating that when the moneys were received on the bills from Hotel, Thomas & Co., the amount should be passed to the credit of Taber, Gardner & Boss. Perrott & Lee afterwards received the whole balance of the said account from Taber, Gardner & Boss, not having credited the proceeds of the said bills; and the present suit was brought by Taber, surviving partner of Taber & Gardner, the original holders of the bills, to recover their amount.

The principal exception was, to the charge of the judge, who directed the jury to find for the defendants, on the ground that the witness, Boss, had not been made a party plaintiff in the suit.

The case was argued by *P. B. Key*, for the plaintiff in error, and by *Hunter*, for the defendants.

February 15th, 1815. (Absent, Todd, J.) Marshall, Ch. J., delivered the opinion of the court as follows:—This suit was brought by the plaintiffs in error, in the circuit court of the United States for the district of Rhode Island, to recover from the defendants the amount of certain bills drawn by General Le Clerc on the government of France. The declaration contains several counts, some special, stating agreements between the parties for the payment of the bills; others general, among which is a count for money had and received by the defendants, to the use of the plaintiffs.

It appeared at the trial, that the plaintiffs and John L. Boss, were concerned in certain commercial speculations, in the prosecution of which John L. Boss sailed, in 1802 and 1803, to Bordeaux, in the Polly, with cargoes in which they were jointly interested. On the first voyage, Boss carried with him the bills of exchange for the amount of which this suit was brought, indorsed in blank by the plaintiff, Gardner, which he delivered to *the [*42 defendants for collection. The amount, when collected, was to be placed to the credit of the return-cargo of the Polly, in which the plaintiffs and John L. Boss were jointly concerned. The account was settled, with-

out giving credit for the amount of these bills; and Taber, Gardner & Boss have been compelled to pay the balance acknowledged to be due. This action was brought to charge the defendants with the bills, alleging that their amount has been received.

At the trial, the plaintiffs offered Boss as a witness, for the purpose of proving the liability of the defendants for the amount of the bills. He swore that he had no interest in the cause nor in the bills; but his testimony was objected to by the defendants, on the ground of his being interested; and the court was moved to instruct the jury, that the action could not be sustained, because Boss was not a party plaintiff in the declaration. This direction was given by the court, and excepted to by the counsel for the plaintiffs. A verdict and judgment were rendered for the defendants, which are brought into this court by writ of error.

The defendants in error contend, that the bills of exchange were part of the cargo of the Polly, and consequently, the joint property of the owners of that cargo. But of this there is no other evidence than that Boss was the bearer of those bills, indorsed in blank, and that their proceeds, if received, were to be placed to the account of the return-cargo. This might very well be, and yet Taber & Gardner remain the sole owners of the bills. Their amount, if received, might be credited to all the partners, in their account with Perrott & Lee, and then be credited to Taber & Gardner in settling the accounts of the partnership. Boss then would have no interest in the bills, unless they should be collected and carried to the credit of the return-cargo. That account having been settled, without including this item, it is not necessarily implied, from the facts in the case, that Boss was interested; and he swears that he was not. This court is of opinion, that the circuit court erred in directing the testimony of Boss to be disregarded; and also in directing the jury to find for the defendants, because he was not made a party plaintiff in the suit.

*43] *Several other opinions were given by the judge, to which exceptions were taken; but it is unnecessary to review them as they depended on the opinion that Boss was interested in the bills for which the action was brought. The judgment is reversed, and the cause sent back for a new trial.

Judgment reversed.

TERRETT and others *v.* TAYLOR and others. (*a*)

Church lands in Virginia.

The religious establishment of England was adopted by the colony of Virginia, together with the common law upon that subject, so far as it was applicable to the circumstances of the colony.

The freehold of the church lands is in the parson.[1]

A legislative grant is not revocable.[2]

The act of Virginia of 1776, confirming to the church its rights to lands, was not inconsistent with the constitution or bill of rights of Virginia; nor did the acts of 1784 and 1785 infringe any of the rights, intended to be secured under the constitution, either civil, political or religious.

The acts of 1798 and 1801, so far as they go to divest the Episcopal church of the property acquired, previous to the revolution, by purchase or donation, are unconstitutional and inoperative.

The act of 1798 merely repeals the statutes passed respecting the church, since the revolution; and left in full operation all the statutes previously enacted, so far as they are not inconsistent with the present constitution.

Church-wardens are not a corporation for holding lands. Church lands cannot be sold, without the joint consent of the parson (if there be one) and the vestry.[3]

ERROR to the Circuit Court for the district of Columbia, sitting in the county of Alexandria.

Taylor and others, "members of the vestry of the Protestant Episcopal church, commonly called the Episcopal church of Alexandria, in the parish of Fairfax, in the county of Alexandria, and district of Columbia, on behalf of themselves and others, members of the said church, and of the congregation belonging to the said church," filed their bill in chancery, against Terrett and others, who were overseers of the poor for the county of Fairfax, in the state of Virginia, and against George Deneale and John Muncaster, wardens of the said church, and against James Wren.

The bill charged that on the 27th of May 1770, the vestry of the said parish and church, to whom the complainants, together with the defendants, George Deneale and John Muncaster, were the legal and regular successors in the said vestry, purchased of a certain Daniel Jennings, a tract of land, then situate in the county of Fairfax and state of Virginia, but now in the county of Alexandria, in the district of Columbia, containing 516 acres, which the said Jennings and his wife, by deed of bargain and sale, on the 18th of September 1770, by the direction of the then vestry, conveyed to a certain Townsend Dade, since deceased, and the said James Wren, both then of the county of Fairfax, and *the church-wardens of the said parish and church for the time being, and to their successors in office, [*44 for the use and benefit of the said church in the said parish. That in the year 1784, the legislature of Virginia passed an act, entitled "an act for incorporating the Protestant Episcopal church;" by the third section of which, power was given to the ministers and vestry of the Protestant Episcopal church to demise, alien, improve and lease any lands belonging to the church. That the act of 1786, entitled "an act to repeal the act for incorporating the Protestant Episcopal church, and for other purposes," declares,

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(*a*) February 17th, 1815. Absent, JOHNSON and TODD, Justices.

[1] See Bronson *v.* St. Peter's Church, 7 N. Y. Leg. Obs. 361.

[2] S. P. Town of Pawlet *v.* Clark, *post*, p. 292.

[3] See Mason *v.* Muncaster, 9 Wheat. 445, for a further decision upon the title in question in this case.

that the act of 1784 shall be repealed, but saves to all religious societies the property to them respectively belonging, and authorizes them to appoint, from time to time, according to the rules of their sect, trustees who shall be capable of managing and applying such property to the religious use of such societies. That under this last law, the complainants conceived they had the power of requiring the church-wardens of their church, who are the trustees appointed by the vestry, under the direction of the vestry contemplated by the last-mentioned act, to sell or otherwise dispose of the said land, and to apply the proceeds of the same to the religious use of the society or congregation belonging to the said church, in such manner as the vestry for the time being should direct. That the complainants had been, according to the rules and regulations of the said society, appointed by the congregation, vestrymen and trustees of the said church, and had appointed the defendants, Deneale and Muncaster, church-wardens of the said church. That some of the present congregation of the church were originally members of the church, when the church was built, and when the land was purchased, and contributed to the purchase thereof. That some of them resided in the county of Fairfax and state of Virginia, but had pews in the church, and contributed to the support of the minister. That the lands were wasting by trespasses, &c. That the complainants, as well as the congregation, wished to sell the lands and apply the proceeds to the use of the church; but were opposed in their wishes by the defendants, Terrett and others, who are overseers of the poor for the county of Fairfax, and who claimed the land under the act of Virginia of the 12th of January 1802, authorizing
*45] the *sale of certain glebe lands in Virginia, which act was not passed until after the district of Columbia was separated from the state of Virginia: in consequence of which claim, they were unable to sell the lands, &c.; wherefore, they prayed that the defendants, Terrett and others, the overseers of the poor, might be perpetually enjoined from claiming the land, that their title might be quieted, and that the defendants, Deneale, Muncaster and Wren might be decreed to sell and convey the land, &c.

The bill was regularly taken for confessed, against all the defendants. The court below decreed a sale, &c., according to the prayer of the bill. The defendants, Terrett and others, the overseers of the poor, sued out their writ of error.

The cause was argued, at last term, by *Jones*, for the plaintiffs in error, and by *E. J. Lee* and *Swann*, for the defendants in rror. The opinion of the court is so full, that it is deemed unnecessary to report the arguments of counsel.

February 17th, 1815. (Absent, Johnson, J., and Todd, J.) Story, J., delivered the opinion of the court, as follows:—The defendants not having answered to the bill in the court below, it has been taken *pro confesso*, and the cause is, therefore, to be decided upon the title and equity apparent on the face of the bill.

If the plaintiffs have shown a sufficient title to the trust property, in the present bill, we have no difficulty in holding, that they are entitled to the equitable relief prayed for. It will be but the case of the *cestuis que trust* enforcing against their trustees the rights of ownership, under circumstances in which the objects of the trust would be otherwise defeated. And in

our judgment, it would make no difference whether the Episcopal church were a voluntary society, or clothed with corporate powers; for in equity, as to objects which the *laws cannot but recognise as useful and [*46
meritorious, the same reason would exist for relief, in the one case as in the other. Other considerations arising in this case, material to the title on which relief must be founded, render an inquiry into the character and powers of the Episcopal church, indispensable.

At a very early period, the religious establishment of England seems to have been adopted in the colony of Virginia; and of course, the common law upon that subject, so far as it is applicable to the circumstances of that colony. The local division into parishes for ecclesiastical purposes can be early traced; and the subsequent laws, enacted for religious purposes, evidently pre-suppose the existence of the Episcopal church, with its general rights and authorities growing out of the common law. What those rights and authorities are, need not be minutely stated. It is sufficient, that, among other things, the church was capable of receiving endowments of land, and that the minister of the parish was, during his incumbency, seised of the freehold of its inheritable property, as emphatically *persona ecclesiæ*, and capable, as a sole corporation, of transmitting that inheritance to his successors. The church-wardens, also, were a corporate body, clothed with authority and guardianship over the repairs of the church and its personal property; and the other temporal concerns of the parish were submitted to a vestry, composed of persons selected for that purpose. In order more effectually to cherish and support religious institutions, and to define the authorities and rights of the Episcopal officers, the legislature, from time to time, enacted laws on this subject. By the statutes of 1661, ch. 1, 2, 3, 10, and 1667, ch. 3, provision was made for the erection and repairs of churches and chapels of ease; for the laying out of glebes and church lands, and the building of a dwelling-house for the minister; for the making of assessments and taxes for these and other parochial purposes; for the appointment of church-wardens to keep the church in repair, and to provide books, ornaments, &c.; and, lastly, for the election of a vestry of twelve persons, by the parishioners, whose duty it was, by these and subsequent statutes, among other things, to make and proportion levies and assessments, and to purchase glebes and erect dwelling-houses for *the ministers in each [*47
respective parish. See statute 1696, ch. 11; 1727, ch. 6; and 1748, ch. 28; 2 Tucker's Black. App'x, note M.

By the operation of these statutes and common law, the lands thus purchased became vested, either directly or beneficially, in the Episcopal church. The minister for the time being was seised of the freehold, in law or in equity, *jure ecclesiæ*, and, during a vacancy, the fee remained in abeyance, and the profits of the parsonage were to be taken by the parish for their own use. Co. Litt. 340 *b*, 341, 342 *b*; 2 Mass. 500.

Such were some of the rights and powers of the Episcopal church, at the time of the American revolution; and under the authority thereof, the purchase of the lands stated in the bill before the court, was undoubtedly made. And the property so acquired by the church remained unimpaired, notwithstanding the revolution; for the statute of 1776, ch. 2, completely confirmed and established the rights of the church to all its lands and other property.

The statute 1784, ch. 88, proceeded yet further. It expressly made the minister and vestry, and in case of a vacancy, the vestry of each parish, respectively, and their successors for ever, a corporation, by the name of the Protestant Episcopal church, in the parish where they respectively resided, to have, hold, use and enjoy all the glebes, churches and chapels, burying-grounds, books, plate and ornaments appropriated to the use of, and every other thing, the property of the late Episcopal church, to the sole use and benefit of the corporation. The same statute also provided for the choice of new vestries, and repealed all former laws relating to vestries and church-wardens, and to the support of the clergy, &c., and dissolved all former vestries; and gave the corporation extensive powers as to the purchasing, holding, aliening, repairing and regulating the church property. This statute was repealed by the statute of 1786, ch. 12, with a proviso saving to all religious societies the property to them respectively belonging, and authorizing them to appoint, from time to time, according to the rules of their sect, trustees, who should be capable of managing and applying such
*48] property to the *religious use of such societies; and the statute of 1788, ch. 47, declared, that the trustees appointed in the several parishes to take care of and manage the property of the Protestant Episcopal church, and their successors, should, to all intents and purposes, be considered as the successors to the former vestries, with the same powers of holding and managing all the property formerly vested in them. All these statutes, from that of 1776, ch. 2, to that of 1788, ch. 47, and several others, were repealed by the statute of 1798, ch. 9, as inconsistent with the principles of the constitution and of religious freedom; and by the statute of 1801, ch. 5 (which was passed after the district of Columbia was finally separated from the states of Maryland and Virginia), the legislature asserted their right to all the property of the Episcopal churches, in the respective parishes of the state; and, among other things, directed and authorized the overseers of the poor, and their successors in each parish wherein any glebe land was vacant, or should become so, to sell the same and appropriate the proceeds, to the use of the poor of the parish. It is under this last statute, that the bill charges the defendants (who are overseers of the poor of the parish of Fairfax), with claiming a title to dispose of the land in controversy.

This summary view of so much of the Virginia statutes as bears directly on the subject in controversy, presents not only a most extraordinary diversity of opinion in the legislature, as to the nature and propriety of aid in the temporal concerns of religion, but the more embarrassing considerations of the constitutional character and efficacy of those laws touching the rights and property of the Episcopal church.

It is conceded on all sides, that, at the revolution, the Episcopal church no longer retained its character as an exclusive religious establishment. And there can be no doubt, that it was competent to the people and to the legislature to deprive it of its superiority over other religious sects, and to withhold from it any support by public taxation. But, although it may be true, that "religion can be directed only by reason and conviction, not by
*49] force or violence," and that "all men are equally *entitled to the free exercise of religion, according the dictates of conscience," as the bill of rights of Virginia declares, yet it is difficult to perceive, how it follows as a consequence, that the legislature may not enact laws more effectually to

enable all sects to accomplish the great objects of religion, by giving them corporate rights for the management of their property, and the regulation of their temporal as well as spiritual concerns. Consistent with the constitution of Virginia, the legislature could not create or continue a religious establishment which should have exclusive rights and prerogatives, or compel the citizens to worship under a stipulated form or discipline, or to pay taxes to those whose creed they could not conscientiously believe. But the free exercise of religion cannot be justly deemed to be restrained, by aiding with equal attention the votaries of every sect to perform their own religious duties, or by establishing funds for the support of ministers, for public charities, for the endowment of churches, or for the sepulture of the dead. And that these purposes could be better secured and cherished by corporate powers, cannot be doubted by any person who has attended to the difficulties which surround all voluntary associations. While, therefore, the legislature might exempt the citizens from a compulsive attendance and payment of taxes in support of any particular sect, it is not perceived, that either public or constitutional principles required the abolition of all religious corporations.

Be, however, the general authority of the legislature as to the subject of religion, as it may, it will require other arguments to establish the position, that at the revolution, all the public property acquired by the Episcopal churches, under the sanction of the laws, became the property of the state. Had the property thus acquired been originally granted by the state or the king, there might have been some color (and it would have been but a color) for such an extraordinary pretension. But the property was, in fact and in law, generally purchased by the parishioners, or acquired by the benefactions of pious donors. The title thereto was indefeasibly vested in the churches, or rather in their legal agents. It was not in the power of the crown, to seize or assume it; nor of the parliament itself, to destroy the grants, unless by the exercise of a power the most *arbitrary, oppressive and unjust, and endured only because it could not be resisted. [*50
It was not forfeited; for the churches had committed no offence. The dissolution of the regal government no more destroyed the right to possess or enjoy this property, than it did the right of any other corporation or individual to his or its own property. The dissolution of the form of government did not involve in it a dissolution of civil rights, or an abolition of the common law under which the inheritances of every man in the state were held. The state itself succeeded only to the rights of the crown; and we may add, with many a flower of prerogative stricken from its hands. It has been asserted as a principle of the common law, that the division of an empire creates no forfeiture of previously vested rights of property. *Kelly* v. *Harrison*, 2 Johns. Ch. 29; *Jackson* v. *Lunn*, 3 Ibid. 109; *Calvin's Case*, 7 Co. 27. And this principle is equally consonant with the common sense of mankind and the maxims of eternal justice. Nor are we able to perceive any sound reason why the church lands escheated or devolved upon the state by the revolution, any more than the property of any other corporation created by the royal bounty or established by the legislature. The revolution might justly take away the public patronage, the exclusive cure of souls, and the compulsive taxation for the support of the church. Beyond these,

we are not prepared to admit the justice or the authority of the exercise of legislation.

It is not, however, necessary to rest this cause upon the general doctrines already asserted; for, admitting that, by the revolution, the church lands devolved on the state, the statute of 1776, ch. 2, operated as a new grant and confirmation thereof to the use of the church. If the legislature possessed the authority to make such a grant and confirmation, it is very clear to our minds, that it vested an indefeasible and irrevocable title. We have no knowledge of any authority or principle which could support the doctrine, that a legislative grant is revocable in its own nature, and held only *durante bene placito*. Such a doctrine would uproot the very foundations of almost all the land-titles in Virginia, and is utterly inconsistent with a
*51] great and fundamental principle of a *republican government, the right of the citizens to the free enjoyment of their property legally acquired.

It is asserted by the legislature of Virginia, in 1798 and 1801, that this statute was inconsistent with the bill of rights and constitution of that state, and therefore, void. Whatever weight such a declaration might properly have, as the opinion of wise and learned men, as a declaration of what the law has been or is, it can have no decisive authority. It is, however, encountered by the opinion successively given by former legislatures, from the earliest existence of the constitution itself, which were composed of men of the very first rank for talents and learning. And this opinion, too, is not only a contemporaneous exposition of the constitution, but has the additional weight, that it was promulgated or acquiesced in by a great majority, if not the whole, of the very framers of the constitution. Without adverting, however, to the opinions on the one side or the other, for the reasons which have been already stated, and others which we forbear to press, as they would lead to too prolix and elementary an examination, we are of opinion, that the statute of 1776, ch. 2, is not inconsistent with the constitution or bill of rights of Virginia. We are prepared to go yet further, and hold, that the statutes of 1784, ch. 88, and 1785, ch. 37, were no infringement of any rights secured or intended to be secured under the constitution, either civil, political or religious.

How far the statute of 1786, ch. 12, repealing the statute of 1784, ch. 88, incorporating the Episcopal churches, and the subsequent statutes, in furtherance thereof, of 1788, ch. 47, and ch. 53, were consistent with the principles of civil right or the constitution of Virginia, is a subject of much delicacy, and perhaps, not without difficulty. It is observable, however, that they reserve to the churches all their corporate property, and authorize the appointment of trustees to manage the same. A private corporation created by the legislature may lose its franchises by a *misuser* or a *non-user* of them; and they may be resumed by the government under a judicial judgment upon a *quo warranto* to ascertain and enforce the forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation. Upon a change of government, too, it may be
*52] admitted *that such exclusive privileges attached to a private corporation as are inconsistent with the new government may be abolished. In respect, also, to public corporations which exist only for public purposes, such as counties, towns, cities, &c., the legislature may, under proper limi-

tations, have a right to change, modify, enlarge or restrain them, securing however, the property for the uses of those for whom, and at whose expense, it was originally purchased. But that the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal, can vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they may please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine. The statutes of 1798, ch. 9, and of 1801, ch. 5, are not, therefore, in our judgment, operative, so far as to divest the Episcopal church of the property acquired, previous to the revolution, by purchase or by donation. In respect to the latter statute, there is this further objection, that it passed after the district of Columbia was taken under the exclusive jurisdiction of congress, and as to the corporations and property within that district, the right of Virginia to legislate no longer existed. And as to the statute of 1798, ch. 9, admitting it to have the fullest operation, it merely repeals the statutes passed respecting the church, since the revolution; and, of course, it left in full force all the statutes previously enacted, so far as they were not inconsistent with the present constitution. It left, therefore, the important provisions of the statutes of 1661, 1696, 1727 and 1748, so far as respected the title to the church lands, in perfect vigor, with so much of the common law as attached upon these rights.

Let us now advert to the title set up by the plaintiffs in the present bill. Upon inspecting the deed which is made a part of the bill, and bears date in 1770, the land appears to have been conveyed to the grantees, as church-wardens of the parish of Fairfax, and to their successors *in that office, for ever. It is also averred in the bill, that the plaintiffs, [*53 together with two of the defendants (who are church-wardens) are the vestry of the Protestant Episcopal church, commonly called the Episcopal church of Alexandria, in the parish of Fairfax, and that the purchase was made by the vestry of said parish and church, to whom the present vestry are the legal and regular successors in the said vestry; and that the purchase was made for the use and benefit of the said church in the said parish. No statute of Virginia has been cited, which creates church-wardens a corporation, for the purpose of holding lands; and at common law, their capacity was limited to personal estate. 1 Bl. Com. 394; Bro. Corp. 77, 84; 1 Roll. Abr. 393-4, 10; Com. Dig. tit. Esglise, F. 3; 12 Hen. VII. 27 *b*; 13 Ibid. 9 *b*; 37 Hen. VI. 30; 1 Burn's Ecc. Law 290; Gibs. 215.

It would seem, therefore, that the present deed did not operate by way of grant, to convey a fee to the church-wardens and their successors; for their successors, as such, could not take; nor to the church-wardens in their natural capacity; for "heirs" is not in the deed. But the covenant of general warranty in the deed, binding the grantors and their heirs for ever, and warranting the land to the church-wardens and their successors for ever, may well operate by way of estoppel, to confirm to the church and its privies, the perpetual and beneficial estate in the land.

One difficulty presented on the face of the bill was, that the Protestant

Episcopal church of Alexandria was not directly averred to be the same corporate or unincorporate body as the church and parish of Fairfax, or the legal successors thereto, so as to entitle them to the lands in controversy. But upon an accurate examination of the bill, it appears, that the purchase was made by the vestry "of the said parish and church," "for the use and benefit of the said church in the said parish." It must, therefore, be taken as true, that there was no other Episcopal church in the parish; and that the property belonged to the church of Alexandria, which in this respect, represented the whole parish. And there can be no doubt, that the Episcopal members of the parish of Fairfax have still, notwithstanding a separation from the state of Virginia, the same rights and privileges as *they
*54] originally possessed in relation to that church, while it was the parish church of Fairfax.

The next consideration is, whether the plaintiffs, who are vestrymen, have, as such, a right to require the lands of the church to be sold in the manner prayed for in the bill? Upon the supposition, that no statutes passed since the revolution, are in force, they may be deemed to act under the previous statutes and the common law. By those statutes, the vestry were to be appointed by the parishioners "for the making and proportioning levies and assessments, for building and repairing the churches and chapels, provision for the poor, maintenance of the minister, and such other necessary purposes, and for the more orderly managing all parochial affairs;" out of which vestry, the minister and vestry were yearly to choose two church-wardens.

As incident to their office, as general guardians of the church, we think, they must be deemed entitled to assert the rights and interests of the church, But the minister also, having the freehold, either in law or in equity, during his incumbency, in the lands of the church, is entitled to assert his own rights as *persona ecclesiæ*. No alienation, therefore, of the church lands can be made, either by himself, or by the parishioners, or their authorized agents, without the mutual consent of both. And therefore, we should be of opinion, that, upon principle, no sale ought to be absolutely decreed, unless with the consent of the parson, if the church be full.

If the statute of 1784, ch. 88, be in force for any purpose whatsoever, it seems to us, that it would lead to a like conclusion. If the repealing statute of 1786, ch. 12, or the statute of 1788, ch. 47, by which the church property was authorized to be vested in trustees chosen by the church, and their successors, be in force for any purpose whatsoever, then the allegation of the bill, that the plaintiffs "have, according to the rules and regulations of their said society, been appointed by the congregation, vestrymen and trustees of the said church," would directly apply, and authorize the plaintiffs to institute the present bill. Still, however, it appears to us, that in case of a plenarty of the church, no alienation or sale of the church lands ought to take place, without the *assent of the minister, unless such assent be
*55] expressly dispensed with by some statute.

On the whole, the majority of the court are of opinion, that the land in controversy belongs to the Episcopal church of Alexandria, and has not been divested by the revolution, nor any act of the legislature passed since that period; that the plaintiffs are of ability to maintain the present bill; that the overseers of the poor of the parish of Fairfax have no just, legal or

equitable title to the said land, and ought to be perpetually enjoined from claiming the same; and that a sale of the said land ought, for the reasons stated in the bill, to be decreed, upon the assent of the minister of said church (if any there be) being given thereto; and that the present churchwardens and the said James Wren ought to be decreed to convey the same to the purchaser; and the proceeds to be applied in the manner prayed for in the bill. The decree of the circuit court is to be reformed, so as to conform to this opinion.

Decreed accordingly.

The Short Staple. (*a*)

The Brig Short Staple and Cargo, Holloway and others, Claimants, *v.* United States.

Embargo.—Rescue.

Quære? Whether, under the 1st and 2d embargo laws of 1807 and 1808, a registered vessel, which had a clearance from one port to another of the United States, was liable to condemnation for going to a foreign port?

If a vessel be captured by a superior force, and a prize-master and a small force be put on board, it is not the duty of the master and crew of the captured vessel to attempt to rescue her; for they may thereby expose the vessel to condemnation, although otherwise innocent.

The Short Staple, 1 Gallis. 104, reversed.

This was an appeal from the sentence of the Circuit Court for the district of Massachusetts, which affirmed that of the district court, condemning the brig Short Staple and cargo. The facts of the case are thus stated by the Chief Justice in delivering the opinion of the court:

This vessel was libelled in the district court of Massachusetts, in March 1809, for having violated the embargo *laws of the United States, [*56
by sailing to a foreign port. The fact is admitted by the claimants, who allege, in justification of it, that the vessel was captured, while on her voyage to Boston, by a British armed vessel, and carried into St. Nichola Mole, where the government of the place seized the cargo.

It appeared in evidence, that the Short Staple sailed from Boston, about the 10th of October 1808, with instructions to procure a cargo of flour, and return therewith to Boston, unless the embargo should be removed before the commencement of her return-voyage, in which case she was directed to proceed to the island of Guadaloupe. At Baltimore, she took on board a cargo of flour, and sailed thence to Boston, about the 28th of October. She was detained, several days, in Hampton Roads, by contrary winds. During this detention, the British armed vessel Ino put into Hampton Roads, for the purpose of repairing some damage sustained in a storm on the coast. The Ino had been in the port of Boston, while the Short Staple lay there, and had cleared out for the Cape of Good Hope, though her real destination was Jamaica. The reason her captain has since assigned for this imposition, was, that by clearing out for the Cape of Good Hope, he was allowed to take on board a larger supply of provisions than would have been allowed, had he cleared out for any port in the West Indies.

(*a*) February 13th, 1815. Absent, Johnson and Todd, Justices.

As soon as the wind was favorable, the Short Staple, together with another vessel, likewise bound from Baltimore to Boston, called the William King, put to sea, and was followed by the Ino, who soon overtook them, and took possession of them both as prize, alleging that they were bound to a French island. The captor put a prize-master and two hands on board the Short Staple, and sailed in company with them, until they fell in with a British ship of war. The captain of the Ino directed the prize-master to meet the ship of war, and submit to her orders; while the Ino, dreading that her hands might be impressed, made sail to the windward and escaped. After their papers had been examined, the Short Staple and the William King were permitted to proceed on their voyage, and were carried into St. *57] Nichola Mole, the place appointed by the captain of the Ino for *meeting them, when he was separated from them by the ship of war. They arrived at the Mole, about two days after parting from the Ino, who followed them, and entered the port soon after them. The government of the place insisted on detaining one of the vessels, as provisions were scarce at the Mole, and the Short Staple was given up to them. Her cargo was landed, under the direction of the government, and purchased at about $32 per barrel. Having received about $1200 in part pay for the cargo, the master of the Short Staple sailed to Turk's Island, and loaded her with a cargo of salt, with which he returned to a port in Massachusetts, where his vessel was seized as having violated the embargo laws. The William King appeared to have been carried to Jamaica, and there liberated, without having been libelled. The Short Staple was condemned in both the district and circuit courts, and the case was brought before this court by a writ of error.

P. B. Key and *R. G. Amory*, for the appellants, contended, 1. That no law prohibited the Short Staple from going to the West Indies; and 2. That she was carried there by the superior force of a British vessel of war.

1. There was no law then in force, by which the brig could be condemned for going to a foreign port. The only embargo laws then in force, which could affect this vessel, were the original embargo act of 22d December 1807 (2 U. S. Stat. 451), and the supplementary act of 9th of January 1808 (Ibid. 453).

The first act laid "an embargo on all ships and vessels bound to any foreign port or place," and directed that no clearance should be granted for any foreign voyage; and that no registered or sea-letter vessel, having on board a cargo, should be allowed to depart from one port of the United States to another port of the United States, unless the master, &c., should give bond, in double the value of vessel and cargo, that the cargo should *58] be relanded in the United States. The act did not *give any forfeiture. The first section of the 2d embargo law (the supplementary act of January 9th, 1808) relates only to vessels "licensed for the coasting trade." The 2d section relates only to vessels licensed for the fisheries or whaling voyages. The 3d section enacts, that "if any vessel" "shall, contrary to the provisions of this act, or of the act to which this is a supplement," "proceed to a foreign port or place," "such vessel shall be wholly forfeited."

If any forfeiture is given, it must be by this section; and this section applies only to such vessels as shall violate the provisions of this or the former act. The "provisions of this act" do not apply to a registered vessel, but only to licensed coasters and fishing vessels. The first embargo law did not forbid a vessel to sail to a foreign port, if she should have a clearance, but relied upon the bond and security that the cargo should be relanded. It was the violation of a contract, not an offence against law. It was a breach of the condition of the bond, but no crime. Every man has a right to refuse to comply with the condition of his bond, if he will pay the penalty. The United States, in the present instance, did resort to the bond. It is true, they did not recover, because the jury found a verdict against them upon the issue of fact. But they have had their remedy.

A registered vessel could only violate the provisions of the first or second embargo law, by going to a foreign port, without a clearance; or by going to a port of the United States, without giving bond. A vessel which had a clearance, and had given the bond, was not forbidden to go to a foreign port. The Short Staple had a clearance and had given the bond. The provisions of the supplementary act could only be violated by licensed coasters and fishing vessels, and are not applicable to the present case. The vessel did not go to a foreign port, contrary to the provisions of the act, but contrary to the condition of the bond.

Jones, contrà.—The only questions are, whether the 3d section of the 2d embargo law superadds the forfeiture of the vessel *to the penalty of the bond, for violation of the previous law? or whether it provides a forfeiture for the violation of a new prohibition? [*59

The expression "contrary to the provisions of this act or of the act to which this is a supplement," mean contrary to the spirit and intention of those acts. The spirit of the former act was, unquestionably, a prohibition of all foreign trade. To go with a cargo to a foreign port, was clearly against the spirit of the embargo. A vessel violates the provisions of the act, when she violates the bond which the act provides. The act declares, that an embargo shall be laid on all vessels bound to a foreign port. The word embargo is equivalent to a prohibition. And the words "bound to a foreign port" mean a vessel intending to go to a foreign port; not merely a vessel ostensibly bound to such port.

But if the vessel, by violating the bond, does not violate the law which requires the bond, yet the third section of the second embargo act creates a new offence, viz., that of going to a foreign port. It is coupled, in the same sentence, with the prohibition to put foreign goods on board of another vessel, which is, unquestionably, an entirely new offence, and yet, according to the words of the act, must be done contrary to the provisions of this or the former act. This shows that the legislature did not mean to confine the forfeiture to violations of the first act, or of the first two sections of the second act.

Amory, in reply, observed, that the word embargo meant a restraint or confinement of vessels already in port, and could not affect the conduct of a vessel after she had left the port. If she has a license to leave the port, the embargo, as such, cannot make her subsequent conduct unlawful.

February 17th, 1815. (Absent Johnson, J., and Todd, J.) MARSHALL, Ch. J., after stating the facts of the case, delivered the opinion of the court,
*60] as follows:—It has been contended by the plaintiffs in error, *1. That the Short Staple, being a registered vessel, and having given bond as required by law for relanding her cargo in the United States, is not liable to forfeiture, if she has violated the condition of that bond. 2. That her sailing to a foreign port, being under the coercion of a force she was unable to resist, is justifiable, under the laws of the United States.

The first error has been pressed with great earnestness by the counsel for the plaintiffs; but the court is not convinced that his exposition of the embargo acts is a sound one. On this point, however, it will be unnecessary to give an opinion; because we think the necessity under which the claimants justify their going into St. Nichola Mole, is sustained by the proofs in the cause. It is not denied, that a real capture and carrying into port, by a force not to be resisted, will justify an act which, if voluntary, would be a breach of the laws imposing an embargo. Nor is it denied, that if such capture be pretended, if it be made with the consent and connivance of the parties interested, such fraudulent capture can be no mitigation of the offence. The whole question, then, to be decided by the court is a question of fact. Was this capture real? Was the force such as the Short Staple could not resist? Or was it made in consequence of some secret arrangements between the captor and captured?

It is contended, on the part of the United States, that the circumstances of this case are such as to outweigh all the positive testimony in the cause, and to prove, in opposition to it, that the Short Staple was carried into St. Nichola Mole, not by force, but with her consent, and by previous concert between her owners and the captain of the Ino. Those circumstances are, 1. The arrival and continuance of the Ino in the port of Boston, while the Short Staple lay in that port, previous to her departure for Baltimore.
*61] *2. Her clearing out for the Cape of Good Hope, while her real destination was Jamaica. 3. The continuance of the Short Staple in Hampton Roads, until the arrival of the Ino. 4. Her capture on a coasting voyage which would not justify suspicion. 5. Her being carried to a port where there was a good market, and there given up: and 6. That the William King, when carried to Jamaica, was also given up, without being libelled.

That these circumstances are, some of them, such as to justify strong suspicion, and such as to require clear explanatory evidence to do away their influence, is unquestionable. But the court cannot admit, that any or all of them together amount to such conclusive evidence as to render it impossible to sustain the defence.

That the Ino should arrive in the port of Boston, while the Short Staple lay in that port, is nothing remarkable. It furnished an opportunity of concerting any future plan of operations with the owners of the Short Staple, or of any other vessel; but is certainly no proof of such concert. There is no evidence, that the respective owners were acquainted, or had any communication with each other; and the whole testimony is positive, that no such communication took place.

That the Ino should have cleared out for the Cape of Good Hope, when her real destination was Jamaica, is sufficiently accounted for. It enabled

The Short Staple.

her to take on board a considerable quantity of provisions, an article in demand in Jamaica, which she would not have been permitted to do, had her real destination been known. This may be a fraud in the Ino, but cannot affect the Short Staple.

That the Ino should have arrived in Hampton Roads, while the Short Staple remained there, and should have followed her to sea, and have captured her, are, unquestionably, circumstances which justify strong suspicion, *and which would be sufficient for the condemnation of the vessel, if not satisfactorily explained: but it is not conceded by the court, that they admit of no explanation. These circumstances are not absolutely incompatible with innocence. [*62

It is proved by testimony to which there is no exception, and which no attempt has been made to discredit, that the Short Staple was absolutely wind-bound the whole time she remained in Hampton Roads; and that she attempted to put to sea, before the arrival of the Ino, but could not. Had this capture ever been pre-concerted in Boston, the Ino and Short Staple would more probably have contrived to meet on the return-voyage of the latter, than to have adopted the course of the one waiting in port for the arrival of the other, and then sailing out almost together.

The arrival of the Ino in Hampton Roads is completely accounted for. She had suffered by the perils of the sea, and put in for necessary repairs. This fact is proved positively, and no opposing testimony is produced.

That the Ino should have pursued the Short Staple on a coasting voyage, and have captured her, was a wrong not to be justified. It is said to have been so atrocious a *tort*, that its reality is incredible. The fact, however, is completely proved. The master of the Short Staple swears that he was on his voyage to Boston; that his intention was to proceed to that port; that he had had no previous communication with the Ino, and had no expectation of being captured by her, or of being turned out of his course. The other persons on board the Short Staple testify to the same facts, as far as their knowledge extends. The owner of the Ino, who was on board, and her officers, swear that they had no previous communication with the Short Staple, or her owner; that there was no concert of any sort between them; that they were informed by some person on shore, while the Ino lay in Hampton Roads for repairs, that the Short Staple and the William King were on a voyage to a French island; that expecting to find something which would justify condemnation as prize, they determined to examine those vessels, and, *although, on examination, they found nothing to justify capture, they still hoped that something would appear in future; and that, at the worst, they should incur no risk of damages, because they should carry the vessels and cargoes to a good market. In this confidence, they determined to take them to Jamaica. This disposition in the captors, however indefensible, is very probable. It grew out of the state of the two countries; and no individual who was captured in consequence of it, ought, if his own conduct contributed in no degree to that capture, to be made the victim of it. [*63

That she was carried into St. Nichola Mole, and there given up to the government of the place, is, in itself, a circumstance throwing some suspicion on the transaction, and requiring explanation. The testimony explains it. The Ino was separated from her two prizes, by a fact which is fully

proved, and which sufficiently accounts for that separation. That her captain should, when about to leave them, appoint some near port as the place of meeting again, was almost of course; and that he should have relinquished one of the vessels to the government of the place, ceases to be matter of much surprise, when it is recollected, that he could not have much expectation of making her a prize; that, in fact, the capture was made with scarcely any hope of condemnation, but with a certainty that it would produce some additional supply of provisions, and could injure no person. The criminality of this mode of thinking, whatever it might be, was not imputable to the owners of the Short Staple.

It has been contended, that, during the separation of the Ino from the captured vessels, a rescue ought to have been attempted. There having been, during that period, but three persons belonging to the Ino on board the Short Staple, they might have been overpowered by the American crew; but the attempt to take the vessel from them was no part of the duty of the Americans, and might, in the event of re-capture, have exposed the vessel and cargo to the danger of condemnation, of which, without such rescue, they incurred no hazard.

*64] The abandonment of the William King, without libelling *her, is the natural consequene of having been able to find no circumstances of suspicion which might tempt the captors to proceed against her. It undoubtedly proves, what the captain of the Ino avows, that he acted under a full conviction of being exposed to no risk by the capture, though he should reap no advantage from it.

The interest which coasting vessels had in fictitious or concerted captures, undoubtedly, subjects all captures to a rigid scrutiny, and exposes them to much suspicion. The case of the claimant ought to be completely made out. No exculpatory testimony, the existence of which is to be supposed from the nature of the transaction, ought to be omitted. The absence of such testimony, if not fully accounted for, would make an impression extremely unfavorable to the claim. But where the testimony is full, complete and concurrent; where every circumstance is explained and accounted for, in a reasonable manner; where the testimony to the innocence of the owners and crew of the vessel is positive, proceeding from every person who can be supposed to have any knowledge of the facts, and contradicted by none; the court cannot pronounce against it. This would be to allow to suspicious circumstances a controlling influence to which they are not entitled.

The sentence of the circuit court, condemning the Short Staple, is reversed and annulled, and the cause remanded to that court, with directions to decree a restoration of the vessel to the claimants, and to dismiss the libel.

Story, J., stated, that he dissented from the opinion of the court, and adhered to the opinion which he gave in the court below, in which he had the concurrence of one of his brethren.[1]

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[1] See The William King, 2 Wheat. 148.

Parker *v.* Rule's Lessee. (*a*)

Direct tax.

Under the act of congress to lay and collect a direct tax (July 14th, 1798), before the collector could sell the land of an unknown proprietor, for non-payment of the tax, it was necessary that he should advertise the copy of the lists of lands, &c., and the statement of the amount due for the tax, and the notification to pay, for sixty days, in four gazettes of the state, if there were so many.[1]

Error to the Circuit Court of the district of West Tennessee, in an action of ejectment. *The facts of the case were thus stated by the Chief Justice in delivering the opinion of the court : [*65

This was an ejectment, brought by the defendant in error, in the circuit court of the United States for the district of West Tennessee. The plaintiff below claimed under a patent regularly issued by the proper authority. The defendant made title under a deed from the collector of the district, reciting a sale of the said land, as being forfeited by the non-payment of taxes, and conveying the same to the purchaser. On the validity of this conveyance, the whole case depends. At the trial, the defendant produced his deed, and also a general list of lands owned, possessed and occupied, on the first day of October 1798, in assessment district No. 12, in the state of Tennessee, corresponding with the collection district No. 8, returned to the office of the late supervisor of the revenue for the district of Tennessee, by Edward Douglass, surveyor of the revenue for said assessment district, among which is the following :

"Grant, John, reputed owner, in Sumner county, on the middle fork of Bledsoe's creek, 640 acres of land, subject to and included in the valuation, valued at $2560, no possessor or occupant."

He also produced the tax-list furnished by said surveyor to Thomas Martin, collector of the collection district No. 8, in which list, said land is described in the same manner as in the said general list, excepting that the said John Grant is described as possessor or occupant of said 640 acres of land, and said land is included in the list of lands belonging to residents. He also produced the advertisements of the sale of the said lands, mentioned in the said deed to have been made in the Tennessee Gazette, in which said John Grant is mentioned only as reputed owner of said land, and proved, by a witness present at the sale, that the said Henry Bradford, for himself and Daniel Smith, became the purchaser of the said land ; and that the said Daniel and Henry, before the execution of the said last-mentioned deed, assigned their interest in the said land to the defendant, Richard Parker. But it did not appear, that the said collector had, at any time, caused a copy of the said list, with a statement of the amount of the tax, and a notification to pay the same, to be published for sixty days, in four gazettes of the state, if there were so *many, pursuant to the last clause of the 11th section of the act of congress, entitled "an act to lay and collect a direct tax within the United States." (1 U. S. Stat. 597.) And thereupon, [*66

(*a*) February 11th, 1815. Absent, Johnson and Todd, Justices.

[1] The marshal's deed is not even *primâ facie* evidence, that the pre-requisites of the law have been complied with. Williams *v.* Peyton, 4 Wheat. 77. And see Early *v.* Homans, 16 How. 610.

the judge instructed the jury, that the said sale made by said collector was unauthorized and void, because the said collector had not previously made said last-mentioned publication, and because it appeared, that the collector proceeded to collect the taxes due on the said land, in the manner prescribed by law for collecting taxes due upon lands, where the owner resides thereon, and not in the manner prescribed when the owners are non-residents, and because there is a variance between the surveyor's books and the collector's list. The defendant below excepted to this opinion of the judge, and a verdict and judgment being rendered against him, he has brought the same, by writ of error, into this court.

Jones, for the plaintiff in error.—There is only one question in this cause, viz., whether the collector, in making sale of the land under the 13th section of the act (1 U. S. Stat. 601) was bound to publish for sixty days, in four gazettes of the state, the copies of the lists of the lands taxable, &c., with a statement of the amount of the taxes due thereon, and a notification to pay the same in thirty days, as required by the 11th section of the same act?

We contend, that this clause of the section applies only to unoccupied lands of unknown proprietors, and not merely to lands of non-residents. Grant, although a non-resident, was a known proprietor. Such publication is only necessary, in case of distress and sale of goods and chattels, which is the only remedy given by the 11th section. If the collector intended to levy the distress, then it was incumbent on him to make the publication. But when the legislature, by the 13th section, give the remedy by sale of the land itself, they make a different provision, and require different notice of the sale, and do not refer to the provisions of the 11th section; all of which provisions relate only to the case of distress.

*67] *C. *Lee*, contrà.—The deed from the collector must always recite all the facts necessary to make the title good. In this respect, the deed is very defective.

The land appears to have belonged to a non-resident. If his residence was known, the law required that he should have personal notice: if not known, he must have presumptive notice, by publication, as the 11th section requires. It cannot be supposed, that the law would require less notice to authorize a sale of the land, than a distress sale of chattels. It cannot be supposed, that the legislature meant to comprise all the pre-requisites of a sale of the land in the 13th section; for that section applies as well to residents as to non-residents, and yet it requires no notice of the amount of the taxes, nor a demand of payment before sale. It is rather to be presumed, that the legislature meant that all the preceding requisites should be complied with.

Jones, in reply.—It is not necessary, that the deed should recite any of the facts preceding the sale; they may all be proved by parol.

February 18th, 1815. (Absent, Johnson, J., and Todd, J.) Marshall, Ch. J., after stating the facts of the case, delivered the opinion of the court, as follows:—It is admitted, that if the preliminary requisites of the law have not been complied with, the collector could have no authority to sell, and the conveyance can pass no title. On the part of the plaintiff in error, it is insisted, that these requisites have been performed, and that the instruc-

tion given by the judge is erroneous. The instruction is, that the sale was unauthorized and void.

It was proved in the cause, that the proprietors of the land in controversy were non-residents of the state of Tennessee, when the tax was assessed, and continued to be so, to the time of bringing the action, and that they had no known agents in that state. *The mode of proceeding with respect to non-residents is prescribed in the 11th and [*68 13th sections of the act imposing the direct tax. The object of the provisions of the 11th section is "lands, dwelling-houses and slaves, which shall not be owned by, or in the occupation, or under the care or superintendence of, some person within the collection district where the same shall be situated or found, at the time of the assessment aforesaid."

It is alleged, that the plaintiff below did not entitle himself to the provisions of this section, by bringing himself within its description. He was a non-resident and had no known agent, but has not shown that there was no occupant of the land. The testimony offered by both plaintiff and defendant is spread upon the record; and although the plaintiff has not shown that there was no occupant, yet that fact came out in the testimony of the defendant, before the opinion of the court was given. One of the tax-lists produced by him states the land to be without an occupant; and the other, which states John Grant to be the occupant, is so far disproved, because the case admits John Grant to have been, at the time, an inhabitant of Kentucky, without any agent in the state of Tennessee.

The requisites of the 13th section of the act, which prescribes the course to be pursued, where lands are to be sold, because the taxes are in arrear and unpaid for twelve months, have been observed. The requisites of the 11th section, which prescribes the duty of the collector, after the assessment of the tax, before he can proceed to distrain for it, have not been observed. The cause depends on this single point—was it the duty of the collector, previous to selling the lands of a non-resident, in the manner prescribed by the 13th section of the act, to make the publications prescribed in the 11th section?

This will require a consideration of the spirit and intent of the law. *The 9th section makes it the duty of the collector to advertise that [*69 the tax has become due and payable, and the times and places at which he will attend for its collection. It is then his duty to apply once at the respective dwellings of those who have failed to attend such places, and there demand the taxes respectively due from them. If the taxes shall not be then paid, or within twenty days thereafter, it is lawful for the collector to proceed to collect the same by distress and sale.

The 11th section prescribes the duty of the collector with respect to lands, &c., not owned, &c., by some person within the collection district wherein the same shall be situated. Upon receiving lists of such lands, &c., he is to transmit certified copies thereof to the surveyors of the revenue of the assessment districts, respectively, within which such persons respectively reside, whose duty it is, to give personal notice of the claim to those who are liable for it. If the tax shall not be paid within a specified time after this notice, it then becomes the duty of the collector to collect the same by distress. If the residence of the owner of such land be unknown, this section requires certain publications to be made, as a substitute for personal notice;

after which, it is the duty of the collector to proceed to collect the tax, by distress, in like manner as where a personal demand has been made.

The 13th section prescribes the duty of the collector, and the forms to be observed in the sale of land, the taxes on which remain unpaid for one year. This section contains no reference to those which preceded it, but marks out the course of the collector in the specific case. It is therefore, contended, and the argument has great weight, that if the requisites of this section be complied with, the sale is valid. This opinion is in conformity with the letter of the section; and it is conceded, that the intent must be very clear, which will justify a connection of that section with those which precede it, so as to ingraft upon it those acts which must be performed by the collector, before he can distrain for taxes. But in this case, when we
*70] take the whole statute *together, such intent is believed to be sufficiently apparent.

There is, throughout the act, an obvious anxiety in the legislature to avoid coercive means of collection, unless such means should be necessary; and to give every owner of lands the most full information of the sum for which he was liable, and to afford him the most easy opportunity to pay it. Thus, the accruing of the tax is to be advertised, and the times and places at which the collector will attend to receive it. A personal demand at the dwelling-houses of those who have neglected to attend to this notice must then be made, a reasonable time before the collector can collect the tax by distress. Where lands are owned by non-residents, whose places of residence are known, this personal notice is still required; and where their residence is unknown, certain publications are substituted for and deemed equivalent to personal notice and demand. In each case, it is made the duty of the collector to proceed to collect the tax by distress and sale.

From this view of the law, it is inferred, not only that the legislature was anxious to avoid coercive means of collection, but has also manifested a solicitude to collect the tax, by distress and sale of personal property, rather than by a sale of the land itself. That all the means of collection prescribed in the act must have been tried, and must have failed, before a sale of the land can be made. The duty of the collector to make a personal demand from the resident owner of lands, and to make those publications which the law substitutes for a personal demand, where the residence of the owner is unknown, does not depend on the fact that personal property is or is not on the land from which the tax may be levied by distress. It is his duty to proceed in the manner prescribed in the 9th and 11th sections, in every case. After having so proceeded, it is his positive duty to levy the tax by distress, if property liable to distress can be found. If, notwithstanding the proceedings directed in the 9th and 11th sections, the tax shall remain one year unpaid, it is to be raised by a sale of the land. It appears to the court, that the 13th section pre-supposes everything enjoined in the 9th and 11th sections to have been performed, and that the validity
*71] of the *sale of land, owned by a non-resident, made by the collector for the non-payment of taxes, must depend not only on his having made the publications required in the 13th section, but on his having made those also which are required in the 11th section. Those publications not having been made in this case, it is the opinion of the majority of this court,

that the sale is void, and that the judge of the circuit court committed no error, in giving this instruction to the jury. The judgment is affirmed, with costs.

Judgment affirmed.

The Struggle. (*a*)

The Brig Struggle, Thomas Leigh, claimant, *v.* United States.

Penal statute.—Circumstantial evidence.

A party who offers an excuse for violating a penal statute, must make out the *vis major* under which he shelters himself, so as to leave no reasonable doubt of his innocence.
Circumstances will sometimes outweigh positive testimony.

Appeal from the sentence of the Circuit Court for the district of Massachusetts, which condemned the brig Struggle, for violation of the non-intercourse act of 28th of June 1809 (2 U. S. Stat. 550), by going, with a cargo, to a prohibited port.[1]

February 18th, 1815. (Absent, Johnson, J., and Todd, J.) Livingston, J., delivered the opinion of the court, as follows :—

This was an information, in the district court of Massachusetts, against the brigantine Struggle, for the violation of the act of congress of the 28th of June 1809, in departing from Portsmouth, in the United States, with a cargo of domestic growth and manufacture, bound to a foreign port with which commercial intercourse was not then permitted. The libel further states that the vessel arrived at said prohibited port, with her cargo, and that no bond had at any time been given to the United States, in the manner required by law, that she should not proceed to any interdicted *port, nor be engaged directly or indirectly, during such voyage, in any trade with such port or place. [*72

The claim denies the departure of the brigantine from Portsmouth, on a foreign voyage, to a port with which commercial intercourse was interdicted, or to any other foreign port or place ; but insists, that she was duly cleared, at the custom-house at Portsmouth, for Charleston, and that she departed and was sailing towards her place of destination, when by the violence of the winds and waves, she was driven out of her course, and became so much damaged, that she could not proceed on to Charleston ; but that it was necessary for the preservation of the vessel and cargo, and of the lives of those on board, to sail for the West Indies ; that she accordingly went to Martinico, and thence proceeded to St. Bartholomews.

The cause being at issue on this allegation of the claimant, and a number of witnesses having been examined, the district court condemned the vessel as forfeited to the United States. This decree was affirmed by the circuit court, from whose sentence this appeal is taken.

The master of the Struggle, who was produced as a witness, swears that after being regularly cleared, she sailed from Portsmouth to Charleston, the cargo being consigned to Joseph Waldron & Co., on whom he had

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(*a*) February 15th, 1815.

[1] See 1 Gallis. 476.

orders to call for advice ; but it being rumored, at the time of his sailing, that the non-intercourse would shortly be removed, he was informed by the owner, that orders were given to Waldron & Co., in that case, to send the vessel to the West Indies, provided the prospects at Charleston should not be equal to his expectation. That five or six days after sailing, they had a very heavy gale from the south-west which made such a tremendous sea that it became impossible to keep the vessel to. That they had not less than 65,000 feet of seasoned sawed lumber on the deck, besides loose lumber, all of which, in his opinion, must inevitably have been lost, if the vessel had been kept head to. At one time, an attempt was made to heave her to, and after laying a few hours, the gale increased and knocked the vessel down, her yards being nearly in the water, and the top of the deck load so shifted that they were obliged to put her before the wind, to *right
*73] the deck load and clear the companion way. During several gales, they were obliged to scud, and at one time for twenty-three hours together. They shipped several seas which washed overboard a part of the loose lumber. About the 16th of February, the wind being less violent, the deck load was found so much soaked, that it was like green lumber, which made the vessel so crank that they could not keep on the wind with a six-knot breeze. One of the water-casks was entirely leaked out ; another partly out ; and the sails and rigging much injured. On a consultation with the people on board, they were all of opinion, that it would be extremely dangerous to attempt coming on the coast, in the state in which the vessel then was, she being so top-heavy as to be almost water-logged. It being also the worst season in the year, they unanimously thought, that the only way they could save the deck load, and probably their lives, would be to make the first port they could. They accordingly bore away for the West Indies, and arrived at Martinico, which was the first port they made. The cargo was there sold, at a low price, it not being thought safe to venture to sea again, in the then condition of the vessel. After making some repairs, they sailed from Martinico for St. Bartholomews, where they took freight for Boston, at which place they arrived in June 1810.

This is the history of the voyage given by the master, and is substantially confirmed by the mate and two of the seamen, who also swear that they shipped for wages usual on a voyage to Charleston, which were lower than those which were given for a voyage to the West Indies. It also appears by the documentary evidence in the case, that the Struggle had a regular clearance on board for Charleston ; that she was chartered by the claimant, of certain merchants of Portsmouth, "to go to some southern port, or to the West Indies ;" that the cargo taken on board at Portsmouth was lumber, butter and crackers ; and that she returned from St. Bartholomews, to the United States, with a cargo on freight consisting of 180 casks and nine barrels of molasses.

On these proofs, the court is now to decide, whether the claimant has made out his allegation, that the vessel was driven out of her course by the violence of the winds and waves, and that her condition was such as to
*74] make *it necessary, for her preservation and the safety of the crew, to sail for a port in the West Indies.

Were the court bound to decide according to positive testimony, without regard to other circumstances, or to the situation and character of the wit-

nesses, it might be difficult to say, that the plea of necessity had not been satisfactorily made out. The master, mate and two of the mariners establish everything which the claimant had undertaken to prove, so far as their positive declarations are entitled to credit. But when it is recollected, how many cases of fictitious distress have been offered to the courts of the United States, as excuses for violations of the restrictive system, as it has been called, and that these cases, whether real or imaginary, have generally been supported by the same species of testimony, it cannot be wondered at, if this court shall receive, with considerable jealousy and caution, evidence which is so perpetually recurring, and which, if compared, will be found to present the same uniform statement of facts, with very few shades of difference, all calculated to impress a belief that some overwhelming calamity, of which, in ordinary voyages, so little is heard, has produced a departure from the original legitimate destination of the vessel. When it is considered too, that the testimony on these occasions comes from men, who, whatever their characters may be in other respects, must be viewed as accomplices in the offence, if any has been intentionally committed, and are, to say the least, very much under the influence of those who have projected the voyage, and are to be gainers by a violation of the law, it cannot be supposed, that such testimony can be examined, without very considerable reserve and distrust.

Although mere suspicion, not resting upon strong circumstances, unexplained, should not be permitted to outweigh positive testimony, in giving effect to a penal statute; yet it cannot be regarded as an oppressive rule, to require of a party who has violated it, to make out the *vis major* under which he shelters himself, so as to leave no reasonable doubt of his innocence; and if, in the course of such vindication, he shall pass in silence, or leave unexplained, circumstances which militate strongly against the integrity of the transaction, he cannot complain, if the court shall lay hold of those circumstances as reasons *for adjudging him *in delicto*. What then are the circumstances in this case, which it is difficult to reconcile with the concurrent testimony of the witnesses who have been examined? [*75

1. If the Struggle really encountered so much bad weather, and was obliged, to avoid shipwreck, and to preserve the lives of the crew, to abandon a coasting for a foreign voyage, it might be expected, that, on her arrival at Martinico, the ordinary process of survey would have been called for. Her situation would then have been ascertained by professional and skilful men. The not taking a precaution so common in cases of distress, and so necessary for the master's exculpation, if he acted without an understanding with his owner, while it leaves us in great doubt as to the magnitude of the injuries sustained, and the imminence of the danger to which the vessel and crew were thereby exposed, is but little calculated to excite a belief of the great extent of either. It is taken for granted, that no such survey was had, from the silence of all the witnesses upon the subject, and from the manifest interest which the claimant had in producing it, if it any degree supported the testimony or the defence which he had set up.

2. A still more common document, and of which, notwithstanding, we hear not a word, is a protest. Perhaps, a case never occurs, that a vessel is forced to abandon a voyage, without stating the reasons of such deviation, in the form of a protest, at the first port at which she arrives. Although, of itself, it would be no evidence, the master might have stated in

his testimony, that he had made one at Martinico. His not having done so, subjects him to the just presumption of having neglected it altogether, and that his going thither was brought about by a necessity of his own contrivance, and not by the act of God, or adverse winds.

Again, although it is said, that orders were sent by the claimant to the house of Waldron & Co., in Charleston, yet neither these orders, nor those to the master, both of which must be presumed to be in writing, are produced. Their suppression (to say the least) is a circumstance of some sus-
*76] picion. It may also be asked, why, *if the danger was so pressing, and the vessel nearly on her beam ends, was not relief sought by throwing over the deck-load, or a part of it? The court does not mean to say, that it was the master's duty to sacrifice the cargo, rather than go to a foreign port; but from his not disembarrassing himself of an incumbrance, which must have been so much in his way, it may well be doubted, whether the situation of the brig were as perilous as is now represented, or the lives of the crew exposed to the dangers we now hear of.

From the declarations of the claimant, as to his intentions, previous to the voyage, an argument was drawn in his favor. It is sufficient to say, that such declarations are not evidence, and if they were, might, in a case otherwise mysterious, rather increase than lull suspicion. As little dependence is to be placed on the fact, that for a foreign voyage, higher wages would have been demanded than for one to Charleston. Although the original agreement with the mariners may have been, and probably was, for Charleston, there can be no doubt, that the owner would have an interest, in a case of this kind, to raise them full as high as seamen would have a right to expect, if the vessel were carried, and especially, without a palpable necessity, to an interdicted foreign port.

Considering then, the suspicious source from which the testimony is derived, and the unfavorable and unexplained circumstances which have been stated, the court is unanimously of opinion, that the sentence of the circuit court must be affirmed.

Sentence affirmed.

Randolph *v.* Donaldson. (*a*)

Escape.

If a debtor, committed to the state jail, under process from a court of the United States, escape, the marshal is not liable.

Error to the Circuit Court for the district of Virginia, in an action of debt, brought by Donaldson against Randolph, late marshal of that district,
*77] for the *escape of one Baine, who, being taken in execution by the deputy marshal, had been delivered over to the jailer of the state prison of Botetourt county, from whose custody he escaped.

The action was in the common form, and the defendant pleaded *nil debet*, upon which issue was joined. Upon the trial, the defendant below took two bills of exception.

The first bill of exception set forth the judgment and execution of Don-

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(*a*) February 16th, 1815. Absent, Marshall, Ch. J., and Todd, Justice.

aldson against Baine, and the marshal's return of the execution in these words "Executed, and the defendant imprisoned in the jail of Botetourt, the 13th of November 1797, as per the jailer's receipt in my possession: Samuel Holt, D. M., for David M. Randolph, M. V. D." It further set forth the evidence of the fact, that the original debtor, Baine, was seen at large; "whereupon, the counsel for the plaintiff prayed the court to instruct the jury, that although the marshal, the defendant, by his deputy, had delivered the said original debtor, Baine, to the jailer of Botetourt county, where he was committed to jail, yet that the defendant was liable to the plaintiff for an escape, upon the discharge of the debtor by the said jailer, unless an escape-warrant has been taken out, as the law directs: whereupon, the court instructed the jury, that in law the marshal would be liable to the plaintiff, if the said Baine escaped out of the said jail, with the consent, or through the negligence of the said jailer; as the act of the jailer was, in that respect, the act of the marshal. The court also instructed the jury, that if the escape of the said Baine from the jail of the said county of Botetourt, had taken place after the expiration of the time when the said David Meade Randolph was marshal of the Virginia district, he would be liable for such escape, unless he shall prove that he had assigned over the said Baine to his successor in office by a deed of assignment; or by an entry on the records of this court, that he had made such assignment according to an act of assembly of the commonwealth of Virginia upon that subject, entitled 'an act to reduce into one all acts and parts of acts relating to the appointment *and duties of sheriffs;' the section of which act referred to in the instruction is in the following words: '§ 21. And for removing all [*78 controversies touching the manner of turning over prisoners upon a sheriff's quitting his office, be it further enacted, that the delivery of prisoners by indenture, between the old sheriff and the new, or the entering upon record, in the county court, the names of the several prisoners and causes of their commitment, delivered over to the new sheriff, shall be sufficient to discharge the late sheriff from all suits or actions for any escape that shall happen afterwards.' To which opinion and instructions, the defendant excepted."

The 2d bill of exception stated, that "the defendant offered evidence of the insolvency of Baine, at the time of his imprisonment and discharge, and moved the court to instruct the jury, that if they were satisfied of the insolvency of Baine, and that Donaldson neither resided himself, nor had any known agent, in the county of Botetourt, at the time of Baine's imprisonment and discharge, to whom notice might be given that he was insolvent and that security for the prison-fees was required, that in these circumstances, the jailer was legally justified in discharging him, under the act of the general assembly of Virginia in such case made and provided. But the court was of opinion, that in the application of this act of assembly to the case of a marshal, the whole district of Virginia was to be considered as his county, and it was sufficient, if the said Donaldson had any such known agent in the district of Virginia; and so instructed the jury; to which opinion and instruction, the defendant excepted."

The jury found a verdict in the following words: "We of the jury find that the said Alexander Baine in the declaration mentioned did escape from the jail in the county of Botetourt, with the consent of the defendant, the

then marshal of the Virginia district, as in the declaration is set forth; and therefore, we find for the plaintiff the debt in the declaration mentioned
*79] and assess his damages to one thousand dollars." *Upon this verdict, judgment was rendered for the plaintiff, and the defendant took his writ of error.

C. Lee, for the plaintiff in error.—By the law of Virginia, it is necessary that the jury should state, in their verdict, that the escape was with the consent of the sheriff. The verdict in the present case states the consent of the marshal; but the jury found the fact, in consequence of the instruction of the court.

1. The first opinion to which an exception was, taken was, that the marshal was liable for the negligence of the jailer. The jailer was not the deputy nor the officer of the marshal, but the deputy of the sheriff of Botetourt county. He was not an officer of the United States, but an officer of the commonwealth of Virginia. He was not appointed by, nor under the control of, nor responsible to the marshal. By the judiciary act of the United States § 28 (1 U. S. Stat. 87), the marshal is expressly made liable for his deputies, "and shall be held answerable for the delivery, to his successor, of all prisoners which may be in his custody, at the time of his removal, or when the term for which he is appointed shall expire, and for that purpose may retain such prisoners in his custody, until his successor shall be appointed and qualified as the law directs."

On the 23d of September 1789 (1 U. S. Stat. 96), congress resolved "that it be recommended to the legislatures of the several states to pass laws making it expressly the duty of the keepers of their jails to receive and safe keep therein all prisoners committed under the authority of the United States, until they shall be discharged by due course of the laws thereof, under the like penalties as in the case of prisoners committed under the authority of such states respectively; the United States to pay for the use and keeping of such jails, at the rate of fifty cents per month for each
*80] prisoner that shall, under their authority, be committed *thereto, during the time such prisoners shall be therein confined; and also to support such of said prisoners as shall be committed for offences."

In consequence of this recommendation, the legislature of Virginia passed "an act for the safe keeping of prisoners committed, under the authority of the United States into any of the jails in this commonwealth" (P. P. New Rev. Code, vol. 1, p. 43), by which it was enacted, "that it shall be the duty of the keeper of the jail in every district, county or corporation within this commonwealth, to receive into his custody any prisoner or prisoners, who may be, from time to time, committed to his charge, under the authority of the United States, and to safe keep every such prisoner or prisoners, according to the warrant or precept of commitment, until he shall be discharged by the due course of the laws of the United States." § 2. "And that the keeper of every jail aforesaid shall be subject to the same pains and penalties for any neglect or failure of duty herein, as he would be subject to, by the laws of this commonwealth, for a like neglect or failure, in the case of a prisoner committed under the authority of the said laws."

The keeper of the jail is directly liable to the party. It was not intended that he should have a double remedy, viz., against the keeper of the jail and

the marshal. Nothing could be more unreasonable, than to make the marshal liable for the conduct of a person not appointed by him, over whom he has no control, and against whom he has no remedy. When the marshal had delivered the prisoner to the keeper of the jail he had discharged his duty and was no longer liable. The prisoner was no longer in the custody of the marshal, but of the jailer.

2. The second opinion of the court, to which an exception was taken was, that if the escape was after the defendant had ceased to be marshal, still he was liable, unless he had assigned over Baine as a prisoner to his successor, in manner provided by the law of Virginia. The observations already made are an answer to this *opinion. The marshal was bound by the law [*81
of the United States to deliver to his successor only such prisoners as were in his custody. Baine was not in his custody, and therefore, he was not bound to deliver him over—and if not bound to deliver him over, he could not be liable for his escape.

The opinion was objectionable also on another ground. By the law of Virginia, the delivery over of prisoners by indenture, and the record of the names of the prisoners delivered over, is not the only evidence which a sheriff may produce of the fact of the delivery. The statute is cumulative only. It describes a mode by which he may certainly exonerate himself, and the kind of evidence which would be conclusive, but does not deprive him of the right of proving the delivery over of the prisoners by other means. The act of congress says nothing of the mode of delivery nor of the mode of proof.

The marshal was not bound to take out an escape warrant as required by the law of Virginia (1 P. P. 118), because the prisoner was in the custody of the jailer, and not of the marshal. Besides, the marshal must of necessity reside at a great distance from many of the jails, and it would be unreasonable to oblige him to superintend them all.

3. The third opinion objected to at the trial was, that in applying the Virginia law of sheriffs to the marshal, the whole district was to be considered as his county; and therefore, if the plaintiff had an agent in any county it was sufficient to prevent his discharge without notice. The words of the act of assembly relative to the residence of the creditor or his agent, ought to be taken strictly. The laws of the state are to be taken as rules of decision where they apply. But in this case, they were not applicable.

R. I. Taylor, contrà.—If doubts exist as to the construction of a law, the argument *ab inconvenienti* has great weight. If the jailer is not liable to the marshal, the United States are not able to enforce their judgments The jailer of a *county is the officer of the sheriff, who may or may [*82
not require security. A district jailer gives security only in the sum of $1500. It is not very important, whether the jailer is liable, as the remedy would generally be of little value. But if he is liable, it does not follow, that the marshal is not.

Under the resolution of congress, and the act of Virginia, the jailer is only liable to the same "pains and penalties," strictly and technically considered, as if, &c. That is, he is only liable criminally, and not civilly; he is liable to punishment for a voluntary escape, but not to a civil remedy. It cannot reasonably be presumed, that the legislature meant to confide the

revenue, the debts of individuals and the execution of the criminal laws of the United States to the responsibility of a county jailer.

It is not unreasonable, to charge the marshal, for he has by law all the power necessary for the safe-keeping of his prisoners. (1 U. S. Stat. 87.) He may call out guards, or he may have an officer on purpose to keep his prisoners. He is bound to deliver over all his prisoners to his successor, and if bound to deliver over, he is bound to safe keep them. If those who are confined in the county jails are not in his custody, there are none in his custody. Who is to produce them on *habeas corpus?* In case of epidemic disease, who is to remove them? Who is to bring them into court for trial? Who is to receive the money upon execution. If the legislature of the United States meant thus to hazard the revenue, the criminal jurisprudence, and the property of individuals, they would not have left it to inference, but have been more explicit.

2. As to the second opinion; it was right, if the first was right. There is no other mode by which a sheriff quitting his office can relieve himself from responsibility. But there was no evidence in the record that the escape was after the defendant ceased to be marshal, and therefore, the
*83] opinion was inapplicable to the case—*and if so, could not injure the defendant. The bill of exception is always supposed to contain the whole evidence in the cause. 3 Dall. 38.

3. As to the third opinion. There was no evidence in the case, that the prisoner was discharged, because there was no agent of the creditor to pay his jail-fees; and therefore, this opinion also was inapplicable to the case, and could not hurt the plaintiff in error. But if the law as to sheriffs in their counties is to be applied to the marshal of the district, then the whole district must be considered as his county. A creditor would have to keep an agent in each county to receive notices, for it would be impossible for him to know in which county the marshal would imprison his debtor.

C. Lee, in reply.—It is unreasonable, that the marshal should be responsible for all the jailers in the state, over whom he has no control. The sheriff is bound to commit a prisoner to the jail of that county, in which he is arrested; and so is the marshal. If the jail is bad, the justices of the county are responsible. If the prisoner escape, through the negligence or by the consent of the jailer, the sheriff is liable, because the jailer is his deputy. In Virginia, if a sheriff commit a prisoner to the district jail, he is not liable, because the district jailer is not his deputy. A *habeas corpus* would be directed to the jailer and not the marshal. As to the risk of the revenue, the United States must suffer as others do; they have thought proper to trust it to such keepers, and if they suffer, the remedy is in their own hands.

2. As to the second opinion; if there was no evidence to justify it, that is another ground of error. But it appeared in the bill of exceptions, that the witness was uncertain whether it was before or after the defendant ceased to be marshal, that he saw the prisoner at large. The opinion, therefore, was prejudicial to the defendant.

3. As to the third opinion. The law of Virginia (1 P. P. 306, § 52),
*84] declares it to be unreasonable, that a *sheriff should be obliged to go out of his county to give notice to creditors at whose suit any person

may be in his custody, or to pay money levied on execution, and enacts, that where an execution shall be delivered to the sheriff of any other county than that in which the creditor shall reside, such creditor shall name an agent in the county where the execution is to be served, for the purpose of receiving notices and money; and if the creditor fail to appoint such agent, the sheriff is not bound to give notice, previous to a discharge of such prisoner for want of security for his prison-fees. The jailer was liable only in the same manner and to the same extent as he would have been if the prisoner had been committed under the state authority. If committed under the state authority, he would have had a right to discharge the prisoner for want of security for his fees, without notice to the creditor. The court, therefore, erred in giving an opposite opinion.

February 21st, 1815. (Absent, Marshall, Ch. J., and Todd, J.) STORY, J., delivered the opinion of the court, as follows :—This is an action of debt, brought against the former marshal of Virginia, for an alleged wilful and negligent escape of a judgment-debtor. At the trial of the cause in the circuit court of Virginia, several exceptions were taken by the plaintiff in error to the opinions of the district judge, who alone sat in the cause ; and the validity of these exceptions is now to be considered by this court.

The first exception presents the question, whether an escape of a judgment-debtor, after a regular commitment, under process of the United States courts, to a state jail, be an escape for which the marshal of the United States for the district is responsible?

Congress, by a resolution passed the 23d September 1789 (1 U. S. Stat. 96), recommended to the several states to pass laws making it the duty of the keepers of their jails to receive and safe keep prisoners committed under the authority of the United States, under like *penalties as in the case of prisoners committed under the authority of such states [*85 respectively ; and, by another resolution of 3d of March 1791 (1 U. S. Stat. 225), authorized the marshals, in the meantime, to hire temporary jails. In pursuance of the former recommendation, the legislature of Virginia, by the act of 12th November 1789, ch. 41 (Revised Code 43), made it the duty of the keepers of the jails within the state, to receive and keep prisoners arrested under the process of the United States, and for any neglect or failure of duty, subjected them to like pains and penalties as in cases of prisoners committed under process of the state.

The act of congress of 24th September 1789, ch. 20, §§ 27, 28, authorizes the marshals of the several districts of the United States to appoint deputies, and declares them responsible for the defaults and misfeasances in office of such deputies. But there is no provision in any act of congress, declaring the keepers of state jails, *quoad* prisoners in custody under process of the United States, to be deputies of the marshals, or making the latter liable for escapes committed by the negligence or malfeasance of the former. If, therefore, the marshals be so liable, it is an inference from the general powers and duties annexed to their office.

It is argued, that the marshals are so liable, because in intendment of law, prisoners committed to state jails are still deemed to be in their custody ; and in support of this argument, is cited the provision in the act of congress which makes the marshal, on the removal from or the expiration of his

office, responsible for the delivery to his successor of all prisoners in his custody; and authorizes him, for that purpose, to retain such prisoners in his custody, until his successor is appointed. And this argument is further supported, by its analogy to the case of sheriffs, and by the extreme inconvenience which, it is asserted, would arise from a contrary doctrine.

The argument is not without weight; but upon mature consideration, we are of opinion, that it cannot prevail. The act of congress has limited the responsibility of the marshal to his own acts, and the acts of his deputies.

*86] *The keeper of a state jail is neither in fact, nor in law, the deputy of the marshal. He is not appointed by, nor removable at the will of the marshal. When a prisoner is regularly committed to a state jail, by the marshal, he is no longer in the custody of the marshal, nor controllable by him. The marshal has no authority to command or direct the keeper, in respect to the nature of the imprisonment. The keeper becomes responsible for his own acts, and may expose himself by misconduct to the "pains and penalties" of the law. For certain purposes, and to certain intents, the state jail, lawfully used by the United States, may be deemed to be the jail of the United States, and that keeper to be keeper of the United States. But this would no more make the marshal liable for his acts, than for the acts of any other officer of the United States, whose appointment is altogether independent. And in these respects, there is a manifest difference between the case of a marshal and a sheriff. The sheriff is, in law, the keeper of the county jail, and the jailer is his deputy, appointed and removable at his pleasure. He has the supervision and control of all the prisoners within the jail; and therefore, is justly made responsible by law for all escapes occasioned by the negligence or wilful misconduct of his underkeeper.

On the whole, as neither the act of congress nor the doctrine of the common law applicable to the case of principal and agent, affect the marshal with responsibility for the escape of a prisoner, regularly committed to the custody of the keeper of a state jail, we are all of opinion, that the decision of the circuit court upon this point was erroneous, and that the judgment must be reversed. This decision renders it unnecessary to consider the other points raised in the bills of exception.

Judgment reversed.

*Polk *v.* Wendall *et al.*

Land law of Tennessee.—Construction of state statutes.

The act of North Carolina (1783, ch. 2), opening the land-office, did not prohibit a person from making several different entries, amounting in the whole to more than 5000 acres, nor from purchasing the rights acquired by others by entries, nor from uniting several entries in one survey and patent; and such union of several entries is allowed by the act of 1784, ch. 19.

In a patent, the obliteration of the consideration does not make void the grant.

In cases depending on the statutes of a state, the settled construction of those statutes, by the state courts, is to be respected.

In Tennessee, the younger patent on the elder entry, prevails over the elder patent on the younger entry.[1]

A patent justifies a presumption that all the previous requisites of the law have been complied with.

A patent is void at law, if the state had no title, or if the officer who issued the patent had no authority so to do.[2]

In North Carolina, the want of an entry nullifies a patent.

After the cession of land by North Carolina to the United States, the former had no right to grant those lands to any other grantee, who had not an incipient title before the cession. The question, whether such incipient title existed, is, therefore, open at law.

Polk's Lessee *v.* Hill, Windel *et al.*, 2 Overt. 118, reversed.[3]

This case, as stated by the Chief Justice in delivering the opinion of the court, was as follows :

This is a writ of error to a judgment in ejectment, rendered in the Circuit Court of the United States for the district of West Tennessee. On the trial, the plaintiff below, who is also plaintiff in error, relied on a patent, regularly issued from the state of North Carolina, for 5000 acres of land, dated the 17th day of April 1800, which patent included the lands in controversy.

The defendants then offered in evidence a patent issued also from the state of North Carolina, and dated on the 28th of August 1795, purporting to convey 25,060 acres of land to John Sevier, which patent also comprehended the lands in controversy. To the reading of this grant, the plaintiff objected, because: 1. By the laws of the state of North Carolina, no grant could lawfully issue for as large a number of acres as are included in that grant. 2. The amount of the consideration originally expressed in the said grant, appears to have been torn out. 3. The said grant, on its face, appears fraudulent, the number of acres mentioned being 25,060, the number of warrants forty, of 640 acres each, and yet the courses and distances, mentioned in its body, include more than 50,000 acres. These objections were overruled and the patent went to the jury. To this opinion of the court, the counsel for the plaintiff excepted.

The counsel for the plaintiff then offered to prove, for the purpose of avoiding the said grant—

1. That the forty warrants of 640 acres each, mentioned *in the said grant, purport, on their face, to have been issued by Landon Carter, entry-taker of Washington county, and that the land covered by the said grant is situated between the Cumberland mountain and Tennessee river, and not within the said county of Washington. [*88

[1] Ross *v.* Read, 1 Wheat. 482. See Miller *v.* Kerr, 5 Id. 1.

[2] Patterson *v.* Winn, 11 Wheat. 380.

[3] For a further decision in the court below, after this reversal, see 2 Overt. 433; which was again reversed in 5 Wheat. 293.

2. That the consideration of ten pounds for every hundred acres was fraudulently inserted in the said grant, by procurement of said grantee, John Sevier.

3. That no entries were made in the office of the entry-taker of Washington, or elsewhere, authorizing the issuing of such warrants.

4. That the pretended warrants are forgeries.

5. That at the time of the cession of the western part of the state of North Carolina to the United States, and at the time of the ratification thereof by congress, on the ——— day of ——— 1790, the said pretended warrants did not exist, nor were any locations or entries in the offices of the entry-taker of Washington county, from which they appear to have issued, authorizing their issuance.

6. That no consideration for the said land was ever paid to the state of North Carolina, or any of its officers.

And to prove that since the execution of the said grant, the consideration mentioned therein had been altered from fifty shillings to ten pounds, the counsel for the plaintiff offered to read as evidence, a letter addressed by the said John Sevier, to James Glasgow, then secretary of state for the state of North Carolina, in the words following, to wit:

"Jonesborough, 11th November 1795.

"DEAR SIR:—I am highly sensible of your goodness and friendship in executing my business at your office, in the manner and form which I took the liberty to request. Permit me to solicit a completion of the small
*89] remainder *of my business that remains in the hands of Mr. Gordon. Should there be no impropriety, should consider myself much obliged to have ten pounds inserted in the room of fifty shillings. I have directed Mr. Gordon to furnish unto you a plat of the amount of three 640 acres, which I consider myself indebted to you, provided you would accept the same, in lieu of what I was indebted to you for fees, &c., which I beg you will please to accept, in case you can conceive that the three warrants will be adequate to the sum I am indebted to you. I am, with sincere and great esteem, dear sir, your most obedient servant, JOHN SEVIER."

"Hon. James Glasgow."

Indorsed thus—"Hon. Mr. Glasgow, Secretary of State."
"Mr. Gordon."

The counsel for the defendants objected to the reception of this testimony, and it was rejected by the court. To this opinion also, an exception was taken.

A general verdict was rendered for the defendants, on which the court gave judgment. This judgment has been brought up to this court by writ of error.

C. Lee, for the plaintiff in error.—Two questions arise in this cause. 1. Whether the fraud does not vacate the grant to Sevier? 2. Whether the evidence of that fraud should not have been admitted?

*90] *1. The invalidity of the grant to Sevier appears upon its face. It is mutilated, by the erasure of the consideration: and it has been fraudulently altered in a material part. By the law of North Carolina, the survey must be annexed to the patent, and is a substantial part of it. From

this survey, it appears, that under forty warrants, for 640 acres each, amounting to 25,060 acres, there have been granted to him more than 50,000 acres. These objections having been made at the trial below, ought to have excluded the patent from the consideration of the jury.

There is a difference between a public and a private grant. A patent must be issued according to the requisites of the law, or it will be void. It takes effect merely by the provisions of the law, and if not made pursuant to law, can convey no title. *Fermor's Case*, 3 Co. 77 ; *Legate's Case*, 10 Ibid. 110 ; *Lord Chandos' Case*, 6 Ibid. 55 ; Barwick's Case, 5 Ibid. 93 ; Co. Litt. 260.

In a case of a sale of land by a sheriff for taxes, the proceedings must be regular and according to the law which authorizes the sale, or it will be void. So, under the bankrupt laws, and the Lords' act, in England. The same rule of law applies to a grant from a state ; and the party may take advantage of it, in ejectment. *Lord Proprietary of Maryland* v. *Jennings*, 1 Har. & McHen. 145. So, if a bond or release be offered in evidence, the other party may show it was obtained by fraud. And if any objection appear upon the face of the instrument, the court will take notice of it. *O'Neale* v. *Thornton*, 6 Cr. 70.

2. The court ought to have permitted the plaintiff to give evidence of the fraud, and of the want of foundation for the patent. In ejectment, the deeds are not declared upon, nor set forth in the proceedings, so that the opposite party has no opportunity to plead the fraud, or the erasure, &c. He can only produce these facts in evidence, by way of objection, so as to prevent such deeds from being read in evidence to the jury.

*If the entry-taker in Washington county had no authority to issue the warrants for these lands, they are void. The evidence of that [*91 fact ought, therefore, to have been admitted.

The evidence of collusion between Sevier and the secretary of state, and of the other facts stated in the bill of exceptions, ought to have been received. For however slight the evidence might have been of some of the facts, yet it ought to have been left to the jury. *Maryland Ins. Co.* v. *Woods*, 6 Cr. 50. The court below decided, that no evidence could be given to invalidate the patent, except what regarded the entries.

Mr. Lee cited the following statutes of North Carolina, from Iredell's revised code, p. 205, the act of 1777, ch. 1, § 3, 4 ; Ibid. p. 322, the act of 1783, ch. 2, § 2 ; Ibid. p. 345, the act of 1784, April session, by which the lands were ceded to the United States. And the acts of 1784, October session, p. 386, ch. 19, § 6 ; 1778, p. 252 ; 1786, ch. 20, § 20 ; 1789, ch. 3, p. 467, and 1791, ch. 21, § 5.

Jones, contrà.—1. The first objection was to the admission in evidence of the patent to Sevier, for any purpose. There was nothing on the face of the patent to make it void. It was not mutilated. There were blanks in it, but no mutilation ; and there is no evidence that it was mutilated. There could be only three kinds of consideration ; fifty shillings, ten pounds, of military service. It could not, by law, be either the first or the last ; it must therefore have been ten pounds. The act of the officer carries a presumption that the proper consideration was paid ; and the statute shows what that consideration ought to have been.

2. The next objection is, that the grant comprehends 50,000 acres instead
*92] of 25,060. But the grant is only for the 25,060, although the *survey may include more. The statute which prohibits grants for more than 5000 acres, does not vacate such grants. It is only directory to the officer; and such grants are recognised by the laws of North Carolina. 1784, ch. 19. The excess is no evidence of such fraud as will vacate the deed. The defendants were not bound to show the correctness of their entries; nor anything else prior to the patent. The entries were merged in the patent.

As to the second bill of exception: it presents but one point. The only evidence offered and rejected was the letter of Sevier to Glasgow. For although it states that the plaintiff offered to prove other facts, yet it does not state that he offered evidence of those facts. But if the bill of exception imports that such evidence was offered, yet the defendants were innocent purchasers. The contest is not between the original parties. They were not bound to look beyond the patent: and if the facts were proved, which the plaintiff offered to prove, yet the patent is not thereby made void, but voidable by proper process. The king may avoid his grants where a subject could not (*Legate's Case*, 10 Co. 113); but it must be either by *quo warranto* or *scire facias*, or information in the nature of a *quo warranto;* which is a process in the nature of a proceeding *in rem:* there is no instance where it has been declared void, when brought collaterally into question. And although a statute declares a grant void, yet it is not actually void, but voidable. 7 Bac. Abr. 64, B; *Fletcher* v. *Peck*, 6 Cr. 180. In the case from Harris & McHenry's reports, the state of Maryland sought to set aside the grant, by an information, and it only shows that upon such a process, the fraud upon the state may be given in evidence. In the present case, no fraud or irregularity has been sufficiently alleged to set aside the deed.

1. It is said, that the lands did not lie in Washington county. This is no objection; because the party had a right to remove his entry.

*93] *2. The charge that the consideration of 10*l.* was fraudulently inserted, is too vague and general. If the party had not paid the 10*l.*, he was still indebted to the state in that sum; and the deed is not for that cause void as to an innocent purchaser.

3. That there were no entries authorizing the warrants. This objection is equivocal, and involves questions of fact and law.

4. That the warrants were forgeries. The patent cannot be declared void for any prior irregularity. In ejectment, you must stop at the patent; and the prior patent gives the better title.

5. That at the time of the cession of the lands to the United States, there were no entries authorizing the warrants. This is in substance the same as the third objection. It is too general and vague, and involves fact and law.

6. That no consideration was paid. This, if true, does not avoid the patent; for if the money was not paid, Sevier remains debtor for it to the state.

With regard to the letter to Glasgow, it is not material, what alteration was made as to the consideration. No evidence of alteration was important, unless it were such alteration as would vacate the deed. This

letter contains no such evidence. It must have referred to some other patent; because the letter was dated in November 1795, and refers to some instrument, then incomplete; but the patent in this case was completed in the preceding August.

As to the issuing of the grant by the state of North Carolina, after the cession of the territory to the United States, the act of cession provided for the issuing of such grants upon entries previously made. It does not appear, that the entries in this case were not made before the cession. The plaintiff's grant was also issued by the state of North Carolina, five years after the defendant's.

C. Lee, in reply.—The practice of England, as to revoking patents, is no rule respecting the land laws of this country. The [*94 register of the land-office is only an officer of the law; can transfer nothing but according to his authority, and cannot grant contrary to law.

The patent is void on its face. It appears to have been obliterated. This fact, together with the letter to Glasgow, ought to have been left to the jury, as tending to prove a fraudulent alteration in the deed.

Unless the patent conveys all the land within the described bounds, it is vague and uncertain. It cannot be limited to the 25,060 acres. If it conveys anything, it conveys the whole 50,000 acres.

February 21st, 1815. (Absent, Todd, J.) MARSHALL, Ch. J., after stating the case, delivered the opinion of the court, as follows:—The first exception is to the admission of the grant set up by the defendants in bar of the plaintiff's title. This objection alleges the grant to be absolutely void, for three causes.

The first is, that no grant could lawfully issue for the quantity of land expressed in this patent. If this objection be well founded, it will be conclusive. Its correctness depends on the laws of the state of North Carolina.

The act of 1777, ch. 1, opens the land-office of the state, and directs an entry-taker to be appointed in each county, to receive entries made by the citizens, of its vacant lands. The third section of this act contains a proviso, that no person shall be entitled to claim a greater quantity of land than 640 acres, where the survey shall be bounded by vacant land, nor more than *1000 acres between lines of land already surveyed for other [*95 persons. The fourth section fixes the price of land thus to be entered, at fifty shillings per hundred acres; after which follows a proviso, that if any person shall claim more than 640 acres for himself, and 100 acres for his wife and each of his children, he shall pay for every hundred acres exceeding that quantity, five pounds, and so in proportion. But this permission to take up more than the specified quantity of lands at five pounds for every hundred acres, does not extend to Washington county.

In June 1781, ch. 7, the land-office was closed, and further entries for lands prohibited. In April 1783, ch. 2, the land-office was again opened, and the price of lands fixed at ten pounds for each hundred acres. The ninth section of this act authorizes any citizen to enter, with the entry-taker to be appointed by the assembly, "a claim for any lands, provided such claim does not exceed 5000 acres." This act limits the amount for which an entry might be made. But the same person is not, in this act, forbidden to

make different entries; and entries were transferrible. No prohibition appears in the act, which should prevent the assignee of several entries, or the person who has made several entries, from uniting them in one survey and patent. The court does not perceive, in reason, or in the directions of the law respecting surveys, anything which should restrain a surveyor from including several entries in the same survey. The form of surveys which is prescribed by law, if that rule should be considered as applicable to surveys made on several entries united, may be observed, and in this case, is observed, notwithstanding the union of different entries.

In April 1784, ch. 19, the legislature again took up this subject, and after reciting that it had been found impracticable to survey most of the entries of lands made adjoining the large swamps, in the eastern parts of the state, agreeable to the manner directed by the acts then in force, without *96] putting the makers thereof *to great and unnecessary expenses, empowered surveyors in the eastern parts of the state to survey for any person or persons, his or their entries of lands in or adjoining any of the great swamps in one entire survey. The third section enacts, "that where two or more persons shall have entered, or may hereafter enter, lands, jointly, or where two or more persons agree to have their entries surveyed jointly, in one or more surveys, the surveyor is empowered and required to survey the same accordingly, in one entire survey; and the persons so agreeing to have their entries surveyed, or entering lands jointly, shall hold the same as tenants in common, and not as joint tenants." The fourth section secures the same fees to the surveyor and secretary as they would have been entitled to claim, had the entries been surveyed and granted separately.

As all laws on the same subject are to be taken together, it is argued, that this act shows the sense of the legislature, respecting the mode of surveying entries, and must be taken into view, in expounding the various statutes on that subject. It evinces unequivocally the legislative opinion, that as the law stood previous to its passage, a joint survey of two entries, belonging to the same person, or to different persons, could not be made. The right to join different entries in the same survey, then, must depend on this act. The first and second sections of this act relate exclusively to entries made in or adjoining to the great swamps, in the eastern parts of the state. The third section is applicable to the whole country, but provides only for the case of entries made by two or more persons. It is, therefore, contended, that the court cannot extend the provision to the case of distinct entries belonging to the same person.

For this distinction, it is impossible to conceive a reason. No motive can be imagined, for allowing two or more persons to unite their entries in one survey, which does not apply with at least as much force for allowing *97] *a single person to unite his entries, adjoining each other, in one survey. It appears to the court, that the case comes completely within the spirit, and is not opposed by the letter of the law. The case provided for is, "where two or more persons agree to have their entries surveyed jointly," &c. Now, this agreement does not prevent the subsequent assignment of the entries to one of the parties; and the assignment is itself the agreement of the assignor, that the assignee may survey the entries, jointly or separately, at his election. The court is of opinion, that under a sound

construction of this law, entries which might be joined in one survey, if remaining the property of two or more persons, may be so joined, though they become the property of a single person.

The second objection to the admission of the grant is, that the amount of the consideration originally expressed on its face appears to have been torn out. The grant stands thus: "for and in consideration of —— pounds," &c. The court is unanimously and clearly of opinion, that there is nothing in this objection. It is not suggested, nor is there any reason to believe, that the words were obliterated for fraudulent purposes, or for the purpose of avoiding the grant. They may have been taken out by some accident; and there is no difficulty in supplying the lost words. The consideration paid was ten pounds for each hundred acres; and there can be no doubt, that the word "ten" is the word which is obliterated. Had the whole grant been lost, a copy might have been given in evidence; and it would be strange, if the original should be excluded, because a word which could not be mistaken, and which, indeed, is not essential to the validity of the grant, has become illegible.

The third exception is, that the grant, on its face, appears fraudulent, because it has issued for 25,060 acres of land, although the lines which circumscribe it, and which are recited in it, comprehend upwards of 50,000 acres. Without inquiring into the effect of a grant conveying *50,000 acres of land, under a sale of 25,000 acres, it will be sufficient to observe, that in this case, the surplus land is comprehended in prior entries, and is, consequently, not conveyed by this grant. This exception, therefore, is inapplicable to the case. It is the opinion of this court, that there was no error in permitting the grant under which the defendant claimed title, to go to the jury. [*98

The remaining exceptions were taken, after the grant was before the jury, and are for causes not apparent on its face. They present one general question of great importance to land-holders in the state of Tennessee. It is this—Is it, in any, and if in any, in what, cases, allowable, in an ejectment, to impeach a grant from the state, for causes anterior to its being issued?

In cases depending on the statutes of a state, and more especially in those respecting titles to land, this court adopts the construction of the state where that construction is settled, and can be ascertained. But it is not understood, that the courts of Tennessee have decided any other point bearing on the subject than this, that under their statutes declaring an elder grant founded on a younger entry to be void, the priority of entries is examinable at law; and that a junior patent founded on a prior entry shall prevail in an ejectment, against a senior patent founded on a junior entry. The question whether there are other cases in which a party may, at law, go beyond the grant, for the purpose of avoiding it, remains undecided.

The laws for the sale of public lands provide many guards to secure the regularity of grants, to protect the incipient rights of individuals, and also to protect the state from imposition. Officers are appointed to superintend the business; and rules are framed prescribing their duty. These rules are, in general, directory; and when all the proceedings are completed by a patent, issued by the authority of the state, a compliance with these rules is pre-supposed. That every prerequisite has been performed, is an inference

properly deducible, and which every man has a right to draw, from the existence of the grant itself. It would, therefore, be extremely *unreasonable, to avoid a grant in any court, for irregularities in the conduct *99] of those who are appointed by the government to supervise the progressive course of a title from its commencement to its consummation in a patent. But there are some things so essential to the validity of the contract, that the great principles of justice and of law would be violated, did there not exist some tribunal to which an injured party might appeal, and in which the means by which an elder title was acquired, might be examined. In general, a court of equity appears to be a tribunal better adapted to this object than a court of law. On an ejectment, the pleadings give no notice of those latent defects of which the party means to avail himself; and should he be allowed to use them, the holder of the elder grant might often be surprised. But in equity, the specific points must be brought into view; the various circumstances connected with those points are considered; and all the testimony respecting them may be laid before the court. The defects in the title are the particular objects of investigation; and the decision of a court in the last resort upon them is decisive. The court may, on a view of the whole case, annex equitable conditions to its decree, or order what may be reasonable, without absolutely avoiding a whole grant. In the general, then, a court of equity is the more eligible tribunal for these questions; and they ought to be excluded from a court of law. But there are cases in which a grant is absolutely void; as where the state has no title to the thing granted; or where the officer had no authority to issue the grant. In such cases, the validity of the grant is necessarily examinable at law.

Having premised these general principles, the court will proceed to consider the exceptions to the opinion of the circuit court, in this case, and the testimony rejected by that opinion.

The case does not present distinct exceptions, to be considered separately, but a single exception to a single opinion, rejecting the whole testimony offered by the plaintiff. The plaintiff offered to prove, that no entries were ever made, authorizing the issuing of the warrants on which the grant to Sevier was founded, and that the warrants themselves were forgeries. He also offered *to prove, that at the time of the cession to congress of *100] the territory in which these lands lie, the warrants did not exist, nor were there any locations in the office from which they purport to have issued, to justify their issuing.

In the state of North Carolina itself, the want of an entry would seem to be a defect sufficient to render a grant null. The act of 1777, which opens the land-office and directs the appointment of an officer in each county, denominated an entry-taker, to receive entries of all vacant lands in his county, directs the entry-taker, if the lands shall not be claimed by some other person, within three months, to deliver to the party a copy of the entry, with its proper number, and an order to the county surveyor to survey the same. This order is called a warrant. The ninth section of the act then declares, "that every right, &c., by any person or persons, set up or pretended to any of the before-mentioned lands, which shall not be obtained in manner by this act directed, or by purchase or inheritance from some person or persons becoming proprietors by virtue thereof, or which shall be obtained in fraud, evasion or elusion of the provisions and restrictions thereof,

shall be deemed and are hereby declared utterly void." The act of 1783, which again opens the land-office, appoints an entry-taker for the western district, and prescribes rules for making entries in his office, and for granting warrants similar to those which had been framed for the government of the entry-takers of the respective counties.

In the year 1789, North Carolina ceded to congress the territory in which the lands lie, for which Sevier's grant was made, reserving, however, all existing rights under the state, which were to be perfected according to the laws of North Carolina. This cession was accepted by congress. Sevier's survey is dated on the 26th day of May 1795.

*The lands for which the warrants were granted, by virtue of which the survey was made, lie within that district of country for [*101 which the land-office was opened by the act of 1777. Had the survey been made on the land originally claimed by these warrants, it must have been a case directly within the ninth section of the act; and the right is declared by that section to be utterly void. But the survey was made on different lands, by virtue of an act which empowers the surveyor so to do, in all cases of entries on lands previously appropriated. This clause in the law, however, does not authorize a survey, where no entry has been made; and such survey would also come completely within the provision of the ninth section. In such case, there is no power in the agents of the state to make the grant; and a grant so obtained is declared to be void.

This subject is placed in a very strong point of view, by considering it in connection with the cession made to the United States. After that cession, the state of North Carolina had no power to sell an acre of land within the ceded territory; no right could be acquired under the laws of that state. But the right was reserved to perfect incipient titles. The fact that this title accrued before the cession, does not appear on the face of the grant; it is, of course, open to examination. The survey was not made until 1795, many years posterior to the cession. It purports, however, to have been made by virtue of certain warrants founded on entries which may have been made before the cession. But if these warrants had no existence, at the time of the cession, if there were no entries to justify them, what right could this grantee have had at the time of the cession? The court can perceive none; and if none existed, the grant is void for want of power in the state of North Carolina to make it.

If, as the plaintiff offered to prove, the entries were never made, and the warrants were forgeries, then no right accrued under the act of 1777; no purchase of the land was made from the state; and, independent of the act of cession to the United States, the grant is void by the express words of the law.

If entries were made in the county of Washington, *but no com- [*102 mencement of right had taken place in the ceded territory, previous to the cession, so as to bring the party within the reservation contained in the act of cession, then the grant must be void, there being no authority in the grantor to make it. In rejecting testimony to these points, the circuit court erred; and their judgment must be reversed, and the cause remanded for a new trial.

Judgment reversed.

The Richmond. (*a*)

The Ship Richmond *v.* United States.

Seizure for breach of municipal law.

The non-intercourse act of 28th of June 1809, which requires a vessel bound to a permitted port to give bond in double the amount of vessel and cargo not to go to a prohibited port, is applicable to a vessel sailing in ballast.

If a merchant vessel of the United States be seized by the naval force of the United States, within the territorial jurisdiction of a foreign friendly power, for a violation of the laws of the United States, it is an offence against that power, which must be adjusted between the two governments; this court can take no cognisance of it.

The law does not connect that trespass with the subsequent seizure by the civil authority, under the process of the district court, so as to annul the proceedings of that court against the vessel.[1]

Appeal from the sentence of the Circuit Court for the district of Georgia, affirming the sentence of the district court, which condemned the ship Richmond, for a violation of the non-intercourse act of 28th of June 1809 (2 U. S. Stat. 550), by departing from Philadelphia, bound on a foreign voyage to a permitted port, without having given bond not to go to a prohibited port.

The case was argued by *Harper*, for the appellant, and *Jones* and *Pinkney*, for the United States.

February 22d, 1815. (Absent, Todd, J.) Marshall, Ch. J., delivered the opinion of the court as follows:—The ship Richmond, an American registered vessel, sailed from Philadelphia, in ballast, in December 1809, with a clearance for New York, but proceeded to Portsmouth, in Great Britain, where she arrived in 1810. She made two voyages to Amelia Island, in East Florida, during the second of which, she was seized, in St. Mary's river, by gun-boat No. 62, January 14th, 1812, and libelled in the district court of Georgia, for violating the act passed the 28th of June 1809, for amending
*103] the non-intercourse *law. The Richmond was condemned in both the district and circuit courts, and from their sentence, the claimants have appealed to this court.

The claimants contend, 1. That the vessel was not liable to forfeiture. 2. That the seizure was made within the territory of Spain, and that all proceedings founded thereon are void.

When the Richmond sailed from Philadelphia, commercial intercourse between the ports of Great Britain, and those of the United States, was permitted. But the act of the 28th of June 1809 (2 U. S. Stat. 550), enacts, that "no ship or vessel bound to a foreign port or place with which commercial intercourse has been or may be thus permitted, except, &c., shall be allowed to depart, unless the owner or owners, consignee or factor of such ship or vessel shall, with the master, have given bond, with one or more sureties, to the United States, in a sum double the value of the vessel and cargo, that the vessel shall not proceed to any port or place with which commercial intercourse is not thus permitted, nor be directly nor indirectly engaged, during the voyage, in any trade with such port or place." If a

(*a*) February 15th, 1815. Absent, Todd, Justice.

[1] The Merino, 9 Wheat. 391; s. p. Dow's Case, 18 Penn. St. 37.

vessel shall depart, without having given such bond, the vessel, with her cargo, are declared to be wholly forfeited.

It is contended, that this act does not apply to vessels departing from the United States to a permitted port, in ballast. The act is certainly not expressed with all the precision that could be wished. The case contemplated by the legislature most probably was that of a vessel sailing with a cargo; but there is reason to believe, that a vessel departing in ballast also was within the meaning and intent of the law. The bond is provided to prevent a breach of the existing restrictive laws, by a vessel clearing out or sailing for a permitted port, but actually proceeding to a prohibited port. This might be done by a vessel with or without a cargo; and the condition of the bond would be violated, in its letter as well as spirit, by *the [*104 vessel's sailing, without the cargo, to a prohibited port. The court understands the law, then, directing a bond to be given in double the value of the vessel and cargo, to apply to the cargo, if there be a cargo, but to the vessel only, if there be no cargo.

The seizure of an American vessel, within the territorial jurisdiction of a foreign power, is certainly an offence against that power, which must be adjusted between the two governments. This court can take no cognisance of it; and the majority of the court is of opinion, that the law does not connect that trespass, if it be one, with the subsequent seizure by the civil authority, under the process of the district court, so as to annul the proceedings of that court against the vessel. One judge, who does not concur in this opinion, considers the testimony as sufficient to prove that the Richmond, when first seized by the gun-boat, was within the jurisdictional limits of the United States. The sentence is affirmed, with costs.

Sentence affirmed.

Arnold and others *v.* United States. (*a*)

Duties on imports.—Bond.—Computation of time.

The double duties imposed by the act of July 1st, 1812, accrued upon goods which arrived within a collection district on that day.

To constitute an importation, so as to attach the right to duties, it is necessary, not only that there should be an arrival within the limits of the United States and of a collection district, but also within the limits of some port of entry.[1]

Semble: That if the condition of a bond be to pay $1700, or the duties which may be ascertained to be due upon certain goods imported, it is not in the option of the obligor, to discharge the bond, by payment of the $1700.

That an obligee may, at law, recover more than the penalty of the bond.[2]

Where the computation is to be made from an act done, the day, on which the act is done, is to be included.[3]

United States *v.* Arnold, 1 Gallis. 348, affirmed.

Error to the Circuit Court for the district of Rhode Island, in an action of debt, upon a bond in the penalty of $3400, given July 2d, 1812, for duties

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(*a*) February 23d, 1815.

[1] See Meredith *v.* United States, 13 Pet. 494.

[2] See Lawrence *v.* United States, 2 McLean 581, 585–8, where the authorities on this point are considered.

[3] Lapeyre *v.* United States, 17 Wall. 198. See Dutcher *v.* Wright, 98 U. S. 560; Burgess *v.* Talman, 97 Id. 384.

at the custom-house. The cause was decided below upon demurrer to the pleas of the defendants, who were the principal and sureties in the bond.

It was an action of a debt on a bond, dated July 2d, 1812, given to the United States for $3400. The condition of the bond was as follows, viz: "The condition of this obligation is such, that if the above-bounden S. G. Arnold, &c., shall and do, on or before the 2d day of October next, well and truly pay, or cause to be paid, unto the collector of the customs for the dis-
*105] trict of Providence *for the time being, the sum of $1700, or the amount of duties to be ascertained as due, and arising on certain goods, wares and merchandise entered by the above-bounden S. G. Arnold, as imported in the brig Dover, R. Fanner, master, from Havana, as per entry dated this day, then the above obligation to be void, &c." The following indorsement was on the bond, viz:

"Amount of duties ascertained as due, 1708 dollars and 38 cents.
THOMAS PECKAM, Jun'r,
Deputy-Collector."

The defendants pleaded, that, as to $1708.38, part and parcel of said sum of $3400 demanded by the plaintiffs, with the interest thereon from the day whereon the same was payable, to the time of the plea, being $13.38, they owe the plaintiffs the same, being in the whole the sum of $1721.76; and that as to the whole residue of the sum demanded, the defendants say, that therefor the plaintiffs their said action ought not to have and maintain, because they say, "that the brig Dover in the condition of the said bond mentioned, sailed from Havana, on the 16th day of June, A. D. 1812, bound to the said district of Providence, and that she arrived within the United States, on the 30th day of June 1812, and within the said district of Providence, on the 1st day of July, A. D. 1812, having on board the said goods, &c., mentioned in the condition, which said goods, &c., were imported into the said United States, on the said 30th day of June 1812, and into the said district of Providence, on the said 1st day of July 1812, in the brig Dover, &c.; that Providence is the sole port of entry in the said district of Providence; and that on the said 2d of July 1812, the said goods, &c., were duly entered at the custom-house in the said district of Providence, as imported in the said brig Dover, &c. The defendants further aver, that the bond aforesaid was made, executed and given by them to the plaintiffs as aforesaid, for securing the duties due on the said goods, so imported as aforesaid, in conformity with, and by virtue and in pursuance of, the act
*106] of congress, &c., passed on the 10th day of August *1799, entitled 'an act making further provision for the payment of the debts of the United States,' and also a certain other act of congress, passed on the 7th day of Jnne 1794, entitled 'an act laying additional duties on goods, &c., imported into the United States.' The defendants also aver, that the duties due by the acts aforesaid, on the importation of said goods, &c., in manner aforesaid, amounted, at the time of the importation of the same as aforesaid, to the aforesaid sum of $1708.38, and no more, and were then and there ascertained by the said deputy-collector, to that sum and no more, according to the condition of said bond, and in pursuance of the provisions of said statutes. They also aver, that at the time of the entering of the said goods, &c., at the custom-house as aforesaid, on the said 2d day of July

1812, neither they, the defendants, nor the collector of the customs for said district of Providence, had any knowledge of the act, entitled 'an act for imposing additional duties upon all goods, &c., imported from any foreign port or place, and for other purposes,' passed on the 1st day of July 1812; nor was the said last-mentioned act promulgated, published and made known, at the district of Providence as aforesaid, at the time of making the said entry, as aforesaid, and this the defendants are ready to verify, &c." To this plea, the plaintiffs demurred.

In the circuit court, judgment was rendered for the plaintiffs, for $3428.90.

Pitkin, on the part of the plaintiffs in error, contended, 1. That the act imposing double duties could not, on principles of law or justice, be considered as in operation until the 2d day of July. The words of that act are, that "an additional duty, &c., shall be levied and collected upon all goods, &c., which shall, from and after the passing of this act, be imported into the United States, &c." The act was approved by the president on the 1st day of July 1812. By the sound construction of the words, *"from and after the passing of this act," it is contended, that the first day [*107 of July must be excluded; that the meaning is the same, as if the words used had been, from and after the 1st day of July, in which case, the 1st day of July would certainly be excluded, and the act would not be in force until after that day. "From and after the passing this act," have also the same meaning; as from and after the time of passing the act. The question would then occur, as it now does, when or at what time was the act passed, the answer is, on the 1st day of July, and of course, unless there are fractions of a day, the duties could not be levied and collected until after that day. The act repealing the duty on salt, passed in 1807, declares, "that from and after the 31st day of December next, so much of any act as lays a duty on imported salt, be and the same is hereby repealed, and from and after the day last aforesaid, salt shall be imported, &c., duty free." No one has ever pretended, that salt could be imported, duty free, until the 1st day of January, because it could not be so imported, until from and after the day preceding. The court must undoubtedly give such a construction to the act, as that no citizen can, by possibility, be subjected to its operation, before it had actually passed. In order to prevent this, the court must either exclude the 1st day of July altogether, or they must admit fractions of a day, and suffer an inquiry into the very moment of time on that day, when the act received the signature of the president, and was lodged in the office of the secretary of state.

If a vessel had arrived in the morning of the 1st day of July, and the act was not in fact approved by the president, until the afternoon of that day, it cannot be pretended, that the goods brought in such vessel, were imported "from and after the passing of the act." It is well known, that acts are not generally presented to the president for his approbation, until about the middle of the day, and on the last day of the session, frequently, not until nearly the last hour of the day. The difficulties, however, attending an inquiry of this nature, as well as the impropriety of calling on the president for information, as to the moment when a law received his sanction, may perhaps be sufficient inducements for *the court to say, that when the rights [*108

and interests of the citizens are so materially involved, and when, by the express words of the act, it is not to take effect, until from and after the passing of the same, they will, as a general rule, exclude the day on which it passed. The authorities, which have a bearing on this question are various and contradictory. In the case of *Pugh* v. *Duke of Leeds*, Cowp. 714, these authorities are referred to and commented upon by Lord MANSFIELD with his usual ability and sound sense.

Much more subtlety than argument has been used to prove a difference in the meaning of words made use of, in instruments, to show the time when they should take effect. When the words have been "from the date," the court have sometimes said, it should include the day, and where the words have been "from the day of the date," it should exclude the day. In some cases, the courts have entirely rejected this distinction, and have said, that they do or may mean the same thing. In the case of *Bellasis* v. *Hester*, 1 Ld. Raym. 280, on a bill of exchange, payable ten days after sight, the court, two judges against one, decided, that the day on which the bill was presented for payment was included. This opinion, however, was against the custom and practice of merchants. In the case of *Hatter* v. *Ash*, 1 Ld. Raym. 85, the following distinction is made by counsel, and is admitted by one of the judges, and not contradicted by the others, that the words "from the date when used to pass an interest, included the day; *aliter*, when used by way of computation on matters of account." This distinction is in some measure recognised by Lord MANSFIELD, in the above case of *Pugh* v. *Leeds*, in Cowper. In this last case, Lord MANSFIELD says, that the words "from the date," or "from the day of the date," may be either inclusive or exclusive, according to ths subject-matter, and may be construed either way, to give effect to the transaction, or for the furtherance of justice between parties. In the case now before the court, it is not necessary to include the day, for the purpose of giving effect and validity to the law; and in case the day is included, manifest injustice may, and in all probability will happen to the citizens of the United States. For, if there can be no fractions of a day, the act must, in legal contemplation, be considered as in force,
*109] *from the first moment of the day on which it received the sanction of the president. It is understood, that by the construction at the treasury, the 1st day of July is excluded, and that the accounts of the collectors of the customs are all settled, excluding double duties, on goods which arrived on that day.

2. Even if the act went into operation on the 1st day of July, then was this case a complete importation, before that time. The vessel and cargo arrived within the United States, and within the limits of the state of Rhode Island, on the 30th day of June, and the importation was then perfected. Importation does not imply a bringing into any particular port, to which the vessel may be destined; a bringing within the jurisdictional limits of the United States, either on land or water, is an importation. Importing and bringing into the United States, are used synonymously in various sections of the collection law, and the fair interpretation of both expressions is, that an importation is no more than voluntarily introducing property within the jurisdiction of the United States, generally, and does not require its actual arrival at the port of its destination. The moment a cargo so arrives within the United States, and before it reaches its port of

destination, the right of the United States attaches to it. A manifest of the cargo must be delivered to their officers, and the cargo subjected in some degree to their control. The United States, then have, at least, an inchoate right to duties, of which the owner, cannot deprive them, except by exportation, without unlading; the right to the duties accrues, on the first entry of the vessel into the waters of the United States, and not after her arrival at her port of destination; and no new right, on such arrival, accrues, except the secondary right of ascertaining the amount of duties to be paid, and the extent of the security required for them, which could not be ascertained, until after an actual entry at the custom-house. The coming in of the vessel to the waters of the United States, her proceeding to her destined port, her entry there, is one transaction, and is one act in relation to duties; and when she reaches her destined port, and enters there, the right of the United States attaches as from the first moment of her coming within the jurisdictional limits of the United States, and the responsibilities of the owner cannot be increased or varied, to his injury, by subsequent acts of the government.

*The 36th section of the law clearly discriminates between importation and entry. By the collection law, and all the forms of manifest, [*110 entry, &c., it is clearly evinced, that importation precedes entry. To constitute an importation, there must be a voluntary bringing of goods into the United States; the vessel must be bound to the United States, with an intent there to unlade her cargo, or to enter the same for exportation, without unlading. Coming in by stress of weather, or other necessity, is not a legal importation.

By a construction given to the navigation acts of Great Britain, coming into a port, with an intent to unlade, although bulk be not broken, is an importation, but a mere coming within the limits of a port, without any intent to break bulk or unlade, is not an importation, either to make the customes become due, or to subject the ship or goods to forfeiture, or to oblige the master to report or make entry, &c. (Reeves' History of the Law of Shipping 260.) So, goods seized in a ship, 20 miles below the Hope, but within the limits of the port of London, are considered as an importation. (Reeves, p. 261.)

It is believed also, that, under our non-importation law, arrival at any particular port of destination, is not necessary to constitute an offence under that act, but that if the vessel is bound to the United States, with an intent there to unlade her cargo, the forfeiture is incurred, the moment the vessel voluntarily enters the limits of the United States. The words in the collection law and non-importation act, are the same, viz: "Imported into the United States," &c.

3. If, however, the importation was not so complete, as that the duties accrued, on the arrival of the vessel within the jurisdictional limits of the United States; it is contended, that the importation was perfected, and the right of the United States to duties complete, on her arrival within the limits of any district of the customs of the United States. *The vessel, [*111 in the case before the court, as is confessed by the pleadings, arrived within the limits of the district of Providence, which is about 20 miles within the jurisdictional limits of the United States, on the 1st day of July; and if, in the fiscal sense of the term, this constituted an importation, and

the law did not take effect until the 2d day of July, the goods so imported, cannot be subject to the duties imposed by that act. We are aware of the decision of the court, in 1810, in the case of the *United States* v. *Vowell and McClean*, 5 Cr. 368. The distinction there taken by the counsel for the defendants, between a district and a port of entry, is recognised by the court as correct. The court say, "the duties did not accrue, in the fiscal sense of the term, until the vessel arrived at the port of entry."

But with great deference, we contend, that the time of importation, even in the fiscal sense of the term, is not ascertained merely by the entry of the master, or of the owner or consignee at the custom-house, but by the arrival of the vessel in the United States, or within the limits of some place in the United States, designated by law. Whether this place be a port of entry, strictly so called, or a district, the master and owner have time given them by law, within which, after such arrival, they are allowed to make their entries at the custom-house. Suppose, the vessel, in this very case, had arrived at the port of Providence, on the 30th day of June, at twelve o'clock, the master would be allowed until twelve o'clock the next day, to make his first report to the collector, and he would not be obliged to exhibit a manifest of his cargo, before forty-eight hours after his arrival, which would not be until the 2d day of July; and the owner or consignee is allowed sixteen days, after the final report of the master, to make his entry, for the purpose of paying or securing the duties. As this vessel would then have arrived, before the law passed, she could not be subject to double duties, although she might not have entered at the custom-house, until after the passage of the law. There is, therefore, a material distinction between importation and entry. When a vessel, bound to the United States, with a cargo, has once arrived within a certain known and specified limit; when she has once passed the line of demarcation fixed by law, then, at least, if not before, must the goods in such vessel be considered as legally *and fiscally imported, and subject to all the provisions of law, relative to the security of duties upon them. The limits of a collection district are particularly designated by law. In every district, there is one, and but one port of entry, but in many of them, there are several ports of delivery. These ports, however, whether of entry or delivery, have no limits fixed or designated by law.

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When a vessel has arrived, "within the limits of any district of the United States," she is under the complete control of the government, and she cannot depart from such district, "unless to proceed to some more interior district," before a report or entry shall be made by the master, with the collector of some district, under the penalty of $400, and the custom-house officers and commanders of the revenue cutters, are authorized to arrest and bring back, any vessel attempting to depart from such district, &c. (1 U. S. Stat. 648, § 29.) The provisions of the next succeeding section, viz., § 30, p. 649, are, "that within twenty-four hours after the arrival of any ship or vessel, &c., at any port of the United States, established by law, at which an officer of the customs resides, the master is to make a report of his arrival," and within forty-eight hours, is to make a further report in writing, with a manifest of the cargo, &c. It is certain, that the word "port" mentioned in this section, must be applicable to a port

of delivery, at which a surveyor of the customs resides, as well as to a port of entry, at which the collector of the district resides.

And whether the master, according to this section, is obliged within forty-eight hours after his arrival within the limits of a district, to make report and entry to the collector of such district, or within forty-eight hours after his arrival at some particular port, in such district; still, after the arrival of a vessel within the limits of such district, she cannot depart from the same, unless to an interior district, until the master has made a report, and exhibited a manifest of her cargo, to the collector of such district. And after such manifest has been exhibited to the collector, she is not permitted to depart from such district, with the whole or any part of her cargo, either to a foreign port, or to any other district, until bonds are *given for [*113
the due entry and delivery of the goods, which are destined for another district, or if the goods are destined for a foreign port, that they "shall not be landed in the United States, unless due entry thereof shall have been first made, and the duties thereupon paid or secured to be paid according to law." (*Vide* §§ 32–4, p. 651–2.) If the goods are intended for exportation, they must be so reported in the manifests, and then the vessel importing them, may proceed "from the district, within which such ship or vessel shall first arrive," &c., on giving bond, as first stated. (§ 32.) If the goods, or any part of them, are destined to any other district, the vessel in which they were brought may proceed to such other district, on such conditions as are specified in the 34th section. This section declares, "that before any ship or vessel shall depart from the district, in which she shall first arrive, for another district (provided such departure be not within forty-eight hours after her arrival in such district), with goods, &c., brought in such ship from a foreign port or place, &c., the master, &c., shall obtain from the collector of the district, from which she shall be about to depart, a copy of the report and manifest made by such master," &c. Then, the word district is used, and not port; and the proviso seems to show, pretty clearly, that within forty-eight hours after the arrival of a vessel, within a district, a report and manifest must be made to the collector of such district.

And when a vessel departs with goods from one district to any other district, the master is obliged, within "twenty-four hours after the arrival of such ship within any other district, so to make report or entry, to or with the collector of such other district," &c. (See page 652, § 34.) The condition of the bonds, in both cases, show that the goods are considered as imported into the district, and not into particular ports, and that the bonds are given to secure the payment of the duties upon them, in case they should be landed in any other port of the United States. With regard to importation, the words of the condition are, "whereas, the following goods, &c., imported into the district of," &c. In the case of the *United States* v. *Vowell and Mc Clean*, the court say, the vessel must arrive at the port of entry, before the duties accrued. If, by an arrival at a port of *entry, [*114
is meant, that a vessel must actually go to a port of entry, as established by law, before a right to the duties can attach, or an entry can be made by the master or owner, the position is believed to be incorrect; as by the 19th section of the collection law, a vessel destined to a port of delivery, in many of the districts, may go directly to such a port of delivery, without even touching at a port of entry, and the master and owner,

may afterwards enter the vessel and cargo, and pay or secure the duties, with the collector at the port of entry in such district, without taking the vessel or cargo to such port of entry.

The provisions of all the sections of the law from the 23d to the 35th, inclusive, relate principally, if not solely, to the conduct of the master, or person having charge of the vessel, with a cargo bound to the United States; and that the object of all the provisions in these sections, is to ascertain the amount and kind of goods, which he has imported, or to prevent their being unladen, without the assent of the government.

If the vessel be owned, in whole or in part, by a citizen of the United States, the master is to have a manifest of the cargo on board; a copy of this manifest must be delivered to an officer of the customs, if within four leagues of the coast; a like copy must be delivered to an officer of the customs, after his arrival within the limits entered on the original manifest; the last copy is to be sent to the collector of the district in which such vessel has arrived, and the original manifest, certified by such officer, must be delivered to such collector, by the master, or he must make oath, that no such copy had been applied for, &c. (see § 25, p. 646); and the master is finally to deliver to the collector of the district, under oath, a manifest containing the particulars of the cargo on board; and after this has been done by the master, the owners or consignees of goods thus imported, are to come forward and pay or secure the duties upon them; and for this purpose are to make a particular entry of such parts of the cargo, as are owned by or consigned to them. The form of this entry is given in the 36th section of the law, and is headed, by the words—"entry of merchandise imported by," &c.

*115] *The complete control of the government over the vessel, from the moment of her arrival within any district, is shown by the 53d section of the law, page 667. This section provides, "that it shall be lawful for the collector of any district in which any ship or vessel may arrive, and immediately on her first coming within such district," &c., "to put on board such ship or vessel, whilst remaining within such district, or in going from one district to another, one or more inspectors, to examine the cargo, &c., and to perform such other duties," &c., "for the better securing the collection of the duties."

4. The bond was taken under the former impost law, as stated in the plea, and accordingly was an explicit contract for such duties as that law imposed, and no other; and whatever claim the plaintiffs may have for double duties, no more than the single duties ought to be recovered on this bond. If any duties are to be paid, on acconnt of the imported articles, beyond the tariff established by the former impost law, they are not recoverable in this action, on the bond given under that law; but recourse must be had to some other process for the recovery of such further duties. The sureties (and in this case two of the defendants are sureties) will not be made liable beyond the responsibility which they expected on entering into the obligation. They expected to be holden for no more than the duties under the former impost law; and the proceedings on the part of government warranted that expectation. The time of giving the bond, the district where it is taken, and the penal sum, being rather less than the amount of double duties, as now demanded, evince conclusively, that the bond, with its condi

tion, was not for double duties, but for the single duties. Every argument, which can be urged for a demand of double duties, may be urged, with equal force, and far more apparent equity, to sustain some other process, in which the sureties would not be subjected to the peculiar hardship of being compelled to pay double duties, for *which they could have no idea [*116
of being responsible, when the bond was given.

This view of the case is according to the essential facts admitted by the pleadings. On the 2d of July 1812, after the imported articles had been properly inspected, the amount of duties was ascertained and indorsed on the bond in the collector's office. The indorsement was expressed in these terms, " amount of duties ascertained as due, $1708.38." Bond for securing the duties being required, before granting a permit to land the articles from the importing vessel, a gross estimate of the amount of duties only could be made at the moment of taking the bond (see § 49, page 640–41), and that estimate was $1700, as mentioned in the condition.

When the articles had been duly inspected, after the permit to land, and after return of such inspection (see page 641), but not before, the duties could be and were ascertained in the regular course at the collector's office. The precise amount of duties was then ascertained according to the former impost law, and found to be $1708.38, and was so indorsed on the bond, according to known provisions of law. Shall that indorsed amount be the measure of the demand on the bond? After the duties had been so ascertained and indorsed on the 2d of July, if a deposit of goods (according to § 42, page 660) had been made for securing the amount of the duties for which the bond had been given, what would have been the measure for determining the sufficiency of such security? It was lawful for the collector, in lieu of sureties, to accept of a deposit of so much of the goods, as should, in his judgment, be sufficient. And this deposit, from the nature of the case, was to be received only after the articles had been landed, and consequently, after the amount of duties was regularly ascertained. The deposit, therefore, must have been for securing the specific sum of $1708.38, and only that sum, when due, could, by law, be charged for duties, to be paid from the proceeds of the deposited goods.

In the present case, there is no question about the fairness of the proceedings at the custom-house. The *whole transaction was according [*117
to the regular course of business. Whatever was uncertain in the condition of the bond, was reduced to certainty, by the indorsement; and the full extent of the obligation was then settled, by fair agreement of the proper agent on the part of the United States. That extent, of course, would be the measure of pledges to sureties. Such extent would measure the charge for duties on the part of a consignee, who might be principal in a bond. And if the consignee were ordered by an owner, who made the shipments abroad, to sell promptly and pay over the proceeds of sales, the whole might be completed and all accounts between them closed, at a place remote from the seat of government, such a New Orleans, before any knowledge could there be had, of the act for imposing double duties. All the official information and proceedings within the district had united to assure him of freedom from all duties or customs, on paying the amount required according to the former impost law. In such a case, to exact double duties from a consignee, who had entered the goods at the custom-house, would be

manifest injustice. It would operate as fraud, or extortion, or both. Is it for this court to believe the legislature capable of intending such wrong?

But where is the difference in principle between such a case and the case now before the court? New Orleans is not the only district where imported articles might be sold by a consignee, or by the owner himself, under such a full conviction of being liable to single duties only, and without a possibility of just compensation or redress, if the government may afterwards surprise him by exacting double duties. If a liability to double duties were known to an owner, at the time of making entry, he might choose to have the articles entered for exportation, according to the terms allowed by the general law relative to the collection of duties on imposts. But this privilege might be taken away, by the construction, under which the double duties are demanded in the present case.

The intent of the parties gives a rule for decision in cases of contract. *118] At the date of this bond, was it mutually *intended to secure the payment of double duties? No such allegation is found in the pleadings; nor is such intention to be fairly inferred from the admitted facts. On the contrary, the intention, fairly understood on each side, was to secure the payment of the single duties only, as required under the former impost law. And this intention is apparent from the penal sum of the bond, with the gross estimate of duties as mentioned in the condition, and the ascertained amount of duties indorsed on the bond.

As the whole transaction at the collector's office is agreed to have been fair, the fact of that indorsement is decisive, to prove, that with reference to the district where the goods were entered and delivered, no rule of duties on imposts had been made known, other than the former impost law. And the general principle of all law requires the rule to be prescribed or made known, before it can be obligatory. To this principle Blackstone has reference in the first and fourth volumes of his commentaries. It is true, he has said, *ignorantia juris quod quisque tenetur scire, neminem excusat.* And this he has stated, as a maxim of the Roman, as well as of the English law. But, according to him, the possibility of knowledge is essential to the obligation of knowing the law. To enforce any positive rule as a law, before the individual could be presumed to know it, would be alike inconsistent with public justice and civil right.

Indeed, this qualification relative to the opportunity and consequent presumption of knowledge, is so essential, that the statement might otherwise be questioned as deficient in accuracy. For the maxim, in terms as stated by Blackstone, is not found in the text of the Pandects indicated by his note of reference (4 Black. Com. 27), nor does that text warrant the position stated by Blackstone as a maxim, unless it be considered as applicable to the case of a law, which might be known by every one, and which, therefore, every one is holden to know, and this may be deemed the fair import of the Latin terms, in which the position is stated. If so considered, and not otherwise, it agrees with the general doctrine of the Roman law, and is a principle of universal jurisprudence.

*119] *In relation to positive law, that principle implies the necessity of its being made known, before it can impose any obligation. Positive law is a manifestation of the legislative will; and although there may be a legislative will, it does not become a law, where it is not manifested.

There was no argument on the part of the United States.

February 23d, 1815. (Absent, Todd, J.) STORY, J., delivered the opinion of the court, as follows:—The United States brought an action of debt against the defendants, on a bond given for the payment of duties on goods imported in the brig Dover into the port of Providence. Upon the pleadings in the court below, judgment was given in favor of the United States, and the defendants have brought the present writ of error to reverse that judgment.

The material facts are, that the brig arrived within the limits of the United States, on the 30th day of June 1812; and within the collection district of Providence, on the first day of July 1812. On the second day of July, an entry was duly made at the custom-house and the present bond was then executed.

The principal question which has been argued is, whether, on these facts, the goods are liable to the payment of the double duties imposed by the act of the first day of July 1812, ch. 112. That act provides, "that an additional duty of 100 per cent. upon the permanent duties now imposed by law, &c., shall be levied and collected upon all goods, wares and merchandises which shall, from and after the passing of this act, be imported into the United States from any foreign port or place." It is contended, that this statute did not take effect until the second day of July; nor, indeed, until it was formally promulgated and published. We cannot yield assent to this construction. The statute was to take effect *from its [*120
passage; and it is a general rule, that where the computation is to be made from an act done, the day on which the act is done is to be included.

It is further contended, that the importation was complete by the arrival of the vessel within the jurisdictional limits of the United States, on the 30th day of June. We have no difficulty in overruling this argument. To constitute an importation so as to attach the right to duties, it is necessary, not only that there should be an arrival within the limits of the United States, and of a collection district, but also within the limits of some port of entry. This was expressly decided in the case of the *United States* v. *Vowell*, 5 Cr. 368. Without therefore adverting to the consideration of the regularity or sufficiency of the pleadings, we are all of opinion, that on the merits the judgment must be affirmed.

Judgment affirmed, with six per cent. damages and costs.

The St. Lawrence, Webb, Master; McGregor and Penniman, Claimants. (*a*)

Withdrawal of property from enemy's country.

If, upon the breaking out of a war with this country, our citizens have a right to withdraw their property from the enemy's country, it must be done within a reasonable time: eleven months after the declaration of war, is too late.[1]

The St. Lawrence, 1 Gallis. 467, affirmed.

Appeal from the sentence of the Circuit Court for the district of New Hampshire, condemning the ship St. Lawrence and cargo. All the claims in this case, except those of McGregor and Penniman for certain parts of the cargo, were settled at the last term, and with regard to these further proof was ordered. (8 Cr. 434.)

No further proof having been produced, the case was submitted to the court, without argument.

February 25th, 1815. (Absent, Todd, J.) Story, J., delivered the
*121] opinion of the court, as follows:—*The only claims in this case now remaining for the consideration of the court, are those of Mr. Penniman and McGregor. Further proof was directed, at the last term, to be made in respect to those claims; and no additional evidence having been produced, beyond that which was then disclosed to the court, the causes have been submitted for a final decision.

In respect to the claim of Mr. Penniman, the evidence is very strong that the goods were purchased, some time before the war, by his agent in Great Britain, on his sole account. They were not, however, shipped for the United States, until the latter part of May 1813.

It is not the intention of the court to express any opinion as to the right of an American citizen, on the breaking out of hostilities, to withdraw his property purchased before the war, from an enemy country. Admitting such right to exist, it is necessary that it should be exercised with due diligence, and within a reasonable time after the knowledge of hostilities. To admit a citizen to withdraw property from an enemy country, a long time after the war, under the pretence of its having been purchased before the war, would lead to the most injurious consequences, and hold out strong temptations to every species of fraudulent and illegal traffic with the enemy. To such an unlimited extent, we are all satisfied, that the right cannot exist. The present shipment was not made until more than eleven months had elapsed after war was declared; and we are all of opinion, that it was then too late for the party to make the shipment, so as to exempt him from the penalty attached to an illegal traffic with the enemy. The consequence is, that the property of Mr. Penniman must be condemned.

And this decision is fatal, also, to the claim of Mr. McGregor. Independently, indeed, of this principle, there are many circumstances in the case unfavorable to the latter gentleman. In the first place, it is not pretended, that the goods included in his claim were purchased before the war.

(*a*) February 23d, 1815. Absent Todd, Justice.

[1] See Arnold *v.* McGregor, 15 Johns. 24.

In the next place, he was the projector of the present voyage, and became, as to one moiety, the charterer or purchaser of the ship. *Nearly all the cargo consisted of goods belonging (as it must now be deemed) [*122 exclusively to British merchants. He was, therefore, engaged in an illegal traffic of the most noxious nature; a traffic not only prohibited by the law of war, but by the municipal regulations of his adopted country. His whole property, therefore, embarked in such an enterprise, must alike be infected with the taint of forfeiture. The judgment of the circuit court must, therefore, as to these claims, be affirmed with costs.

Sentence affirmed.

Drummond's Administrators *v.* Magruder & Company's Trustees. (*a*)

Evidence in equity.—Reversal.

If the execution of an important exhibit of the complainant, be not admitted by the defendant, in his answer, who calls upon the complainant to make full proof thereof, in the court below, this court will not presume, that any other proof was made, than appears in the transcript of the record.

A copy of a deed from a clerk of the court, without the certificate of the presiding judge, that the attestation of the clerk is in due form, cannot be received as evidence, in a suit in equity.

If this court reverse a decree upon a technical objection to evidence (probably not made in the court below), it will not dismiss the bill absolutely, but remand the cause to the court below for further proceedings.

This was an appeal from the decree of the Circuit Court for the Virginia district, in a suit in chancery, brought by the trustees for the creditors of W. B. Magruder & Co. against Drummond's administrators, to compel the latter to account for funds put into the hands of their intestate by W. B. Magruder & Co.

The defendants, in their answer, said they knew no such firm or copartnership as W. B. Magruder & Co.; they could not admit it, and hoped the complainants would be put to the proof thereof. They had no knowledge of the deed of trust mentioned in the bill, and hoped the complainants would be required to make ample proof thereof. That W. B. Magruder was largely in debt to their intestate, and they believed the funds put into his hands by Magruder were intended to be applied to that debt.

The only proof of the deed of trust, appearing in the transcript of the record, was a copy certified by one Gibson, who called himself clerk of Baltimore county; without any certificate from the presiding judge that *his attestation was in due form. It purported to be an assignment [*123 of personal estate only, and was not required by the laws of Maryland to be recorded.

P. B. Key, for appellants, contended, 1. That the complainants have not shown any title to call the defendants to account. 2. That on reversal, this court must dismiss the bill.

They claim as favored creditors, at the expense of Drummond, who is an equally meritorious creditor of Magruder. They have no equity to be let in to new proof to make a new case. If the court below had dismissed the bill, relief could not have been given, on a bill of review, unless new

(*a*) February 9th, 1815. Absent, Livingston, Story and Todd, Justices.

evidence, not known at the time of the first trial, should have been produced. This court cannot send the cause back for a new trial; or if they can, they will not in favor of these exclusively favored creditors.

R. I. Taylor, contrà.—The cause is now placed on very different ground from that on which it appeared in the court below. There, the question was, whether the defendants could set off a debt due to their intestate from W. B. Magruder, against this claim in the right of W. B. Magruder & Co. The only question now is, whether the court below erred in giving a decree in favor of the complainants, without evidence of the execution of the original deed of assignment. The court below could not have decreed in favor of the complainants, unless they had been satisfied of the execution of the deed, or the proof of its execution had been waived by the other party. This court, therefore, will presume that the execution of the deed was so proved, or the proof waived. Exhibits may be proved *vivâ voce* at the trial. It was not necessary to reduce the testimony to writing. Harrison Ch. Prac. 403; Laws of U. S. vol. 1, p. 68; vol. 6, p. 100. If incompetent evidence was admitted in the court below, *without objection, it is no cause for reversal of the decree.

*124]

P. B. Key, in reply.—The execution of the deed was put in issue by the answer, and it ought to appear upon the record, that it was proved. If the complainants have failed to put the proof upon the record, it is their own fault. The answer puts in issue the right of the complainants to sue. A copy from the record, even if properly authenticated, would not have been sufficient, because it is not such a deed as the law requires to be recorded.

February 25th, 1815. (Absent Todd, J.) WASHINGTON, J., delivered the opinion of the court, as follows:—The appellees filed their bill on the equity side of the circuit court of Virginia, for the purpose of recovering a sum of money due from William Drummond to William B. Magruder & Co. To entitle themselves to sustain this suit, they allege in their bill, that they are creditors and trustees of William B. Magruder & Co., by virtue of a deed of assignment annexed to the bill as part thereof. This exhibit purports to be an assignment to the complainants of all the partnership effects, debts and credits of William B. Magruder & Co., in trust for the payment of certain favored creditors of that company, amongst whom are the complainants.

The appellants filed their answer denying any knowledge of such a copartnership as William B. Magruder & Co., and call upon the complainants to prove the same. They also deny any knowledge of the deed of trust mentioned in and annexed to the bill, and call upon the complainants to make full proof of it. To this answer, there was a general replication; and the cause being heard upon these proceedings, the exhibits and examination of witnesses and the report of the master commissioner, a decree was rendered for the complainants for the sum reported to be due from the defendant to William B. Magruder & Co.; from which decree, the defendants appealed to this court.

*The exhibit mentioned in and annexed to the bill, alleged to be an indenture of assignment from William B. Magruder & Co. to the complainants, appears to be a copy of a sealed instrument certified to be a true copy from the records of Baltimore county court, under the hand of

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William Gibson, who styles himself clerk of that court. The record contains no other evidence of the authenticity of this instrument; and the question is, whether the circuit court erred in decreeing, upon this evidence, in favor of the appellees.

The right of the appellees to bring this suit is, by their own showing, merely derivative; and consequently, it was incumbent on them to prove by legal evidence, that the deed of assignment from William B. Magruder & Co., under which they claimed this right to sue a debtor of that house, was duly executed. The answer put this matter directly in issue, by denying any knowledge of the deed exhibited with the bill, and requiring full proof to be made of it. This court is not at liberty to presume, that any other proof of this deed was given in the court below, than what appears on the record. That proof consists in the certificate of a person who styles himself clerk of Baltimore county court, that the paper to which his certificate is annexed, is a copy of a deed taken from the records of the court of that county; but there is no such certificate as the act of congress requires, to satisfy the court that the attestation affixed to this copy, is in due form. It follows, that the instrument so certified cannot be noticed as a copy of a deed from William B. Magruder & Co.; and as it is the foundation of the complainants' right, the court erred in decreeing in favor of the complainants, upon such defective evidence. But as this court cannot fail to perceive, that the objection to the proof of this instrument is merely technical, and was probably not made at all in the circuit court, it would seem improper, to dismiss the bill absolutely. The court is unanimous in reversing the decree; and a majority are of opinion, that the cause ought to be remitted to the circuit court of Virginia, for further proceedings to be had therein.

Decree reversed, and remanded for further proceedings.

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*The Mary, Stafford, Master. (a) [*126

Condemnation as prize of war.—Bottomry claimant.—Continuity of voyage.

The condemnation of a vessel as enemy's property, for want of a claim, cannot prejudice the claim for her cargo; but it is still competent for the claimant of the cargo, to controvert the fact that the vessel was enemy's property, so far as that fact could prejudice his claim.

One claimant cannot be injured by the contumacy of another.

The holder of a bottomry-bond cannot claim in a court of prize.

An American vessel sailing from England, in August 1812, in consequence of the repeal of the British orders in council, and compelled by dangers of the seas, to put into Ireland, where she was necessarily detained until April 1813, when she sailed again for the United States, under the protection of a British license, being captured on the voyage by an American privateer, was protected by the president's instructions of the 28th of August 1812. The continuity of the voyage was not broken.

Appeal from the sentence of the Circuit Court for the district of Rhode Island, condemning the cargo of the Mary, as prize to the privateer Paul Jones.

This cause was argued at last term by *Stockton* and *Pinkney*, for the

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(a) February 20th, 1815. Absent, Todd, Justice.

claimants, and *J. Woodward*, for the captors (8 Cr. 388), when leave was given by this court, for further proof, by affidavits, on the following points.

1. As to the citizenship of N. J. Visscher.

2. As to the names of the other heirs of General Fisher, who are interested in the property ; the place of their residence, and their national character.

3. As to the time when N. J. Visscher went to England ; the object he had in view in going thither ; how long he resided there ; when the cargo was purchased ; and when he returned to the United States.

4. As to the instructions which the Paul Jones had on board, at the time of the capture of the Mary ; and particularly, whether the president's instruction of the 28th of August, 1812, had been delivered to the captain, or had come to his knowledge, at the time of the capture ; or whether the Paul Jones had been in port, after the 28th of August, 1812, and before the capture.

The captors also had leave to make further proof as to the same points.

The further proof now offered consisted of the affidavits of the claimant, N. J. Visscher, Jacob S. Pruyn and David Gelston, collector of the customs for the port of New York. The affidavit of N. J. Visscher stated, in substance, that he, and sundry other persons (whose names and places of residence are mentioned, and who are all citizens and residents of the
*127] United States), are *the sole heirs-at-law and personal representatives of the late General Garret Fisher, who died in London, intestate. That he, in behalf of himself, and as agent for the other heirs, went to England (having first obtained leave from the war department, he being a military officer in the service of the United States), in consequence of an agreement between him and the other heirs, dated June 19th, 1811 (which original agreement is annexed to the affidavit). He arrived in England on the 22d of August 1811, and obtained letters of administration on the estate of General Fisher, collected the effects, converted them into cash, paid the debts, and was prepared to remit the balance to the United States, long before the war was known in England ; and was waiting for a favorable opportunity of investing the same in property that could be advantageously sent to the United States, the balance of exchange being then greatly against him, and not being able to invest the whole in United States' stock. That as soon as the revocation of the English orders in council took place, supposing that it would be followed by the repeal of the non-importation law of the United States, he gave orders for the purchase of British goods to nearly the whole amount of the balance remaining in his hands, which purchase, including the goods now in question, was made by Harman Visger, his agent, before the war was known in England, who caused them to be sent to Bristol to be shipped, where they arrived in July and August ; whence they were shipped, early in August, on board the American brig Mary. That the goods were the sole property of the claimant, for himself and the other heirs of General Fisher. That he left England, as soon as his business was settled, and arrived in the United States, on the 19th of October 1812.

The affidavit of Mr. Pruyn confirmed that of Mr. Visscher, as to the residence and citizenship of the claimant and the others interested in the cargo. The affidavit of Mr. Gelston stated the fact, that a copy of the president's instruction of the 28th of August 1812, was given to the commander

of the Paul Jones, before she sailed on the cruize in which she captured the Mary. No further proof was offered on the part of the captors.

**Stockton*, for the claimant, after reading the further proof offered by the claimant, said, he should rest the case, in the opening, upon the argument formerly made. [*128

J. Woodward, for the captors, was directed by the court to show wherein this case differs from that of *The Thomas Gibbons*, decided at last term, upon the effect of the president's instruction of the 28th of August 1812. (8 Cr. 421.)

Woodward.—The Thomas Gibbons was an American vessel, and sailed so early as to be presumed to have sailed in consequence of the repeal of the orders in council. But we contend, that the Mary, sailing from Ireland, under a Brstish license, as late as April 1813 (which license was obtained for the vessel and cargo, by a British subject in his own name), and laden with British goods, must be taken to be a British vessel, and not as sailing in consequence of the repeal of the British orders in council, within the meaning of the instruction of the 28th of August. But the fact that the vessel has not been claimed, is clear proof that she was British.

The voyage from Ireland, in April 1813, so far as respects those instructions, is a voyage *de novo*, whatever it may be considered to be upon more general principles of law. The intent of these instructions was to protect American vessels and their cargoes, sailing from England, under the impression that the repeal of the orders in council would have been followed by a repeal of our non-importation law, and a cessation of hostilities ; but not to protect vessels sailing with a full knowledge that those consequences had not, and probably would not, follow the repeal of the orders in council. At the time the Mary sailed, all such expectations had ceased. The instructions are derogatory to the rights of war, and the party wishing to protect himself thereby must bring himself strictly within their meaning and intent. The vessel and cargo were safe at Waterford, and the political relation between the two countries was then well understood, *there was no necessity of her sailing from thence ; she knew that the war was raging with increased violence. [*129

The new license, although it refers to the old one, bears a very different character. The old one was innocent, because it was not then the license of a belligerent, and did not give a belligerent character to what it protected ; but the new had all the characters of a belligerent license, notwithstanding its connection with the old. When she sailed, she knew, or might have known, and taken warning by the act of congress of the 2d of January 1813, which extends the protection of the instructions only to vessels sailing before the 15th of September 1812. The instructions merge in, or are controlled by, the provisions of that act. A vessel could not be protected by the instructions, unless she sailed not only in consequence of the repeal of the orders in council, but before the 15th of September 1812.

The necessity for a new license shows that it was a new voyage. She was obliged to take new papers and a new clearance. But if a voyage be legal in its commencement, and before it be finished, become illegal, and the party has an opportunity to put an end to it, he is bound to do so. The

prosecution of the voyage, after a knowledge of its illegality, and after an opportunity given to abandon it, must be considered as placing the party *in delicto*.

If this property was purchased, after knowledge of the war had reached England, it is liable to condemnation. The invoices are dated the 13th of August, and the war was known in Liverpool, on the 18th of July. By the order for further proof, the claimant is called upon to prove the time when the cargo was purchased. No such proof is offered. The affidavit of Mr. Visscher, if it could be considered as proof, does not state the time, but merely states, in general terms, that the purchase was made before the war was known in England. This is not such proof as the order requires. The proof of the fact, if it exist, is in England, why has it not been obtained? It is the most material fact in the case. The voluntary affidavit of the party himself, who is so deeply interested in the cause, cannot be evidence. At
*130] the last term, *the court wanted further evidence of that fact. They have not obtained it, nor is it shown that it was out of the power of the claimant to produce it. It was in his power. But it was not in our power to produce evidence of the contrary. It is not probable, that the witnesses would have consented to a voluntary examination on our part, and we had no means to compel them to testify. We rely upon this defect of evidence.

Emmett, on the same side.—The condemnation of the vessel, is final and conclusive, there being no appeal. Part of the cargo is in the same condition: 160 bundles of steel, worth about $1000, are unclaimed, and of course, no appeal was taken and they belong to the libellants. N. J. Visscher filed two claims, and therefore, had time to rectify the mistake if any were made. It is clear, therefore, that there were articles on board which did not belong to N. J. Visscher, and that he intended to disclaim certain parts of the cargo.

This case is not within the reason of the decision in the case of *The Thomas Gibbons*. The intention of the instructions was, to exempt the property from capture, not to give it an entire immunity. This could be done only by the legislative power. The object of the instructions was to suspend the prize act, in this particular, until the legislature could interfere. In the case of *The Thomas Gibbons*, this court, in delivering its opinion, has connected the instructions with the act of congress of 2d January 1813, and seems to hold out the idea, that the time of sailing of a vessel must be limited to the 15th of September, in order to be protected by the instructions. The act of congress had made that definite which the instructions had left undefined. If the instructions and the act are not thus to be connected and construed together, there is no time limited, and a vessel may, at any period of the war, be protected by those instructions.

Does this vessel come within those instructions? Is she a vessel owned by citizens of the United States? She has been condemned as enemy's property. From that sentence there has been no appeal. It is conclusive.

*131] *But although that objection seems conclusive, yet there is a still stronger ground of condemnation. She did not sail from Waterford, until nine months after war was declared. Here was ample time for countermanding her voyage, after knowing that the repeal of the orders in council

would not produce a cessation of hostilities. Can such a case be protected by the instructions?

The further proof furnishes irresistible evidence of trading with the enemy. The order for further proof calls for evidence of the national character of Visscher, and those interested with him in the claim, and of the time when the goods were purchased, as well as with regard to the question whether the instructions were on board the privateer. It is clear, therefore, that the court were not then satisfied as to any of those points.

No further competent evidence has been produced as to the time of purchase. The court will not receive as proof, the affidavit of the interested party himself, when it is clear, that better evidence must have been in his power. Why did he not produce the affidavit of his agent, who made the purchases, or the bills of parcels, which he must have in his possession, by which to settle with the other heirs? These bills of parcels also would have shown whether other parts of the cargo as well as the 160 bundles of steel, did not belong to Harman Visger.

But this was a clear case of trading. Visscher was only to collect and remit the proceeds of the estate. Instead of which, he goes to trading with it for his own benefit, not that of the heirs. By undertaking to ship goods, he took the risk on himself, and if lost, he must account to the other heirs. It is immaterial, however, whether the goods were purchased before or after knowledge of the war. *Case of the St. Philip*, cited in *Potts* v. *Bell*, 8 T. R. 556, from the MS. notes of Sir E. Simpson.

LIVINGSTON, J.—Was not this point settled in the case of *The Rapid?* (8 Cr. 155.)

Emmett.—I think it was; but lest it should not *have been, I refer [*132
the court to the case of *The Juffrow Louisa Margaretha*, 1 Rob. 170 (Am. ed.), cited in the case of *The Hoop; The Eenigheid*, Ibid. 177; *The Fortuna*, Ibid. 178; Sir WILLIAM SCOTT's judgment in *The Hoop*, Ibid. 181, where he does not allow an excuse either of convenience or necessity. A license from the government of the United States ought to have been obtained for the Mary, or the voyage abandoned. *The William*, 1 Rob. 180.

A distinction is attempted to be taken between this case and that of *The Rapid*. It is said, this vessel was in motion. If a vessel has been in motion so far that there is no opportunity of countermanding the voyage, this distinction might be relied upon. But here there was time for countermanding. Upon this point, see again the case of *The Fortuna*. When was the Mary in motion? War was published in London, on the 26th of July. This vessel did not begin to load until August, and did not sail from Bristol, until three weeks after knowledge of the war. N. J. Visscher himself was present and might have countermanded the voyage, which is a circumstance of great importance. *The Juffrow Catharina*, 5 Rob. 142 (Eng. ed.).

STORY, J.—The case of *The Rapid* differs from this. She went from this country to that of the enemy, after knowledge of the war.

Emmett.—As to *The Rapid*, the condemnation was owing to the presence of Harrison, who might have countermanded the voyage, but did not.

Whether the party be in the country at the time of the breaking out of the war, or goes there afterward, is immaterial; in each case, he is equally bound to countermand the voyage. The present case therefore is precisely that of *The Rapid.* But N. J. Visscher was in England, long after the Mary put into Waterford. He did not leave England until the 7th of September; the Mary arrived at Waterford in August. He knew that the vessel must remain there until the spring, and that she could not arrive in the United
*133] *States until nearly a year after the declaration of war. Why did he not apply to the United States for a license?

The sailing from Waterford was a new voyage. We are to consider the transaction, not in a commercial point of view, but as it is affected by public policy and national law. To every belligerent purpose, it was a voyage *de novo.* It is not protected by the act of congress of 2d January 1813. That act requires that the vessel should have sailed before the 15th of September 1812, and should have sailed in consequence of the repeal of the orders in council. The act has no prospective view. Visscher knew that it did not protect this vessel. He traded at his peril. *The Hoop,* 1 Rob. 181.

But if, contrary to expectations, this property should be restored, we trust it will be with costs. There was no proof of property on board. She was found sailing with a British license, dated long after the war was known. She had sailed long after the 15th of September, and did not appear by any documents on board to be within the president's instructions of the 28th of August 1812. It is not usual to give costs, after an order for further proof. If the papers withheld, had been produced, it is probable a great deal more of the property would be found to belong to Harman Visger.

Pinkney, in reply.—It is said, that Mr. Visscher has been trading for his own benefit, upon the funds he received. There is no foundation for such an assertion. The letters of Harman Visger, and all the documents show, that the goods were purchased and shipped for the joint benefit of all the heirs. He did the best for the interest of all concerned, according to his judgment, and agreeable to the agreement of the parties, which contemplates and provides for the case of his being obliged to remit goods, and binds him to cause them to be insured.

Two questions arise in this case, 1. Was the Mary the property of an
*134] American citizen? *2. If so, was she, when captured, sailing in consequence of the repeal of the British orders in council?

1. Was the Mary the property of an American citizen? All the documentary evidence shows that she was. But it is contended, that she was the property of one Smith, a Scotchman, and this assertion depends upon the evidence of the cook, who says he believed it because Smith ordered the men about. But it appears that this cook was shipped just as the vessel sailed.

It is said also, that the ship, not having been claimed, was condemned, and no appeal has been prayed, which shows conclusively that she was British property. The reason why she was not claimed appears in the evidence. She was hypothecated for more than she was worth. If lost by capture, the owner is not personally liable, but if he should claim, and the vessel should be restored, he would be liable for the amount of the bot-

tomry-bond. Visscher, who held the bond, could not claim in his own name, for it has been decided, that such a lien on the ship will not support a claim, and he could not use the name of the owner, without his consent, which he would certainly not give to impose a liability on himself. It was his interest to make it a total loss. A sentence of condemnation, founded upon the want of claim, accounted for in such a manner, cannot surely be conclusive evidence that the ship was not *bonâ fide* owned by an American citizen.

2. Was she sailing in consequence of the repeal of the orders in council? This voyage unquestionably had its inception in consequence of that repeal. We think, this case falls precisely within the principles decided in that of *The Thomas Gibbons*. But it is said, that the deviation to Waterford makes it a new voyage. That this was a continuation of the voyage at the common law, is admitted; but not in a court of prize. Why should there, in this respect, be a difference between the law-merchant and the law of *nations? We contend, that the law of nations, being more enlarged, [*135
is less rigid than the law-merchant.

But as to prize law, the English courts of prize always connect voyages of this kind. Continuity is the favorite doctrine of a prize court. The British courts of prize, on the subject of contraband of war, seem to have been enamored of this doctrine of continuity; they condemn vessels returning with the proceeds of contraband; thereby making the homeward voyage the outward voyage, and the proceeds of contraband, the contraband itself.

But it is said, that this vessel was bound on an illegal voyage, and therefore, cannot plead distress. She acted on the belief that the repeal of the orders in council would produce peace, as all others did, and if she was in error, *communis error facit jus*. The president's instructions and the act of congress go on the ground that this error was excusable.

This vessel is within the benefit of the maxim *actus Dei nemini facit injuriam*. She would certainly have been protected by that maxim, if she had been all that time driven about the Atlantic, by storms and contrary winds; and her case is still the same; she was still *in itinere*. It is said, that the instructions were a substitute for a legislative act, and that the act of congress has superceded the instructions. This we do not admit. They may both stand together—their objects are different.

But we are referred to the policy of the instructions, and it is said, that this vessel was not within that policy. The adventure was undertaken, in the belief that the war would cease; the going to Waterford and the detention there were necessary to the prosecution of the voyage.

But it is said there was *locus pœnitentiæ*. That Visscher knew how long the vessel would be detained there, and therefore, ought to have abandoned the voyage. There is no evidence of that fact, if it were material. But if he did know it, he knew also, that the voyage was innocent in its inception, and that its continuity could not be broken by this necessary deviation.

*As to his obtaining a second British license, it was necessary; he [*136
could not leave Waterford without it. It was not a voluntary act. He acted under a *vis major*. The second license was only a renewal of the first; if he had authority to go at all, he might lawfully use the means. After his return to the United States, he did not apply for an American

license, because he was daily expecting the arrival of the Mary; besides, he knew that she was protected by the president's instructions. The opposite argument is raised upon the supposition that she must not only commence her voyage, under an impression that war had ceased, but must continue under the same impression, during the whole voyage. Must she return, if, in the midst of the Atlantic, she is undeceived?

The voyage was commenced, under a belief that war had ceased, and was continued, under the impression that she would be protected by the instructions of the president. Although there was war between the United States and Great Britain, yet there was peace between the United States and this adventure. This case, in principle, is exactly that of *The Thomas Gibbons.*

But we are accused of not having produced sufficient further proof of the proprietary interest in the cargo and the time of purchase. They say the only evidence is the affidavit of N. J. Visscher—*testis in propriâ causâ.* Such testimony is, and always must be admitted in prize causes. N. J. Visscher is a man of fair character. But his testimony was matter of supererogation. Every document and paper showed before that the property was American.

But they say, that as we undertook to furnish further proof, we ought to have done so—that we were in possession of the bills of parcels and ought to have produced them. The fact is not so, nor can it, in the nature of commercial transactions be so. We had the invoices, but not the bills of parcels, they were the vouchers of Harman Visger, who made the purchases; they remained in England, and it could not be expected that we should send there for them. N. J. Visscher has produced his test affidavit, which is all that could be expected.

*137] *But there is an objection to the omission to claim 160 bundles of steel. By a comparison of the ship's papers with the claim, it will be found that he meant to claim, and did claim, the whole of the cargo. The omission of this item was by mistake.

The rule that every trading with an enemy subjects to confiscation, will not, I trust, be sanctioned by this court. All the essential parts of this transaction took place in peace, or in imagined peace. The rule of trading with an enemy is not absolutely inexorable. See the case of *The Madonna delle Gracie*, and the principles stated by Sir W. Scott in *The Hoop.* The danger of treasonable intercourse is the ground of the rule. But here was no such danger. Another ground of condemnation of goods is said to be their adherence to the enemy. But here, instead of adhering to the enemy, the goods were withdrawn by the earliest opportunity. It was certainly for the interest of the United States, that the goods should be withdrawn from the power of the enemy. But it is said, that it was contrary to his allegiance. Is it contrary to his allegiance to do that, the forbearance of which would be for the advantage of the enemy? Why should we give a new face of terror to the principles of war?

The case of *The Rapid* was essentially different. There, was opportunity for treasonable intercourse. She sailed from this country, after the war was declared. Let not the rule be made an iron rule. It has been carried far enough. There is not a shadow of authority for condemnation in a case like this, where a mere remittance of funds, acquired before the war, was intended to be made at the first knowledge of the war.

All the cases cited against us, are to be found in the case of *The Hoop*, except one referred to in *Potts* v. *Bell*. Not one of them includes the present case. 1. *The Ringende Jacob* was a clear case of mercantile trading, in open war. 2. *The Lady Jane:* this case is relied upon because the cargo was the produce of goods sent to Spain before the war. But the commercial adventure was planned and concocted during the war. 3. *The *Deergarden of Stockholm* was a case of trade with the enemy, wholly originating during war. [*138 4. *The Elizabeth of Ostend* was another clear case of trading during war. 5. *The Juffrouw Louisa Margaretha:* according to the statement of this case in Bosanquet & Puller (*Escott's Case*), part of the goods were purchased long after the war had broken out, and the adventure was projected in the heat of the war. One part of the cargo was considered as infected by the other. 6. *The St. Louis* or *El Allessandro:* in that case, the goods were shipped in the midst of the war, and were bound to the port of an enemy. 7. In the case of *The Compte de Wohronzoff*, the goods were shipped long after the existence and knowledge of the war, and in the regular prosecution of trade. 8. So, in *The Expedite von Rotterdam*, the exportation of goods was from the enemy's country, in the midst of the war. 9. In the case of *The Bella Guidita*, the voyage was direct to an enemy country, with provisions. 10. In *The Eenigheid*, the voyage was to, not from, the enemy's country, and was after the knowledge of the war. In that case, there might be treasonable intercourse, but here there could be none. 11. *The Fortuna* was the case of a voyage to the enemy's country, which might have been countermanded after knowledge of the war. 12. In the case of *The Freeden*, the voyage was also to an enemy's port, after notice of the war. 13. In *The William*, which is a case much relied on by the opposite counsel, it appears in 8 T. R. 560, that the sugars in question were received by the British merchant's agent, from the enemy, after the war broke out, and were received in the course of a general trade, which is the feature that distinguishes this case of the Mary from all that have been cited.

The claimants in those cases were general merchants, in the regular prosecution of their trade ; but ours is a single case of accidental remittance of funds, constituting no part of a general trade. To this long list of cases, Sir John Nicholl, in *Potts* v. *Bell*, 8 T. R. 556, has added one more—*The St. Philip*, in 1747, where the Lords refused evidence that the goods were bought before the war, being of opinion, that the effects of British subjects, taken trading with the enemy, are good prize. This is certainly a hard case. It is very briefly stated ; none of the particular circumstances being mentioned. *It does not appear, how long after the breaking out of the war the goods were shipped, which would be a very important [*139 consideration in the innocence or guilt of the transaction. This court, it is presumed, will not push the law of war to its utmost extent, and certainly, not further than it has been extended by the English courts.

As to costs. If the Mary was within the president's instructions, the captors are not entitled to costs and expenses.

Story, J.—When further proof has been ordered, are not costs and expenses to be allowed, of course ?

Pinkney.—I think not.

February 25th, 1815. (Absent, Todd, J.) MARSHALL, Ch. J., delivered the opinion of the court, as follows :—Nanning J. Visscher, an American citizen, administrator of General Garret Fisher, deceased, went to Great Britain, in the year 1811, for the purpose of collecting the estate of the said General Garret Fisher in that country, and remitting it to the United States, for those who were entitled to it by law. Immediately after the repeal of the orders in council, the said Nanning J. Visscher invested a considerable portion of the funds of the said estate, in British merchandise, and engaged the brig Mary, a vessel having an American register, to convey it to the United States. The Mary was engaged at Woolwich, and came round to Bristol, where her cargo was procured. She began to take it on board on the 3d of August 1812; and on the 15th of August, having completed her lading, she sailed from the port of Bristol for the United States, having on board a British license, dated on the 8th of July 1812. While prosecuting her voyage, she encountered such severe weather, and received such damage, as to be under the necessity, in order to avoid the danger of foundering at sea, to put into the port of Waterford, in Ireland,
*140] for the purpose of being repaired. While lying in Waterford, *and undergoing repairs, she was also detained by a general embargo, imposed on all American vessels in the ports of Great Britain. The Mary, being released by the high court of admiralty, and her repairs being completed, her license was renewed on the 27th of March 1813, and she sailed from Waterford, for Newport, in Rhode Island, on the 7th of the following month. On the 22d day of April, she was captured by the American privateer Paul Jones, Captain Taylor, and brought into Newport, Rhode Island, where the vessel and cargo were libelled as enemy property. No claim being put in for the vessel, she was condemned; but the cargo, which was claimed by Nanning J. Visscher, for himself and the other heirs of General Fisher, was restored. From this sentence, the captors appealed. In the circuit court, the sentence of the district court was reversed and the cargo was condemned. From this sentence of condemnation, an appeal was taken to this court, and the case was argued at the last term.

The president's instructions of the 28th of August 1812, were then for the first time relied on, but it was not admitted on the part of the captors, that these instructions were known to Captain Taylor. For the ascertainment of this important fact, it was necessary to admit further proof. It being uncertain how this fact would appear, the court also directed further proof on other points, which were involved in some degree of doubt.

It is now proved incontestibly, that the instructions of the 28th of August were on board the Paul Jones, at the time of the capture. These additional instructions direct "the public and private armed vessels of the United States not to intercept any vessels belonging to citizens of the United States, coming from British ports to the United States, laden with British merchandise, in consequence of the alleged repeal of the British orders in council." The effect and operation of these instructions were settled in the case of *The Thomas Gibbons*. The only inquiry to be made in this case is, do they apply to the Mary?

*To sustain their application, it must appear, 1. That the Mary
*141] belonged, at the time of capture, to a citizen of the United States. 2. That she was coming from a British port to the United States, laden with

British merchandise, in consequence of the alleged repeal of the British orders in council.

1. Was the Mary the property of an American citizen? She carried an American register, which represented her as the property of James B. Kennedy, a citizen of the United States. She sailed from Charleston, in South Carolina, as an American vessel, commanded by Captain Stafford, a native American citizen, who continued to command her, until her capture, and who always supposed her to be the property of Mr. Kennedy. Her first license, which was granted before intelligence of the declaration of war had reached England, was granted to her as an American vessel; and in the renewed license, she was still considered as an American vessel.

In opposition to this testimony, is the deposition of one of the mariners, who supposes one Smith, a British subject, to be a part-owner of the Mary, because the master so informed him, and because Smith ordered the people about as much as Mr. Kennedy or the master. So much of this deposition as refers to the information of the master, is not very probable; and if true, must either discredit the master's testimony, or be considered as a communication made for some particular purpose, while the vessel was in a British port. That part of it which states Smith to have ordered the people about as much as Mr. Kennedy, in not very intelligible, since Mr. Kennedy, the owner of the Mary, does not appear to have been on board the vessel, or at Bristol, or at Waterford.

*Had a claim been put in for the Mary, this testimony, opposed to the proof furnished by the register and the deposition of the master, would have been light indeed. But no claim was filed for the Mary, and she was, consequently, according to the course of the court of admiralty, condemned as enemy property. [*142

This sentence is now relied on by the captors, as establishing the fact. The argument has been pressed with great earnestness, and is certainly entitled to serious consideration. The conclusive effect which the captors would give to this sentence, is founded in part on reasoning which is technical, and in part on the operation which the fact itself ought to have on the human mind, in producing the conviction that the claim was not filed, because it could not be sustained. A sentence of a court of admiralty is said not only to bind the subject-matter on which it is pronounced, but to prove conclusively the facts which it asserts. This principle has been maintained in the courts of England, particularly, as applying to cases of insurance, and has been adopted by this court in the case of *Croudson and others* v. *Leonard*. (4 Cr. 434.) Its application to the case at bar will be considered.

The Mary was not condemned by the sentence of a foreign court of admiralty, in a case prior to and distinct from that in which the cargo was libelled. She was comprehended in the same libel with the cargo. The whole subject formed but one cause, and the whole came on together before the same judge. By the rules of the court, the condemnation of the vessel was inevitable; not because in fact she was British property, but because the fact was charged, and was not repelled by the owner, he having failed to appear and to put in his claim. The judge could not close his eyes on this circumstance; nor could he, in common justice, subject the cargo, which was claimed according to the course of the court, to the liabilities incurred

by being *imported in a hostile bottom. In the same cause, a fact, not controverted by one party, who does not appear, and therefore, as to him taken for confessed, ought not, on that implied admission, to be brought to bear upon another who does appear, does controvert, and does disprove it. The owners of the cargo had no control over the owner of the vessel. Visscher could not force Kennedy to file a claim; nor could Visscher file a claim for him.

The evidence that the vessel was American property could not be looked into, so far as respected the rights of Kennedy, because he was in contumacy; but Visscher was not in contumacy. He was not culpable for, and therefore, ought not to suffer for, the contumacy of Kennedy. That contumacy, in reason and in justice, ought not to have prevented the district court from looking into the testimony concerning proprietary interest in the vessel, so far as the rights of other claimants depended on that interest. Nor is the court informed of a legal principle which should have restrained the district judge from looking into this testimony. If we reason from analogy, we find no principle adopted by the courts of law or equity, which, in its application to courts of admiralty, would seem to subject one claimant to injury from the contumacy of another.

A judgment against one defendant for the want of a plea, or a decree against one defendant for want of an answer, does not prevent any other defendant from contesting, so far as respects himself, the very fact which is admitted by the absent party. No reason is perceived why a different rule should prevail in a court of admiralty, nor is the court informed of any case in which a different rule has been established.

If the district court was not precluded by the non-claim of the owner of the vessel, from examining the fact of ownership, so far as that fact could affect the cargo, it will not be contended, that an appellate court may not likewise examine it. This case is to be distinguished from those which
*144] *have been decided on policies of insurance, not only by the circumstance that the cause respecting the vessel and the cargo came on, at the same time, before the same court, but by other differences in reason and in law, which appear to be essential.

The decisions of a court of exclusive jurisdiction are necessarily conclusive on all other courts, because the subject-matter is not examinable in them. With respect to itself, no reason is perceived for yielding to them a further conclusiveness than is allowed to the judgments and decrees of courts of common law and equity. They bind the subject-matter as between parties and privies.

The whole world, it is said, are parties in an admiralty cause; and therefore, the whole world is bound by the decision. The reason on which this *dictum* stands will determine its extent. Every person may make himself a party, and appeal from the sentence; but notice of the controversy is necessary, in order to become a party, and it is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. Where these proceedings are against the person, notice is served personally, or by publication; where they are *in rem*, notice is served upon the thing itself. This is necessarily notice to all those who have any interest in the thing, and is reasonable, because it is necessary,

and because it is the part of common prudence for all those who have any interest in it, to guard that interest by persons who are in a situation to protect it. Every person, therefore, who could assert any title to the Mary, has constructive notice of her seizure, and may fairly be considered as a party to the libel. But those who have no interest in the vessel, which could be asserted in the court of admiralty, have no notice of her seizure, and can, on no principle of justice or reason, be considered as parties in the cause, so far as respects the vessel. When such person is brought before a court in which the fact is examinable, no sufficient reason is perceived, for precluding him from re-examining it. The judgment of a court of common law, or the decree of a court of equity, would, under such *circumstances, be re- [*145
examinable in a court of common law, or a court of equity; and no reason is discerned why the sentence of a court of admiralty, under the same circumstances, should not be re-examinable in a court of admiralty.

This reasoning is not at variance with the decision that the sentence of a foreign court of admiralty, condemning a vessel or cargo as enemy property, is conclusive in an action against the underwriters, on a policy in which the property is warranted to be neutral. It is not at variance with that decision, because the question of prize is one of which courts of law have no direct cognisance, and because the owners of the vessel and cargo were parties to the libel against them.

In the case of *Croudson et al.* v. *Leonard*, two judges expressed their opinions. Those who were silent, but who concurred in the opinion of the court, undoubtedly acquiesced in the reasons assigned by those judges. On the conclusiveness of a foreign sentence, Judge JOHNSON said, "The doctrine appears to me to rest on three very obvious considerations: the propriety of leaving the cognisance of prize questions exclusively to courts of prize jurisdiction; the very great inconvenience, amounting nearly to an impossibility, of fully investigating such cases in a court of common law; and the impropriety of revising the decisions of the maritime courts of other nations, whose jurisdiction is co-ordinate throughout the world." These reasons, undoubtedly, support the opinion founded on them; but it will be readily perceived, that they would not apply to the case before the court.

After stating the conclusiveness of the sentence of courts of exclusive jurisdiction, Judge WASHINGTON said, "This rule, when applied to the sentences of courts of admiralty, whether foreign or domestic, produces the doctrine which I am now considering, upon the ground that all the world are parties in an admiralty cause. The proceedings are *in rem;* but any person having an interest in the property may interpose a claim, or may prosecute an appeal from the sentence. *The assured is emphatically [*146
a party, and in every instance has an opportunity to controvert the alleged grounds of condemnation, by proving, if he can, the neutrality of the property. The master is his immediate agent, and he is also bound to act for the benefit of all concerned; so that in this respect he also represents the insurer." The very foundation of this opinion, that the assured is bound by the sentence of condemnation is, that he was in law a party to the suit, and had a full opportunity to assert his rights. This decision cannot be applicable to one in which the person to be affected by the sentence of condemnation was not, and could not, be a party to it.

If the sentence condemning the Mary did not technically preclude the owners of the cargo from asserting in the court of admiralty her American character, the weight of the evidence on that point is to be fairly estimated. In support of her American character, the documentary evidence is complete and unequivocal; and the corroborative testimony is calculated to strengthen a belief in the verity of the register. In support of her hostile character, the omission of the owner to file his claim is chiefly relied on. The importance of this circumstance is not to be controverted. Its weight, however, is much diminished, by the consideration that the case affords no reasonable ground for believing that the owner could have been restrained from making his claim, by the apprehension of failing to support it. There is no testimony, and there is no reason to suspect that any testimony was attainable, which could have successfully opposed the register. This consideration gives plausibility to the argument, that the worthlessness of the vessel, the bottomry-bond with which she was charged, the expectation that the condemnation would relieve him from that debt, might be the motives for not resisting that condemnation. It is possible, too, that in point of fact, he might not have actual notice of the proceedings. This is not to be presumed, and is not to benefit the owner; but it is possible; and may
*147] be taken into the *account, in estimating the effect of this negligence on persons who are not culpable for it.

It has been said, that the owners of the cargo, and that Nanning J. Visscher, who held the bottomry-bond, ought to have filed a claim. But the interest under the bottomry-bond could not have been asserted; nor had the owners of the cargo any right to the vessel. Had they known that they were to be, in any manner, affected by the character of the vessel, they might, and most probably would, have exerted themselves to have brought forward Kennedy as a claimant, or to have accounted for his silence; but in the district court the president's instructions were unknown, and their effect unthought of. The owners of the cargo, therefore, neither troubled themselves about the vessel, not attempted to account for the claim to her not being filed. When, afterwards, in this court, the bearing of those instructions was discovered, and further proof was directed, that direction did not extend to proof, which might account for the failure of Kennedy to assert his title to the vessel. This may excuse the claimants for not producing testimony to that point.

Upon the best consideration we have been able to bestow upon the subject, the court is of opinion, that the Mary, in this claim, must be deemed to have been the property of an American citizen.

2. Did she sail from a British port, in consequence of the alleged repeal of the British orders in council? That the voyage in its inception was produced by the opinion, that the repeal of the British orders in council would terminate the differences between the two nations, is too clear for controversy. Had the Mary proceeded directly from Bristol to her port of destination in the United States, the counsel for the captors would not contend, that it was not a voyage described by the instructions of the 28th of August. But the delay in the port of Waterford, it is said, has broken the continuity of the voyage, and in deciding on its character, the departure from Waterford, not the departure from Bristol, must be considered as its commencement.

The Mary.

*It is not denied, that in a commercial sense, this is one continued voyage, to take its date at the departure of the Mary from Bristol. But it is urged, that where the rights of war intervene, a different construction must take place. The court does not accede to the correctness of this distinction. The Mary was forced into Waterford by irresistible necessity, and was detained there by the operation of causes she could not control. Had her departure been from a neutral port, and she had been thus forced, during the voyage, into a hostile port, would it be alleged, that she had incurred the liabilities of a vessel sailing from a port of the enemy? It is believed, that this allegation could not be sustained, and that it would not be made. But as between the captors and the captured in this case, the voyage was, in its commencement, as innocent as if made from a friendly port. The detention at Waterford, then, can no more affect the character of the voyage in the one case, than in the other.

But it is said, that the owners of the cargo ought to have applied to the American government for a license to bring it into the United States. So far as respects the captors, there could be no necessity for a license, since the vessel was already protected from them, by the orders of the president, under which they sailed; and for any other purpose, a license was unnecessary, provided the importation, if the voyage had been immediate and direct from Bristol, could be justified. If a cargo be innocently put on board in an enemy country, if, at that time, it be lawful to import it into the United States, the importation cannot be rendered unlawful, by a detention, occasioned, in the course of the voyage, either by the perils of the sea, or the act of the enemy, unless this effect be produced by some positive act of the legislature. There is no such act.

*It has been contended, that the act for the remission of fines, penalties and forfeitures, in certain cases, passed on the 2d of January 1813, controls the instructions given by the president on the 28th of August 1812, and limits the operation of those instructions to the specific cases described by congress; and as that act protects only those importations which were made previous to its passage, it has been argued, that the president's instructions can go no further. Independently of the war, all British merchandise was excluded from the ports of the United States, by a system of policy supposed to have been founded on the British orders in council. The secretary of the treasury had power to remit forfeitures incurred under these laws. When the orders in council were repealed, large shipments were made of British merchandise, by American merchants, in the full confidence that the American restrictive system would fall with the orders which produced it. This opinion and the proceedings in consequence of it, were thought excusable both by the executive and legislative departments of government. The president instructed the cruizers of the United States not to molest vessels of this description, "but on the contrary, to give aid and assistance to the same; in order that such vessels and their cargoes may be dealt with on their arrival, as may be decided by the competent authorities." These instructions act solely on the rights of war, and regulate the conduct of the public and private armed vessels of the United States. [*149

The legislature passed an act on the 2d of January 1813, taking away the discretion of the secretary of the treasury, and directing him absolutely

to remit all penalties and forfeitures incurred by violating the non-intercourse laws, in all cases of importation made before the passage of the act, in American vessels, provided the goods were the property of citizens of the United States, and the vessels departed from any port of the United Kingdom of Great Britain and Ireland, between the 23d day of June and the 15th of September then preceding. *This act does not contemplate the conduct of captors, or the rights of war. Its sole object is to remit certain penalties already incurred by a violation of municipal law. The legislature does not appear to have had in view the instructions given be the president to the armed vessels of the United States, much less to have intended to control those instructions.

*150]

But, in effecting these different objects, the executive and the legislature were impelled by the same motive—the peculiar hardship of exposing the citizens of the United States, in such a case, to the penalties either of war, or of municipal law. The one intended to protect from capture, the other from forfeiture, property which had been shipped in the reasonable confidence that peace and commercial intercourse between the two countries were the fruits of the repeal of the British orders in council. The president recognised the principle, but left the time within which it should operate, to be decided by the armed vessels and by the courts, according to the circumstances of each case. The legislature prescribed certain limits within which it should operate. This court, in construing the less explicit instructions of the president, with respect to the departure of a vessel from a British port, has respected the more explicit language of the legislature on the same subject. But the instructions of the president relate only to the departure of the vessel. They do not extend to the time of its arrival. In this respect, there is nothing to be explained. Consequently, the act of congress can furnish no aid in their construction. That the instructions were intended to protect from capture all vessels which had sailed in that confidence which was inspired by the repeal of the British orders in council, however the voyage might be protracted, is apparent from their language, and from the fact that they continued to be delivered to the armed vessels of the United States, after the passage of the act of the 2d of January 1813.

It is the unanimous opinion of the court, that the Mary was, at the time of her capture, protected by the instructions under which the captor sailed. This opinion renders all inquiry into the character of the cargo unnecessary.

*The counsel for the captors have claimed their costs and expenses, on the ground, that there was probable cause of capture. This claim is sustained by the court. Further proof has been required, and the lateness of the period at which the Mary was found on the ocean, justified a suspicion, that her case was not one to which the instructions of the president extended.

*151]

The sentence of the circuit court condemning the cargo of the Mary is reversed, and the cause is remanded to that court, with directions to dismiss the libel so far as respects the cargo, and to restore the same to the claimants, and to allow the captors their reasonable costs and expenses.

Sentence reversed.

Doe, Lessee of Lewis and wife, *v.* McFarland and others. (*a*)

Ejectment by executor.—Evidence.

It is not necessary, that the executor of a will, made in Virginia, devising to the executor, land in Kentucky, should take out letters testamentary in Kentucky, to enable him to maintain an ejectment for the land, in Kentucky.[1]

If the plaintiff, in his declaration, claims the whole tract, a deed showing that he has only an undivided interest in the tract, may be given in evidence.

Error to the Circuit Court for the district of Kentucky, in an action of ejectment.

The case was submitted to the court at last term, by *Wickliffe*, for the plaintiffs in error, and *G. M. Bibb*, for the defendants, upon notes of an argument, and was argued at this term, by *C. Lee*, for the plaintiffs in error.

February 27th, 1815. (Absent, Todd, J.) Marshall, Ch. J., delivered the opinion of the court, as follows:—This is a writ of error to a judgment rendered in the circuit court of the United States for the district of Kentucky, in an ejectment by the plaintiffs in error, against the defendants.

*At the trial of the cause, the plaintiffs produced and read in evi- [*152
dence, a patent from the commonwealth of Virginia, granting certain lands, therein described, lying in the county of Nelson, in the now state of Kentucky, to John May, John Banister, Kennon Jones, Thomas Shore and Christopher McConico. He then offered in evidence, the last will and testament of John May, deceased, which contained this clause, "I give and devise my land, to my executors herein after named, and to the survivors and survivor of such of them as may act, and their heirs, for the purpose of selling as much thereof as will pay all my debts." This will was proved and admitted to record, according to the laws of Virginia, while Kentucky was a part of that state, and is duly certified by the proper authority. The plaintiff, Ann Lewis (wife of the other plaintiff, Thomas Lewis), who was an executrix named in the will of the said John May, alone qualified as executrix, and took upon herself the burden of executing the said will; but she did not qualify, and did not obtain her letters testamentary, until after Kentucky had become an independent state.

The counsel for the defendants objected to the admissibility of the will and certificate thereto subjoined, because the said Ann had only qualified, and sued out letters testamentary in the state of Virginia, and not in the state of Kentucky, where the land lies. The court sustained the objection, and the will was not permitted to go in evidence to the jury. To this opinion, an exception was taken. There was also a second exception taken, on the same rejection of evidence, which depends entirely on the correctness of the first opinion, and therefore, need not be particularly stated.

It has been decided in this court, that letters testamentary give to the executor no authority to sue for the personal estate of the testator, out of the jurisdiction of the power by which those letters are granted.[2] But this decision has never been understood to extend to a suit for lands devised to an executor. In such case, the executor sues as devisee. His right is

(*a*) February 17th, 1815. Absent, Todd, Justice.

[1] See Taylor *v.* Benham, 5 How. 233.

[2] Kerr *v.* Moon, 9 Wheat. 565.

derived from the will, and the letters testamentary do not give the title. *153] The executors are trustees for the purposes of the will. *This will may be considered as requiring that the executors shall act, to enable themselves to take under the devise to them; but when the condition is performed, those who have performed it, take under the will. That the executrix took upon herself that character, after the separation of Kentucky from Virginia, is of no consequence. When she did take it upon herself, the condition on which the devise was made, was performed, and she took as devisee under the will; and the act consummating her title, had relation to the time of its commencement, which was before the separation of the two states. Were it even necessary, which is not admitted, to record this will in Kentucky, that objection was not made to the instrument, and therefore, the court cannot suppose it to exist. The will was rejected, because the executrix had not qualified in Kentucky, and this objection is not deemed a valid one.

An objection was also taken to a deed, which was offered in evidence, on the ground of an alleged variance between it, as proof, and the allegations in the declaration. The deed was not permitted to go in evidence to the jury; and to this opinion also, an exception was taken. The variance is not pointed out. If the objection to the deed is, that it conveys only an undivided interest, while the declaration claims the whole tract, the objection ought not to have been sustained; but on the propriety of rejecting the deed it is not necessary to give an opinion, since the judgment must be reversed on the first point.

Judgment reversed, and the cause remanded, with directions to grant a new trial and to permit the will to be read in evidence.

Clarke's Executors *v.* Van Riemsdyk. (*a*)

Equity.—Effect of answer.—Insolvent discharge.

The answer of one defendant in chancery is not evidence against his co-defendant;[1] nor is his deposition, although he had been discharged under the act of assembly of Rhode Island (of 1757) from all debts and contracts prior to the date of the discharge, and although the debt in suit was a debt contracted prior to such discharge—the debt having been contracted in a foreign country.

An answer in chancery, although positive, and directly responsive to an allegation in the bill, may be outweighed by circumstances, especially, if it be respecting a fact which, in the nature of things, cannot be within the personal knowledge of the defendant.[2]

A denial by the defendant that his testator gave authority to A. to draw a bill of exchange, is not such an answer to an averment of such authority, as will deprive the complainant of his remedy; unless the defendant also deny the subsequent assent of his testator to the drawing of such bill; for a subsequent assent is equivalent to an original authority.

Semble: that a discharge under the act of assembly of Rhode Island (of 1757) from all debts, duties, contracts and demands outstanding at the time of such discharge, upon surrender of all the debtor's property, will not protect him against a debt contracted in a foreign country.

Van Reimsdyk *v.* Kane, 1 Gallis. 371, 630, reversed.

This cause was this day argued by *Burgess* and *Stockton*, for the appellants, and *Harper*, for the appellee, in the absence of the reporter.

*February 28th, 1815. (Absent, Todd, J.) Marshall, Ch. J., [*154 delivered the opinion of the court, as follows:—This is an appeal from a decree made in the Circuit Court of the United States for the district of Rhode Island. The appellee filed his bill in that court, praying that the appellants and James Munro, Samuel Snow and Benjamin Munro, late merchants, trading under the firm of Munro, Snow & Munro, might be decreed to pay him the amount of a bill of exchange, drawn in his favor, at Batavia, by Benjamin Munro, at nine months sight, on Messrs. Daniel Crommelin & Sons, merchants, Amsterdam, for the sum of 21,488 guilders, on account of advances made by the said Riemsdyk for the use of the defendants in the circuit court.

In the year 1805, John Innes Clarke and Munro, Snow & Munro, being joint-owners of the ship Patterson, in equal moieties, projected a voyage to Batavia, and appointed Benjamin Munro, one of the house of Munro, Snow & Munro, supercargo. The ship carried out some goods on account of the owners, and other goods on account of different persons, the whole to be invested in a return-cargo, on the profits of which the ship-owners were to receive 45 per cent. instead of freight. The bill charges that the supercargo was empowered verbally, in case of a deficiency of funds at Batavia, to load the ship with a return-cargo, to take up money on the joint account of the owners, and, if necessary, to draw bills of exchange therefor on Messrs. Daniel Crommelin & Sons, of Amsterdam, or on the owners. The Patterson returned in the spring of 1806, with a cargo derived from the funds taken out in the outward voyage.

In March 1806, the Patterson again sailed to Batavia, on a voyage in all

(*a*) February 22d, 1815. Absent, Todd, Justice.

[1] Leeds *v.* Marine Ins. Co., 2 Wheat. 380.

[2] But whatever the nature of the evidence, it must be equal to two witnesses, or one witness with corroborating circumstances, sufficient to turn the balance. Parker *v.* Phettyplace, 2 Cliff. 70; s. c. 1 Wall. 684.

respects similar to the first. That part of the cargo which was furnished by
*155] the owners *consisted of wines and some other inconsiderable articles. Being unable to sell the wine in Batavia, the supercargo placed it for sale in the hands of Mr. Van Riemsdyk, the defendant in error. Rather than return, without filling the vessel for the owners, he drew bills on them to the amount of $2389.89 ; and also drew on Messrs. Crommelin & Sons, merchants, of Amsterdam, the bill for which this suit was brought. The bill is drawn by Benjamin Munro, in his own name, but it contains a direction to charge the same to John Innes Clarke and Munro, Snow & Munro, merchants, of Providence, Rhode Island, North America. Of all these proceedings, the owners were regularly informed by letter from Benjamin Munro, their supercargo. The ship returned safe, in March 1807, and the proceeds of the cargo purchased by these bills were received by the owners. The bills drawn on the owners were duly paid ; but no provision was made for that drawn on Daniel Crommelin & Sons.

In May 1807, the ship proceeded on a third voyage to Batavia, with Benjamin Munro again supercargo. The owners appear to have relied on the wine placed in the hands of Van Riemsdyk, on the second voyage, for producing the funds with which to procure their part of the return-cargo. In June 1807, Munro, Snow & Munro became insolvent ; and according to the laws of Rhode Island, obtained a certificate discharging them from the claims of their creditors, so far as such discharge could be affected by a law of the state. They had previously transferred, for a valuable consideration, to John Innes Clarke, all their interest in the ship, the return-cargo and the accruing freight, the whole of which came into his possession, on the return of the vessel. In December 1807, the bill was presented to Messrs. Daniel Crommelin & Sons, and protested for non-acceptance ; and in October 1808, it was protested for non-payment. Neither Clarke, nor Munro, Snow & Munro, had any funds in the hands of Messrs. Daniel Crommelin & Sons. John Innes Clarke departed this life, in November 1808, having first made his last will and testament, of which the plaintiffs in error are executors,
*156] who have *assets in their hands more than sufficient to satisfy the claim of Van Riemsdyk.

The defendants, Munro, Snow & Munro, in their answer, acknowledge all the material allegations of the bill, and expressly admit the authority of Benjamin Munro to draw the bill of exchange for which this suit was instituted. But they state their insolvency ; and claim the benefit of the certificate of discharge granted them in pursuance of the laws of the state of Rhode Island.

Clarke's executors deny that Benjamin Munro had any authority to take up money on credit, for any purpose whatever, or to draw bills of exchange; and assert that both the complainant and Benjamin Munro knew that he had no such authority. They admit, that if the money was taken up, it was for the joint use of the ship-owners, but not on their credit. It was, they say, on the sole credit of Benjamin Munro.

At the hearing, the bill was dismissed as to Munro, Snow & Munro, and a decree was made against Clarke's executors for the sum of $11,526.14, being the amount of the sum specified in the bill of exchange in the complainant's bill specified, together with ten per cent. damages for the non-payment thereof, and interest upon both these sums, from the time when

the said bill of exchange became due, to the time of rendering the decree. From this decree, the executors of the said John Innes Clarke prayed an appeal to this court.

In determining the extent of Clarke's liability, the authority of Benjamin Munro to draw this bill becomes a question of material importance. If the answer of Munro, Snow & Munro, or their depositions taken in the cause, be admissible evidence against Clarke's executors, this question is decided. But the admissibility of their answer, for this purpose depends on the establishment of such a partnership as would authorize the draft of Munro, as one of the partners; and the admissibility of their depositions depends on their being rendered disinterested witnesses by the certificate of discharge stated *in the proceedings. The court, being satisfied on neither of [*157 these points, will exclude both the answer and depositions, and consider the cause independently of them.

The letter of Benjamin Munro, written at Batavia, on the 3d of November 1806, the day on which the bill in favor of Van Riemsdyk was drawn, and addressed to John Innes Clarke, esquire, and to Messrs. Munro, Snow & Munro, contains these passages: "I have shipped on board the Patterson, on your account and risk, 505 peculs Jacatia coffee, agreeably to invoice and bill of lading inclosed. I have drawn on you for the amount of $2389.89, at ninety days sight, in favor of the several officers, &c., on board the Patterson, being the amount of money they had remaining over their privileges, and which I have allowed them fifteen per cent. advance thereon, and which drafts you will please to honor. A statement thereof, I annex. I have also drawn on Messrs. Daniel Crommelin & Sons, merchants, Amsterdam, at nine months sight, in favor of the honorable William V. H. Van Riemsdyk, of this place, for the amount of 21,488 guilders, on account of the Patterson, and which bills you will, no doubt, prepare for timely, as I have written those gentlemen." "I leave all the Maderia wine in the hands of the honorable Mr. Reimsdyk, as it will not sell at all, I transmit his receipt for the same. I have received no advance on the wine."

To this letter was annexed a statement of the cargo of the Patterson, containing this item: "For owners of Patterson, 505 peculs coffee." There was, also, the following memorandum: "Memorandum of bills payable by you at ninety days sight, viz: Captain James Shaw, 1st, 2d, 3d exchange, $748.75, &c., amounting in the whole to $2389.89. Amount of bills drawn on Messrs. Daniel Crommelin & Sons, merchants, Amsterdam, payable by them *at nine months sight, in favor of the honorable [*158 William V. H. Van Riemsdyk, viz: Four bills of exchange, 1st, 2d, 3d, 4th, for the amount of 21,488 guilders, equal to $8595. I have allowed Mr. Riemsdyk on the money, twenty per cent. advance."

It is impossible to read this letter, and these *memoranda*, without feeling a conviction that Benjamin Munro believed himself to be acting within the scope of his authority, and supposed that neither his bills on the owners, nor that on Crommelin & Sons, would be considered by them as an extraordinary or unexpected transaction. He makes no apology for what had been done; gives no description of his difficulties and embarrassments at being disappointed in Batavia by not receiving the funds on which he relied for their return-cargo, and of his doubts whether the measure to which he had resorted in consequence of that disappointment, would be approved by

them. His language is the language of an agent acting within his powers, on a contingency which had been foreseen and provided for. Having stated the bills drawn on them, he adds, in the usual style of letters of notice, "which drafts you will please to honor." After stating the drafts on Crommelin & Sons, he adds, "which bills you will, no doubt, prepare for timely, as I have written those gentlemen." This is not the language of an agent conscious of having transcended his powers.

But it will be admitted, that the opinion of the agent on the extent of his powers, will not bind his principals. Let us, then, inquire, so far as the testimony will inform us, into the opinion entertained on this point by the principals themselves. On the 1st of November 1806, at Batavia, Benjamin Munro stated an account-current between himself and the owners of the ship Patterson, according to which the executors of John Innes Clarke, admit the settlement to have been made, on the arrival of the vessel. That account debits the owners with $9090, the amount of invoice of 505 peculs of coffee, shipped on board the Patterson, on their account and risk, and with
*159] the fifteen per *cent. advance on the bills drawn on them, and the twenty per cent. advanced on the bills drawn on Crommelin & Sons, and credits them with the amount of those bills. The entry of the last-mentioned bills is thus expressed, "bills drawn on Messrs. Daniel Crommelin & Sons, payable by you, at nine months sight."

This account charges the owners with the disbursements of the vessel, which exceed the funds in the hands of Munro, other than those produced by the bills of exchange, so that the whole return-cargo was purchased by these bills. Not a sentence escapes either of the owners, disapproving the conduct of Munro, or expressing surprise at it. With that full knowledge of the whole transaction which is given by the letter of Munro, by the statement annexed to it, and by the account; with full information that the whole cargo was purchased with bills drawn on them and on a house in Amsterdam, to be paid by them, they receive the cargo and dispose of it to a very considerable profit. Can they now be permitted, in a court of conscience, to question the authority by which the bills were drawn.

The circumstances which prove their acquiescence in this authority are not yet exhausted. The Patterson sails on a third voyage to Batavia, and Benjamin Munro is again supercargo. His conduct in drawing bills on the second voyage is not censured. He is not informed, that this is a power not confided to him; that he has mistaken the extent of his authority; that his principals are not bound by his drafts. He goes again to India, in the full belief that his conduct has met with perfect approbation, and that no intention existed to throw upon him the bills he had drawn on Amsterdam, for moneys with which he had purchased the second cargo. In this belief, the proceeds of the wines, placed in the hands of Van Riemsdyk, are drawn out of his hands and invested in another return-cargo for the owners of the Patterson.

Had there not been an entire acquiescence in the bill drawn by him on Crommelin & Sons, a full admission on the part of his principals that they were responsible for that bill, and that no attempt would be made to throw
*160] it on him, can it be believed, that the proceeds of these *wines would have been invested in a return-cargo for the owners of the ship? Had Van Riemsdyk suspected that the owners would disclaim the authority

of their supercargo to draw bills, and would fail to place funds in Amsterdam to meet them, and would endeavor to turn him over to that supercargo for payment, is it credible, that he would have permitted the proceeds of this wine to pass out of his hands, without an attempt to secure himself? These circumstances strengthen the conviction growing out of the whole conduct of the owners, that in drawing the bill for which this suit was instituted, Benjamin Munro acted within his authority.

This testimony is opposed by the answer of Clarke's executors; and the rule that an answer must prevail, unless contradicted by one witness as well as by circumstances, is said to be so inflexible, that the strongest circumstances will not themselves be sufficient to outweigh an answer.

The general rule that either two witnesses or one witness, with probable circumstances, will be required to outweigh an answer asserting a fact responsively to a bill, is admitted. The reason upon which the rule stands, is this. The plaintiff calls upon the defendant to answer an allegation he makes, and thereby admits the answer to be evidence. If it is testimony, it is equal to the testimony of any other witness; and as the plaintiff cannot prevail, if the balance of proof be not in his favor, he must have circumstances, in addition to his single witness, in order to turn the balance. But, certainly, there may be evidence arising from circumstances, stronger than the testimony of any single witness.

The weight of an answer must also, from the nature of evidence, depend, in some degree, on the fact stated. If a defendant asserts a fact which is not and cannot be within his own knowledge, the nature of his testimony cannot be changed by the positiveness of his assertion. The strength of his belief may have betrayed him into a mode of expression of which he was not fully apprised. When he intended to utter only a strong conviction of the existence of a particular fact, or what he deemed an *infallible deduction from facts which were known to him, he may assert that [*161 belief, or that deduction, in terms which convey the idea of his knowing the fact itself. Thus, when the executors say that John Innes Clarke never gave Benjamin Munro authority to take up money, or to draw bills, when they assert that Riemsdyk, who was in Batavia, did not take this bill on the credit of the owners of the Patterson, but on the sole credit of Benjamin Munro, they assert facts which cannot be within their own knowledge. In the first instance, they speak from belief; in the last, they swear to a deduction which they make from the admitted fact that Munro could show no written authority. These traits in the character of testimony must be perceived by the court, and must be allowed their due weight, whether the evidence be given in the form of an answer or a deposition. The respondents could found their assertions only on belief; they ought so to have expressed themselves; and their having, perhaps incautiously, used terms indicating a knowledge of what, in the nature of things, they could not know, cannot give to their answer more effect than it would have been entitled to, had they been more circumspect in their language.

But were the court to allow to this answer all the weight which is claimed for it by counsel, it would not avail his clients. It asserts, that Munro drew bills, without authority from his owners, but does not assert that his owners never confirmed his acts. It will not be denied, that the acts of an agent, done without authority, may be so ratified and confirmed

by his principals, as to bind them in like manner as if an original authority had existed. The application of this principle to the case at bar is as little to be denied as the principle itself. The transactions which have been urged to show an original authority to draw the bill in question, will be recollected, without being recapitulated. The court is of opinion, that they amount to a full confirmation of those proceedings of their agent, which had been communicated to his principals, and to an undertaking to perform the engagements he had made for them.

It is urged, on the part of the appellees, that this undertaking is not joint, but several, and binds each party to the extent of his interest, and no
*162] further. *The court does not so understand the transaction. The undertaking not being express, its extent must be determined by the character of their acts of confirmation, and by the character of the act confirmed.

The bill is to be charged, as expressed upon its face, to John Innes Clarke, and to Munro, Snow & Munro. In his letter of the 3d of November, 1806, addressed to his owners, Benjamin Munro, after mentioning the bills, says, "which bills you" (that is, John Innes Clarke and Munro, Snow & Munro) "will, no doubt, prepare for, timely." In the account with his owners, rendered by Benjamin Munro, and dated the 1st of November 1806, he charges them jointly with the coffee purchased by these bills, jointly with the premium advanced, and credits them jointly with the amount of the bills. This account is afterwards referred to by John Innes Clarke himself as a settled account. The court cannot understand the undertaking, proved by these papers, and by the conduct of the parties, to be other than a joint undertaking of the owners to put themselves in the place of Benjamin Munro, and to provide funds to take up the bill.

It is said, that even on this principle, the decree is for too large a sum, because the premium and the damages cannot be recovered in a court of chancery. It is the unanimous opinion of the court, that the liability of the owners of the ship Patterson for the bill drawn by Benjamin Munro in favor of Riemsdyk is precisely the same as if it had been drawn by themselves. They have made his act their act. There is no evidence that the contract is not allowable by the laws of Batavia; nor did the owners, when informed of it, complain of its terms. This court cannot presume that it is illegal. The damages form no part of the contract, and certainly cannot be decreed
*163] by a court of chancery, unless, *by the laws of the place where the bill was drawn, they become a part of the debt. Upon this point, the court has no information; and for this reason, the decree must be reversed.

It is also the opinion of the court, that the dismissal of the bill of the complainants as to James Munro and Samuel Snow, the surviving partners of Munro, Snow & Munro, was irregular;(*a*) and that a decree ought to have been made against them also. For these causes, the decree must be in part reversed, and the cause remanded to the circuit court, with directions to reform the decree according to this opinion.

The Decree of this Court is as follows:—This cause came on to be heard,

(*a*) It is probable, that the court did not observe that the dismissal of the bill as to Munro, Snow & Munro, was with the assent of the complainant.

on the transcript of the record of the circuit court of the United States for the district of Rhode Island, and was argued by counsel; which being considered, the court is of opinion, that John Innes Clarke, in his lifetime, and Munro, Snow & Munro, the owners of the ship Patterson, were jointly liable for the bill of exchange in the complainant's bill mentioned, to the same extent as if the said bill had been drawn by them; and that the estate of the said John Innes Clarke, in the hands of his executors, is, in equity, chargeable with the said debt, as far as the said John Innes Clarke in his lifetime was chargeable therewith. This court is, therefore, of opinion, that there is no error in so much of the said decree of the circuit court for the district of Rhode Island as directs the respondents, the executors of the said John Innes Clarke, deceased, to pay to the complainant the amount of the said bill, with interest thereon, from the time when the same became payable, to the day on which the said decree was made, and the same as to so much thereof is affirmed. And this court is further of opinion, that the defendants ought not to have been ordered to pay damages on the said bill, without proof that, by the law of the place where the same was drawn, damages were made payable: in which case, the persons bound to pay the said bill are liable in a court of equity, as well as in a court of law, to pay such damages. This court *is also of opinion, that so much of the said decree as dismisses the bill of the complainants as to James Munro and Samuel Snow, [*164 the surviving partners of Munro, Snow & Munro, is irregular, and that a decree ought to have been made against them likewise. It is, therefore, the opinion of this court, that so much of the said decree of the circuit court for the district of Rhode Island, made in this case, as directs the appellants to pay to the complainant in that court, damages at the rate of ten per centum on the amount thereof, with interest thereon; and so much of the said decree as dismisses the bill of the complainant as to James Munro and Samuel Snow, the surviving partners of Munro, Snow & Munro, is erroneous and ought to be reversed, and the same is reversed accordingly. And this court doth further order and decree, that the said cause be remanded to the said circuit court for the district of Rhode Island, with directions to receive proof of the law of Batavia respecting protested bills of exchange, to conform its decree to this opinion, and to make the same against the surviving partner or partners of the late commercial house of Munro, Snow & Munro as well as against the appellants; all which is ordered and decreed accordingly.

Finley *v.* Williams and others. (*a*)

Land law of Kentucky.

In Kentucky, the courts of law will not look beyond the patent, but courts of equity will; and will give validity to the elder entry against an elder patent.[1]

Between pre-emption-rights, the prior improvement will hold the land against a prior certificate, entry, survey and patent.

It is not essential to the dignity of an entry upon a pre-emption-warrant, that the entry should, in terms, call for the improvement, although it must in fact include such improvement.

An entry calling for "the Big Blue Lick," will not support a survey and patent for land at the Upper Blue Lick, the Lower Blue Lick being generally called "the Big Blue Lick," although there may be other calls in the entry which seem to designate the Upper Blue Lick as the place intended.

This was an appeal from the decree of the Circuit Court for the district of Kentucky, in a suit in chancery, brought by Finley to compel Williams and others, who had the elder patent, to convey certain lands to the complainant, which he claimed by virtue of a prior settlement.

The cause was argued by *Pope*, for the appellants, and *Clay*, for the appellees, on the 22d of February 1813, in the absence of the reporter.

*165] *February 28th, 1815. (Absent, Todd, J.) Marshall, Ch. J., delivered the opinion of the court, as follows:—This cause depends on the land law of Virginia, which is also the land law of Kentucky, that state having formed a part of Virginia, when the act was passed in which the titles of both plaintiff and defendant originated. Both parties claim the land in controversy, by virtue of improvements made previous to the first day of January 1778, which improvements were recognised by the act generally termed "the previous title law," and gave the persons making them a pre-emption of 1000 acres of land, to include the improvement, on paying therefor the price at which the state sold its vacant lands, "provided they respectively demand and prove their right to such pre-emption, before the commissioners for the county to be appointed by virtue of this act, within eight months."

In the year 1781, an act passed which, after reciting that, by the discontinuance of the commissioners in the district of Kentucky, many good people of the commonwealth were prevented from proving their rights of settlement and pre-emption in due time, owing to their being engaged in the public service of this country, enacts, that the county courts in which such lands may lie, be empowered and required to hear and determine such disputes, and that the register of the land-office be empowered and directed to grant titles, on the determinations of such courts, in the same manner as if the commissioners had determined the same.

It appears, that in the year 1773, John Finley, the plaintiff in the cause, marked and improved the land in controversy. He entered into the continental service in the year 1776, and continued therein throughout the war. His claim was not made before the commissioners, but was made to the

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(*a*) February 28th, 1815. Absent, Todd, Justice.

[1] McArthur *v.* Browder, 4 Wheat. 488; Blunt *v.* Smith, 7 Id. 248; Hunt *v.* Wickliffe, 2 Pet. 201; Garnett *v.* Jenkins, 8 Id. 75; Brush *v.* Ware, 15 Id. 93. And see Johnson *v.* Towsley, 13 Wall. 85–6.

court of the county in which the lands lie, by which court his claim was allowed, and the following certificate was granted :

"At a court held for the county of Fayette, March 12th, 1782, application and satisfactory proof being made, this court doth certify that John Finley is entitled to the *pre-emption of 1000 acres of land, situate [*166 on the main branch of Licking Creek, to include an improvement made in the year 1773, by said Finley, and to be bounded by a survey made, at the time, for him, which includes the Upper Blue Lick, by virtue of such marking out and improving, and his being in public service when the commissioners sat in the district, and thereby prevented applying for the same."

A pre-emption warrant was obtained, and on the 14th day of November, in the year 1783, an entry was made with the proper surveyor in the following words : "John Finley enters 1000 acres of land on a pre-emption warrant, No. 2526, on Licking, to include the Upper Blue Lick, and bounded on three sides by the line of an old survey made in the year 1773, beginning," &c. This entry was surveyed, and a patent issued thereon.

William Lynn, under whom the defendants claim, made an improvement on the same ground, in the year 1775, and laid his claim before the commissioners, who allowed the same, and granted a certificate therefor, dated the 20th day of November, in the year 1779, in the following words :

"William Lynn this day claimed a pre-emption of 1000 acres of land, at the state price, lying on the south side of Licking Creek, known by the name of the Big Blue Lick, to include the said lick, lying in a short bend of the said creek, by improving the same in the year 1775, &c."

On the 22d of June 1780, Lynn, having obtained a pre-emption warrant, entered the same with the proper surveyor, in these words : "William Lynn, James Barbour and John Williams enter 1000 acres of land upon a pre-emption warrant, beginning a quarter of a mile below the Big Blue Lick, on Licking, on the south side thereof, running on both sides of the said creek, and east and south for quantity." This entry was so surveyed as to include the lands in dispute, and a patent was obtained thereon of an earlier date than that of Finley.

Upon this patent, an ejectment was brought, and judgment obtained by Lynn, Barbour and Williams. Finley has brought this suit to compel a conveyance of that part of the land held by Lynn and others, which is included in his patent. On a hearing, *it was the opinion of the cir- [*167 cuit court, that Lynn and others held the better title ; in conformity with which a decree was made. From that decree, Finley has appealed to this court.

The peculiar state of titles to land in Kentucky, a senior patent being, in many cases, issued on a junior title, and it being a rule in their courts of law not to look beyond the patent, have settled the principle, that courts of equity will sustain a bill brought for the purpose of establishing the prior title by entry, and of obtaining a conveyance from the person holding under a senior patent issued on a junior entry. The courts of the United States have conformed to this practice, and adopted the principle. It is also settled, in Kentucky, that, between pre-emption rights, the prior improvement will hold the land, although the certificate of the commissioners, the entry,

the survey and the patent, be all posterior, in point of time, to those obtained by the person who has made an improvement of a later date.

It follows, from these established principles, that Finley must prevail, unless he has lost the right acquired in consequence of his improvement. The circuit judge was of opinion, that this right was lost by the form of his entry with the surveyor. Not having, in that entry, called, in terms, for his improvement, that judge was of opinion, that although his entry does, in fact, comprehend his improvement, yet he has surrendered the preference which his pre-emption warrant gave him, and sunk his claim to the level of a common treasury warrant. This court can perceive no reason for that opinion. The law requires that the entry shall, in fact, include the improvement, but does not make it essential to the dignity of the entry, that the improvement shall, in terms, be called for. The certificate expressly states that the land granted is to include the improvement; and the entry, which is made with remarkable precision, conforms exactly to the certificate in the description of the land intended to be taken.

*168] *But it is contended by the defendant, that whatever may be the opinion of the court on this point, Finley's title as to a pre-emption must yield to that of Lynn, in consequence of his having omitted to assert his claim before the court of commissioners. The legislature could not, it is said, after permitting the time for making this claim to expire, revive it, to the prejudice of any other person who had acquired title to the land. It is added, that the decisions in Kentucky have been adverse to titles to pre-emptions depending on certificates granted by the county courts, in cases where they come into competition with titles gained before the grant of such certificates.

This court would not willingly depart from the state decisions, if they have settled the principle the one way or the other; and would, therefore, have deferred the determination of this cause, until more certain information could be obtained, had it rested solely on the validity of the plaintiff's title as founded on a pre-emption. But on an inspection of the record, the entry of the defendants is deemed so radically defective as necessarily to yield to the title of the plaintiff, should his warrant even be reduced to the grade of a treasury warrant.

The law requires that the holder of a land-warrant "shall direct the location thereof so specially and precisely as that others may be enabled with certainty to locate other warrants on the adjacent residuum." Such has been the difficulty of making special locations, that much of the precision which the law would seem to require, has been dispensed with; but a reasonable and practicable certainty has always been deemed necessary; and wherever the material and principal call of a location has been calculated, instead of informing, to misguide subsequent locators, the location itself has been brought into hazard, and it has often been determined, that the survey was made on other land than that which the entry covered. In examining these questions, the courts of Kentucky have universally and properly deter-

*169] mined, that all subordinate calls in an entry must yield to a principal *call to which they may be repugnant. If a great and prominent object, immovable and durable in itself, and of general notoriety, be called for in a location, that object must fix and locate the entry, although other

minor and temporary objects, to be discovered only by a strict and successful search, might prove that the locator really intended to take other land.

In the entry of Lynn and others, there is such a principal call. The Big Blue Lick is perhaps an object of as universal notoriety as any in Kentucky. But there are two Blue Licks on the same creek, and both of them are large licks. In such a case, the locator would certainly be at liberty, and it would be his duty to designate the lick he intended to take; for if his entry would apply to the one as well as to the other, it would be justly chargeable with a vagueness which would leave subsequent locators unable to locate with certainty the adjacent residuum. This entry has, in its terms, designated the lick intended to be included: it is "*the* Big Blue Lick." The entry does not call for *a* Big Blue Lick, but for *the* Big Blue Lick, thereby excluding any other lick than that which was emphatically denominated *the* Big Blue Lick. We are then to ask, which of these licks a man in Kentucky, holding a warrant which he intended to locate, would suppose was *the* Big Blue Lick?

Upon this subject, the testimony is not doubtful. It is in full proof, that at the time the entry of the defendants was made, and for some years before, the Lower Blue Licks were generally called the Big Blue Licks; and that where the defendants have surveyed was known by the name of the Upper Blue Licks. They were sometimes, though rarely, distinguished from each other as the Upper Big Blue Licks and the Lower Big Blue Licks; somtimes as the Upper and the Lower Blue Licks; but the term *the* Big Blue Licks, when used without the word "upper" or "lower," was universally understood to designate the Lower Blue Licks.

The company which made this location in 1775 had not discovered the Lower Blue Licks, and therefore denominated the spring which they did discover, "the *Big Blue Lick;" but the name originated and expired with themselves. It was never adopted by the people of the country. It is probable, that Lynn did contemplate the Upper Blue Licks, when he made his entry; but between conflicting entries, a mistake of this kind is fatal to the person who commits it. In the case of *Bodley* v. *Taylor* (5 Cr. 191), it was impossible not to perceive that Taylor intended one creek, when he named another; but subsequent locators could judge of his intention only from the words of his entry. [*170

But it is contended, that there are other explanatory calls in the entry, which cure the defect which has been stated, and designate, with sufficient certainty, that the Upper Blue Lick was intended to be included in the entry. The entry is said to require a lick on the south side of Licking; and the spring which issues at the Upper Blue Lick is on the south side. The words are, "beginning one-quarter of a mile below the Big Blue Lick, on Licking, on the south side thereof." The locator intends to describe his beginning; and these words are to be construed with reference to that intention. Do the words, "on Licking," describe the place of beginning, or the location of the Big Blue Lick? The latter was unnecessary, because there was no Big Blue Lick, except on Licking; and because, were the fact otherwise, the lick would be ascertained by calling for a beginning, a quarter of a mile below it on Licking. But the beginning might be a quarter of a mile below the lick, and yet not on the creek. The beginning would be, in some degree, uncertain, unless it be fixed by those words. The entry is

understood, as if it were expressed thus: "beginning on Licking, on the south side thereof, a quarter of a mile below the Big Blue Lick." If reference be had to the certificate granted by the commissioners, that places the land, not the lick, on the south side of the creek. A cabin and a marked tree, in a country full of cabins and marked trees, cannot control a call made for an object of such general notoriety as the Big Blue Lick. A subsequent locator would look for them only at the Big Blue Lick.

*171] *It is the opinion of this court, that the decree of the circuit court be reversed and annulled, and that the defendants be decreed to convey to the plaintiff so much of the land comprehended within this grant, as appears by the survey made in this cause to lie within the bounds of the grant made to the complainant.(*a*)

Decree reversed.

(*a*) The opinion of the circuit court, consisting of Judges TODD and INNES, was as follows:—The claims of the parties in this suit commenced as pre-emption rights, yet by their subsequent acts in making their entries with the surveyor, they have reduced them to the footing of treasury-warrant claims, by omitting in their entries to call for their respective improvements, the foundation and essence of pre-emption rights. *Bryan and Owings* v. *Wallace*, Hughes 194. These circumstances render it unnecessary for the court to express an opinion as to the description of persons contemplated to be relieved by the act of the Virginia legislature which passed in May 1781.

The defendants derive their title under an entry made the 22d of June 1780, in the words following, to wit: "William Lynn, James Barbour and John Williams enter 1000 acres upon a pre-emption warrant, beginning one-quarter of a mile below the Big Blue Lick, on Licking, on the south side thereof, running up both sides of the said creek, and east and south for quantity," which being of elder date than that of the complainants, the defendants holding the elder grant for the lands in controversy, I shall, therefore, consider the validity of their entry first, and test thereby their right to the land in dispute, which, if it be defective, and cannot be supported, must yield to the complainant, whose entry, in that case, is deemed good and valid for so much as it can legally cover.

The important call in the entry of the defendants is "the Big Blue Lick, on Licking, on the south side thereof." The validity of this entry rests on the following points: Was the lick, described in the connected plat filed in this suit, by the name of the Blue Lick, on the 22d day of June 1780, and prior to that time, generally known and called by the name of "the Big Blue Lick?" Does it lie on the south side of Licking? Is it a big lick? If the lick was not notoriously known by the name of the "Big Blue Lick" prior to June 1780, is the identity thereof so described as to put a subsequent locator on his guard?

By the testimony taken in this cause, the lick in controversy was discovered by the complainant and his fellow adventurers, in the year 1773, and was by them called the Upper Blue Lick, in contradistinction to another and larger lick, which had then been discovered by some of the company, lower down Licking. In the year 1775, another company of adventurers, consisting of five persons, of whom William Lynn was one, discovered the lick, and by them it was called the "Big Blue Lick," and from the entry made with the surveyor, by Lynn, it was so known to him, and called by that name, on the 22d day of June 1780. From the year 1777 to the present day, the lick has been, generally, and perhaps, universally, with the above exception by Lynn, designated by the name of the Upper Blue Lick. The weight of testimony preponderates, as to the name of the lick, in favor of the complainant. Therefore, as to the notoriety of the lick by the name of "the Big Blue Lick," the entry of the defendants is defective. Although it often happens, that notoriety of an object called for in an

entry cannot be satisfactorily proved, yet the identity thereof may be so described, *that it may be found by reasonable inquiry and searching therefor, and when found, known by the description. In that case, identity is equal to notoriety. [*172

I will now inquire how far the identity of the lick called for in the entry of the defendants can be supported? All the witnesses in the cause speak of the lick in question, as being a blue lick, and it is so admitted by the parties who, in their admission, represent the salt water issuing from the spring to be of a bluish color. There is no testimony which proves the existence of any Blue Lick, on Licking, except the Upper and Lower Blue Licks. The testimony establishes two salt springs on the south side of Licking; that the one lowest down is less than the upper spring; that there is another salt spring on the north side of Licking, at the place called the Lower Blue Licks, which is larger than that on the south side of the stream; and that there is no salt spring on the north side of Licking, opposite the upper lick. The witnesses also, when speaking of the lower salt springs, describe them generally as one entire object, "the Lower Blue Lick," or Licks; and William Brooks describes both the Upper and Lower Blue Licks, as big licks, and that the upper spring discharges most water.

The courts in this country have always endeavored to sustain an entry, if by reasonable construction it be possible. For this purpose, they will reject an absurd or superfluous call; they will supply a word; they will consider a call not proved as expunged; and although there are more allegations than are proved, yet if enough is proved to render the entry sufficiently certain, the court will support it.

These observations are made, to show that the courts will go great lengths to support defective entries, in imperfect and unimportant calls, and are not applicable to the entry now under consideration, which, in itself, is considered as possessing sufficient identity to put a subsequent locator upon inquiry, and when found, to know the place by the description contained in the entry. The Upper and Lower Blue Licks had received appropriate names, as early as the year 1777. The Lower Blue Licks, although there were at that place two salt springs, one on the north and the other on the south side of Licking, had received an appropriate name, conveying the idea of unity. This was not the situation of the Upper Blue Lick, which, although it had also an appropriate name, by which it was most generally known, at the time the entry of the defendants was made, yet it lies altogether on the south side of Licking.

The testimony taken in this cause supports every call in the entry of the defendants. All the witnesses concur, that the place designated in the connected plat as a blue lick, is entitled to that appellation. Brooks says that both the licks, *i. e.*, the Upper and Lower Blue Licks, are big licks; and in answer to a request to express his opinion which of the two was the largest, said he would recommend an examination; and the upper lick is on the south side of Licking. These facts apply to the description given in the defendants' entry, and will not apply to the Lower Blue Licks. Therefore, as no entire blue lick is proved to exist on the south side of Licking, except that designated in the connected plat, the entry of the defendants is sustained, and the court is of opinion, that no doubt could exist in the mind of a subsequent locator, upon viewing the Upper and Lower Blue Licks, and comparing the situation and other circumstances attending the Upper Blue Lick, with the entry, but that it was the place described, and would defeat any idea of ambiguity, if it had occurred. On examining the connected plat, I find that the defendants have commenced their survey on Licking, about one hundred poles below the lick, whereas, by the entry, they ought to have begun only eighty, that being the precise distance called for as the point of beginning of their survey. To rectify which, a new survey was ordered, upon the return of which, the defendants were decreed to convey to the complainants so much of the land as was in the defendants' original survey, and was now left out by the new survey, as interfered with the complainant's survey, and that the complainant's bill be dismissed as to all the residue.

*McIver's Lessee *v.* Walker and others. (*a*)

Land law of Tennessee.

If there is nothing in a patent to control the call for course and distance, the land must be bounded by the courses and distances of the patent, according to the magnetic meridian.[1]

Course and distance must yield to a call for natural objects.

All lands are supposed to have been actually surveyed, and the intention of the grant is to convey the land according to the actual survey.

If a patent refer to a plat annexed, and if in that plat, a water-course be laid down as running through the land, the tract must be so surveyed as to include the water-course, and to conform as near as may be to the plat, although the lines thus run do not correspond with the courses and distances mentioned in the patent, and although neither the certificate of survey, nor the patent, calls for that water-course.

Quære? Whether parol evidence can be given, that the surveyor intended to express the courses, according to the true, and not according to the magnetic, meridian?

Error to the Circuit Court for the district of East Tennessee, in an action of ejectment, brought by the plaintiff in error against the defendants. The case is thus stated by the Chief Justice in delivering the opinion of the court:

On the trial, the plaintiff produced two patents for 5000 acres each, from the state of North Carolina, granting to Stockley Donalson, from whom the plaintiff derived his title, two several tracts of land lying on Crow creek, the one, No. 12, beginning at a box-elder, standing on a ridge-corner to No. 11, &c., "as by the plat hereunto annexed will appear." The plat and certificate of survey were annexed to the grant.

The plaintiff proved that there were eleven other grants of the same date, for 5000 acres each, issued from the state of North Carolina, designated as a chain of surveys joining each other, from No. 1 to No. 11, inclusive, each calling for land on Crow creek, as a general call, and the courses and distances of which, as described in the grants, are the same with the grants produced to the jury. It was also proved, that the beginning of the first grant was marked and intended as the beginning corner of No. 1, but no other tree was marked, nor was any survey ever made, but the plat was made out at Raleigh, and does not express on its face that the lines were run by the true meridian. It was also proved, that the beginning corner of No. 1, stood on the north west side of Crow creek, and the line, running thence down the creek, and called for in the plat and patent, is south 40 degrees west. It further appeared, that Crow creek runs through a valley of good land, which is on an average about three miles wide, between mountains unfit for cultivation, and which extends from the beginning of the survey No. 1, in the said chain of surveys, until it reaches below survey No. 13, in nearly a straight line, the course of which is nearly south 35 *174] degrees *west, by the needle, and south 40 degrees west, by the true meridian. That in the face of the plats annexed to the grants, the creek is represented as running through and across each grant. The lines in the certificate of survey do not expressly call for crossing the creek; but each certificate and grant calls generally for land lying on Crow creek. If the lines of the tracts herein before mentioned No. 12 and 13, in the said

(*a*) February 9th, 1815. Absent, Livingston, Story and Todd, Justices.

[1] s. c. 4 Wheat. 444.

chain of surveys, be run according to the course of the needle and the distances called for, they will not include Crow creek or any part of it, and will not include the land in possession of the defendants. If they be run according to the true meridian, or so as to include Crow creek, they will include the lands in possession of the defendants. Whereupon, the counsel for the plaintiff moved the court to instruct the jury, 1. That the lines of the said lands ought to be run according to the true meridian, and not according to the needle. 2. That the lines ought to be run so as to include Crow creek and the lands in possession of the defendants.

The court overruled both these motions, and instructed the jury, that the said grant must be run according to the course of the needle, and the distances called for in the said grants, and that the same could not be legally run so as to include Crow creek, and that the said grants did not include the lands in possession of the defendants. To this opinion, an exception was taken by the plaintiff's counsel. A verdict and judgment were rendered for the defendants, and that judgment is now before this court on a writ of error.

The Chief Justice, in stating the case, omitted the fact, that testimony was offered by the plaintiff at the trial, to prove "that the surveyor who made the plats and certificates of survey annexed to the grants, had regard to the true meridian, and not to the course of the needle, in making the said certificates of survey, and intended the courses of the surveys so to be run;" which testimony was rejected by the court below, as inadmissible—but the court admitted evidence "that *the general practice of making surveys by surveyors, has been to run to the courses of the needle.' [*175

Swann, for the plaintiff in error.—The court below ought not to have rejected the testimony to prove the intention of the surveyor to run the lines of these grants by the true meridian. It corroborates the plat annexed to the grant. The rule of construction as to grants from the state, especially in Virginia, North Carolina and Tennessee, differs from the rule as to other deeds. Course and distance may be controlled by parol evidence of the actual manner in which the survey was made, and of the actual marks and bounds made upon the land, at the time of the survey. The courts have not stopped at a natural object called for, if parol evidence be given that, according to the actual survey, the line extended beyond that object. The marks control the course and distance of the patent. *Baker* v. *Glasscock*, 1 Hen. & Munf. 77; *Bustian* v. *Christie*, 1 Taylor (N. C.) 116; *Standen* v. *Bains*, 1 Hayw. 238; Ibid. 378; *Blount's Lessee* v. *Masters*, MS.; *Herbert* v. *Wise*, 3 Call 239.

If the witness had testified that a survey had been actually made, and that it included the creek, it would have been admissible testimony. But the plat was intended to be a substitute for an actual survey. It was a part of the patent, annexed to it, and referred to by it. It was as much a part of the patent, as if it had been inserted in it. It shows, that the land ought to be laid off so as to include the creek, as plainly as if the patent had expressed it in words. The course, south 40 degrees west, is ambiguous; it may mean a magnetic or a meridianal course. The question is, what was the intention of the surveyor? How shall it be ascertained? The most direct mode of ascertaining it is, to prove his declarations at the time. It

is true, that by proving what was the general practice of surveyors, you may infer his intention ; but that is a secondary mode of proof, and less certain than proof of his declarations at the time he made the particular survey in question. This is not bringing parol evidence to contradict or to control the plat, but to corroborate and confirm it. If a grant is capable of two
*176] constructions, the court *must adopt that which is most beneficial to the grantee. *Miller* v. *White*, 1 Taylor (N. C.) 163.

Jones, contrà.—The general practice of the country is to survey by the compass, and all the courses expressed in surveys refer to the magnetic meridian. A certificate of survey, therefore, is always supposed to express magnetic courses, unless the contrary be expressed on its face. No parol proof can be admitted to contradict what is so strongly implied. It would be a dangerous practice ; it would be a difficult thing for a common surveyor to ascertain the true meridian, and there is no law of North Carolina which compels him to do it. The testimony offered was not to prove any act of the surveyor, but his intention.

There is no natural boundary called for in the patent. The general expression that the land is on Crow creek, cannot control the course and distance. The expression in the patent, " as by the plat hereunto annexed will appear," refers only to the courses and distances, and not to the actual location of the land. The figure of a creek, delineated on the plat, without any reference to it in the certificate of survey, cannot control the boundaries actually described. Not a word is said about the lines including or crossing Crow creek ; and in order to include the creek, you must deviate from the straight line called for.

C. Lee, in reply.—The intent of a grant must be effectuated, if by any means, consistent with the rules of law, it can be done. The intent of this grant cannot be effectuated by the mode of survey directed by the court below. The plat, annexed to the grant, shows the intent to be to make the survey conform to the nature of the ground, so as to include the creek and the valley, and exclude the mountains. The law of North Carolina requires the plat to be annexed to the deed, which is thereby, and by the reference to it in the body of the deed, made a part thereof; and contains a plain declaration that the grantee shall have the valley through which the creek runs.
*177] *On what ground could the testimony of the intention of the surveyor have been rejected by the court, when they admitted testimony to show the general practice to be, to survey by the magnetic meridian? That general practice was only a fact from which the jury might infer, in the absence of positive testimony, what the intent of the surveyor was. It was a grade of evidence, inferior to positive testimony of the intention. It was only *primâ facie*, not conclusive evidence of his meaning. There was no law of North Carolina which required the surveyor to go by the magnetic, and not by the true meridian. He was at full liberty to adopt the true meridian, if he pleased. We say, he did so, and the plat itself is evidence of the fact ; for it could not otherwise be consistent with itself. You must run the lines according to the true meridian, to include the creek.

Marshall, Ch. J.—Does not difficulty arise, in consequence of the grant having been made, without actual survey?

C. Lee.—That is a matter between the state and the grantee. After a grant, no stranger can take advantage of such a defect. The state may waive the objection, if it chooses to do so.

Swann.—It has been settled, I believe, in North Carolina that when a grant has actually been made, no inquiry shall be made by the state as to the survey, &c. In *Dickey* v. *Hoodenpile*, 1 Hayw. 359, the judge says, "when a grant has issued, we can look no further back; all previous proceedings must be considered as regular."

March 1st, 1815. (Absent Todd, J.) MARSHALL, Ch. J., after stating the facts of the case, delivered the opinion of the court, as follows:—"It is undoubtedly the practice of surveyors, and the practice was proved in this cause, to express in their plats and certificates of survey, the courses which are designated by the needle; and if nothing exists to control the call for course and distance, the land must be *bounded by the courses and [*178 distances of the patent, according to the magnetic meridian. But it is a general principle, that the course and distance must yield to natural objects called for in the patent. All lands are supposed to be actually surveyed, and the intention of the grant is, to convey the land, according to that actual survey; consequently, if marked trees and marked corners be found, conformable to the calls of the patent, or if water-courses be called for in the patent, or mountains, or any other natural objects, distances must be lengthened or shortened, and courses varied, so as to conform to those objects.

The reason of this rule is, that it is the intention of the grant, to convey the land actually surveyed, and mistakes in courses or distances are more probable and more frequent, than in marked trees, mountains, rivers or other natural objects, capable of being clearly designated and accurately described. Had the survey, in this case, been actually made, and the lines had called to cross Crow creek, the courses and distances might have been precisely what they are, it might have been impracticable to find corner or other marked trees, and yet the land must have been so surveyed as to include Crow creek. The call, in the lines of the patent, to cross Crow creek, would be one to which course and distance must necessarily yield. This material call is omitted, and from its omission arises the great difficulty of the cause.

That the lands should not be described as lying on both sides of Crow creek, nor the lines call for crossing that creek, are such extraordinary omissions, as to create considerable doubt with the court, in deciding whether there is any other description given, in the patent, of sufficient strength to control the call for course and distance. The majority of the court is of opinion, that there is such a description. The patent closes its description of the land granted by a reference to the plat which is annexed. The laws of the state require this annexation. In *this plat, thus [*179 annexed to the patent, and thus referred to, as describing the land granted, Crow creek is laid down as passing through the tract. Every person, having knowledge of the grant, would also have knowledge of the plat, and would, by that plat, be instructed, that the lands lay on both sides of the creek; there would be nothing to lead to a different conclusion, but a difference of about five degrees in the course, should he run out the whole

chain of surveys, in order to find the beginning of No. 12 ; and he would know that such an error in the course would be corrected by such a great natural object, as a creek laid down by the surveyor in the middle of his plat. This would prove, notwithstanding the error in the course, that the lands on both sides of Crow creek were intended to be included in the survey, and intended to be granted by the patent.

It is the opinion of the majority of this court, that there is error in the opinion of the circuit court for the district of East Tennessee in this, that the said court instructed the jury, that the grant, under which the plaintiff claimed, could not be legally run, so as to include Crow creek, instead of directing the jury, that the said grant must be so run as to include Crow creek, and to conform as near as may be to the plat annexed to the said grant ; wherefore, it is considered by this court, that the said judgment be reversed and annulled, and the cause be remanded to the said circuit court, that a new trial may be had according to law.

The Chief Justice added, that he did not think the question about the true meridian had much to do with the case. The court decided it upon the plat. If it had not been for the plat, they should have said, that the land ought to be surveyed by the magnetic meridian.

Duvall, J.—My opinion is, that there is no safe rule but to follow the needle, making allowance for variation, according to practical observation.

Judgment reversed.

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*180] *Owens *v.* Hannay. (*a*)

Practice in error.—Transcript.—Alien enemy.

It is not necessary, that the transcript of the record should contain the names of the jurors.

Semble: That if it appear by the record, that the plaintiff below was a subject of Great Britain, and a war break out between Great Britain and the United States, after rendition of the judgment below, and before affirmance on the writ of error, the plaintiff in error cannot take advantage of the fact, that the original plaintiff is an alien enemy; but the judgment may be affirmed.[1]

Error to the Circuit Court for the district of Georgia, in an action of *assumpsit*, upon a special promise to pay interest upon the amount of a decree in chancery, in consideration of forbearance.

The plaintiff below was stated in the declaration to be an alien and British subject, and the defendant a citizen of Georgia. A demurrer to the declaration having been overruled, the defendant pleaded *non assumpsit*, upon which issue, the verdict and judgment were against him, in May 1811, and he brought his writ of error. In the transcript of the record, which came up, a blank was left for the names of the jurors, but in other respects the record appeared to be perfect. The verdict and judgment were fully stated.

War was declared by the United States against Great Britain, on the 18th of June 1812, and continued at the time of the argument in this court.

(*a*) February 8th, 1815. Absent, Livingston, Story and Todd, Justices.

[1] See Buckley *v.* Lyttle, 10 Johns. 117.

Harper, for the plaintiff in error, contended, 1. That as it appeared upon the record, that the plaintiff was an alien enemy, and the defendant had had no opportunity to plead that fact, this court ought not to affirm the judgment; and 2. That the omission of the names of the jurors was fatal, inasmuch as it did not appear from the record, that it was the verdict of a legal jury.

March 1st, 1815. (Absent, Todd, J.) Marshall, Ch. J., stated the opinion of the court to be, that the omission of the names of the jurors was not material. Nothing was said upon the first point.

Judgment affirmed, with costs.

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*The Fanny's Cargo. (*a*) [*181

United States *v.* Cargo of the Ship Fanny, Jennings, Master.

Non-intercourse law.

Under the non-intercourse act of 1809, a vessel from Great Britain had a right to lay off the coast of the United States, to receive instructions from her owners in New York; and if necessary, to drop anchor, and in case of a storm, to make a harbor; and if prevented, by a mutiny, of her crew from puttiug out to sea again, might wait in the waters of the United States for orders.

Appeal from the sentence of the Circuit Court for the district of Connecticut, restoring the property to the claimants.

The American ship Fanny was laden at Greenock, in Scotland, with a cargo of British goods, the property of citizens of the United States, and sailed from thence, on the 4th day of July 1812, after the repeal of the orders in council, and before the war between Great Britain and the United States was known in Greenock. The orders to the master were, to proceed to New York; but unless he was perfectly sure of being allowed an entrance for ship and cargo at New York, he was not to go into the waters of the United States, but to send up a pilot-boat with his letters, so that the consignees might fix upon a port of discharge. The master had no knowledge of the war, until his arrival on the coast, when he received it off Montauk point, from a pilot-boat, who also informed him that several British frigates were off Sandy Hook, capturing American vessels. Whereupon, he dispatched the pilot-boat, with letters for his owners, by the way of New London. Soon afterwards, it became calm, and the ship, drifting too near the shore, he dropped anchor. In the course of the night, it came on to blow a gale, and finding it impossible to lay there, he attempted to get under weigh and stand off, but before he could get up the anchor and make sail, he drifted so far in, that he could not fetch Montauk point, and the pilot informing him that there was good anchorage ground in Fort-pond bay, and that it would not be safe to keep out, he proceeded with the ship to that bay, intending to stand out as soon as the storm abated. Having there cast anchor, and rode out the gale, his crew refused to get under weigh, to go out of the waters of the United States, alleging that they understood he had a British license, and was going to put his ship *under the pro- [*182

(*a*) February 24th, 1815. Absent, Todd, Justice.

tection of British ships of war, and they were afraid of being impressed. He then determined to come out into the sound, and there wait for orders, without going into any port. He did so, but was boarded about half way from Port-pond bay to the Race, Fisher's Island bearing north, and seized by a revenue-cutter, who carried him into New London, where the cargo was libelled for having been shipped in Great Britain, with the knowledge of the master, with intent to be imported into the United States, contrary to the provisions of the non-intercourse act of 28th June 1809 (2 U. S. Stat. 550). In the district court, the cargo was condemned, but was restored by the circuit court. From this sentence, the United States appealed.

The cause was argued by *Jones*, for the United States, and *Daggett*, for the claimants, in the absence of the reporter.

March 1st, 1815. (Absent, Todd, J.) JOHNSON, J., delivered the opinion of the court, as follows:—This case bears every feature of fairness. The voyage was undertaken upon the repeal of the orders in council. The vessel was laden in the short space of four days, and sailed without a knowledge of the war. Her destination was alternative—to New York, if she could enter; if not, to a British port. Upon arriving off Montauk, she receives notice of the war, and of the danger of capture in prosecuting her voyage to New York. A pilot-boat is then dispatched to New London, by the master, with notice to his owners of his situation, and a request for instructions.

To call off for instructions, was fair and justifiable; and to obtain them it was necessary that he should await the return of the pilot-boat. Thus circumstanced, a calm obliges him to drop anchor to prevent his drifting on shore, and a storm forces him into a bay for shelter. Whilst there, his crew mutiny, and prevent his leaving the bay, in order to lay off, and await
*183] the return of his messenger; and whilst plying in the waters between *Montauk and New London, he is seized by the revenue-cutter, and forced into the latter port. We are of opinion, that there was nothing, either in action or intention, which subjected this vessel to municipal forfeiture. A condemnation is claimed on no other ground; and the decree of the circuit court must, therefore, be affirmed.

The claims of the several parcels of merchandise seized in the Fanny, rest on the same circumstances, and must likewise be restored.

Decree affirmed.

The Frances, Boyer, Master: Dunham & Randolph's claim. (*a*)

Prize.—Enemy's property.

If a British merchant purchase, with his own funds, two cargoes of goods, in consequence of, but not in exact conformity with, the orders of an American house, and ship them to America, giving the American house an option, within twenty-four hours after receipt of his letter, to take or reject both cargoes; and if they give notice, within the time, that they will take one cargo, but will consider as to the other; this puts it in the power of the British merchant, either to cast the whole upon the American house, or to resume the property, and make them accountable for that which came to their hands. The right of property in the cargo, not accepted, does not, *in transitu*, vest in the American house, but remains in the British subject, and is liable to condemnation, he being an enemy.[1]

The Frances, 1 Gallis. 445, affirmed.

In this case, further proof was ordered, at the last term. (See 8 Cr. 354.)

Pinkney, for the claimants.—The property vested in Dunham & Randolph by the shipment. It was made in consequence of, although not strictly in conformity with, their orders; and delivery to the master of the vessel was tantamount to a delivery to themselves. The invoices and bills of lading all stated the goods to be shipped on their account and risk.

But if the property did not pass by the shipment, there is no reason why it should not pass *in transitu*, so that it be, before capture. It is true, that it cannot vest *in transitu*, so as to defeat a vested belligerent right. But if the transfer take place, according to the original terms of the contract, before a belligerent right has accrued, it is not within the principle nor the spirit of the rule. If the further proof shows that the property had absolutely vested in Dunham & Randolph, before the capture, it must be restored.

The further proof shows that the invoice, stating the shipment to be made for their account and risk, was *sent to them; and that Dunham & Randolph wrote a letter, before the capture of the Frances, [*184 accepting the goods by the Fanny, and saying that they would consider as to those by the Frances.

The question then is, whether the whole of both cargoes did not thereby vest, *eo instanti*, in Dunham & Randolph? The documentary evidence is clear and positive; it behooves the captors to show how it is qualified. The condition upon which the property was to vest in the claimants, was performed, before the capture. They agree to take the goods by the Fanny, and were instantly bound to take both shipments. They could not afterwards refuse that by the Frances. Their letter, agreeing to take the goods by the Fanny, was dated the 22d of August. The Frances was not captured until the 28th.

Emmett, on the same side.—The surplus of goods, beyond the other, was chiefly, if not entirely, in the Fanny, and accepted by Dunham & Randolph, so that there can be no question, on the ground that the goods by the Frances were not ordered. Dunham & Randolph's letter of 19th of September explains the cause of their partial acceptance.

(*a*) February 18th, 1815. Absent, Todd, Justice.

[1] The Frances, 2 Gallis. 391.

Dexter, contrà.—This court has decided, that this was a condition precedent, and that the transfer could not take place until the condition was performed.

The first question is, whether, if the goods were accepted by Dunham & Randolph, either in fact or in law, the property could pass *in transitu*. The general principle is, that it could not. The question always is, in whom was the right of property at the time of shipment? The simplicity and celerity with which the trial of captures must be conducted, require that the ques-
*185] tion should be limited to the time of shipment. For the *same reason, prize courts have rejected equitable liens. If it were not so, further proof would be required in every case. *The Twende Venner*, 6 Rob. 329, n. This rule is reasonable. Possession is evidence of ownership. Change of title *in transitu* is only an exception to the general rule. The exception should be confined to the cases in which it has been held necessary, as where possession could not be delivered, &c. The papers on board are always sufficient for the captors. In a prize court, the documentary evidence is all important. This point is settled in the case of the claim of Magee & Jones, in *The Venus*, at this term.

As to the further proof produced in this cause, it is of very little importance. Dunham & Randolph did not comply with the condition upon which the property was to vest in them. They agreed to take a part only, and therefore, were not entitled to any. It is immaterial, whether this bound them to take the whole or not. It did not bind Thompson. He had a right to refuse to let them have any part, as they had not accepted the whole, or he might insist upon their taking the whole. It was at his option, to call upon them to account, as his factors, for the whole. If Thompson had such a right, the captors have such a right, for by the capture they succeeded, *jure belli*, to all the rights of Thompson.

The time was past when they accepted the goods by the Fanny; they were in the custody of the law, under the seizure of the revenue officers. Dunham & Randolph could only accept them conditionally; *i. e.*, if they should be restored; but if they should be condemned, they could not receive them.

It is not credible, that they should have received them absolutely, at the time they were under seizure. They did not *bonâ fide* accept them. It is not to be believed, that they would take upon themselves the risk of their condemnation. It was probably done as a cover, for the benefit of Thompson. The goods not being according to order, they were not bound to accept them. Thompson made a new proposal to them. They did not accept it, but offered new terms on their part, to which Thompson did not assent; so that there was no agreement. The property never passed.

*186] *Emmett*, in reply.—There are two questions in this cause: 1. The first is a question of fact, did Dunham & Randolph accept the goods? 2. The second is a question of law, can such an acceptance change the title *in transitu?*

1. Dunham & Randolph, relying on the justice of the United States, and that they would protect goods, the property of citizens of the United States, shipped on the faith of the declarations of their agents respecting the effect of the repeal of the orders in council, did *bonâ fide* accept them. This

appears from their letter of the 19th of September. They had no motive to make the goods appear American rather than British; for in each case, they would be equally liable to condemnation. They relied entirely upon the justice of the government.

The acceptance of the goods by the Fanny was absolute. The language used in regard to those by the Frances was intended to deceive the enemy, in case of British capture.

Thompson had no right to annex the condition to the acceptance. The goods were ordered by Dunham & Randolph. Thompson had agreed to execute the order, and was bound so to do. In shipping the goods, he was executing an order, not making a bargain. Dunham & Randolph had a right to take to their own account the goods ordered, and receive the residue as a consignment, to sell for the account of Thompson. If the question were now open, I should say, that these goods never belonged to the shipper. They were purchased by the agent of Dunham & Randolph, by their order, and for their account.

2. In point of law, what was the effect of the acceptance? The acceptance was good for both cargoes, or it was good for neither. Thompson either had, or had not, a right to annex the condition. If he had not, then the goods were the property of Dunham & Randolph *ab initio*. If he had a right to annex the condition, they *had no right to reject it. They were bound to take all or none; if they took part, they were bound [*187 to take the residue. Their reservation of a right to consider as to the goods by the Frances, was void.

The only remaining question is, whether belligerent property can change *in transitu*. Belligerent rights, in derogation of the common law, are to be construed strictly. They are not to be extended further than the state of war requires. *The Vrow Anna Catharina*, 5 Rob. 161. The rules of war are not to be changed for the convenience of captors. It is true, that the captors are to judge by the ship's papers; but here the ship's papers all showed the truth of the case; and nothing but a single letter cast any doubt upon it.

The rule extends no further than that a neutral title shall not originate during the voyage. If the title originated anterior to the war; if the shipment was made before the war, and not in contemplation of war; and if the condition, upon which the title was to change, was annexed before the war; such a contract could not be in violation of the belligerent rights. Thompson had not an option to hold Dunham & Randolph to the acceptance, or not, as he pleased. If they did an act which bound them, he was bound also. The acceptance must be considered absolute, and the condition not in derogation of belligerent rights.

March 2d, 1815. (Absent, Todd, J.) JOHNSON, J., delivered the opinion of the court, as follows:—This claim is interposed to obtain restitution of three bales and nineteen boxes of goods captured in the Frances. As early as the 23d of July 1811, these claimants, anticipating a repeal of the orders in council, gave an order to Alexander Thompson, of Glasgow, to ship him a variety of articles. In July 1812, upon the repeal of the orders in council, Thompson ships the articles ordered; and originally intending to ship to *the claimants, a consignment on his own account, inter- [*188

mingles with the goods ordered, a variety of others, not contained in the order of the claimants. These goods are shipped by two vessels, the Fanny and the Frances; and by a letter dated the 11th of July 1812, Thompson advises the claimants of these shipments; and after descanting on the merits of the articles, and declaring his reason for blending other goods with those shipped to their order, and his subsequent determination to make them an offer of the additional goods, he continues in these words: "I leave it with yourselves, to take the whole of the two shipments, or none at all, just as you please. If you do not wish them, I will thank you to hand the invoices and letters over to Messrs. Falconer, Jackson & Co. I think twenty-four hours will allow you ample opportunity for you to make up your minds on this point; and if you do not hand them over within that time, I will, of course, consider that you take the whole." "You will see, I think, the reasonableness of your taking the whole or none of the shipment."

The Fanny reached the waters of the United States in safety; and being seized by a revenue-cutter, was carried into New London, where she has been finally restored. The Frances was captured on the 28th of August, by the privateer Yankee, and carried into Rhode Island. On the 22d of August, after the arrival of the Fanny, the claimants write to Falconer, Jackson & Co., and accept of the shipment by the Fanny; but with regard to that by the Frances, they write in the following words: "His letter also speaks of another shipment of thirty-one packages *per* Frances, which, on arrival, we shall then hand in our determination." On the first of September following, they again write to Falconer, Jackson & Co., intimating their acceptance of the shipment by the Frances. On this state of facts, it is contended, that the claimants are entitled to restitution; that they either had an original interest in the goods shipped, or had acquired one, before the capture.

In the ordinary course of mercantile transactions, a delivery to a ship-
*189] master is a delivery to the consignee. *But it is evident, that this delivery may be absolute or qualified, and that the effect of it must vary accordingly. A voluntary agent has the option either to enter upon his agency, in strict conformity with the instructions of his principal, or with such reservations or conditions as he may think proper to prescribe; and the only consequence is, that, in the latter case, he leaves his principal at liberty to adopt or repudiate his acts. The shipper who purchases goods on his own credit, or with his own funds, is not acting in the ordinary capacity of a factor. If he were, the goods, even before shipment, would be the property of the individual on whose order the purchase is made. Such shipments are in the nature of a mercantile credit, and the shipper always retains the uncontrolled exercise of discretion in extending it. There was, therefore, nothing inconsistent with the relative rights of the parties, in Thompson's imposing upon the consignees the condition of taking all or none of the two shipments; and the consequence was, that the delivery was not absolute, but qualified; and until the condition performed, the goods remained the property of the shipper; and had they suffered shipwreck, the loss would have been his.

But it is contended, that the condition was performed, and that this case forms an exception from the rule, that, as to the exercise of belligerent

rights, there shall be no transfer *in transitu*. The acceptance of the cargo by the Fanny was on the 22d, the capture of the Frances on the 28th of August. It is contended, that the acceptance of the Fanny's cargo was conclusive as to both shipments; and that, although partial in terms, it must, in law, have effect as to the whole, since such was the condition imposed by the shipper; and that it was, in fact, the intention of the claimants that such should be the effect of the acceptance; but the reservation was intended only as a *ruse de guerre* to guard against the effects of hostile capture.

There is certainly nothing illegal, in resorting to devices to elude hostile capture; and where it can be clearly shown, that property is really neutral or friendly, its being covered under hostile habiliments, for the purpose *of evasion, will not necessarily subject it to condemnation. But the evidence must be less equivocal than that relied on in this case. The [*190 property was already captured and libelled, as liable to American capture, when the claimants' letter of the 19th September was written. To receive such evidence, under such circumstances, to so critical a point, would be to surrender every belligerent right to fraud and imposition. The letter of the 22d of August must, therefore, be taken on its plain import, and such effect given to it as its words imply. This letter contains an express exclusion of the goods under consideration; but it is contended, that as Thompson's letter left them no latitude, but obliged them either to choose or refuse the whole, their acceptance of part cast on them the property in the whole.

But we are of opinion, that such was not the effect of this act of the claimants. The consequence of such a doctrine would be, that where a property is to be acquired upon a condition performed, the condition may be rejected, and yet the property acquired. It certainly put it in the power of the shippers, either to cast the whole property upon the claimants, or resume the property, and make the consignee accountable for that which had come to his hands. Falconer, Jackson & Co., upon the arrival of the Frances, had she not been captured, would have had an undoubted right to demand the shipment made by her, on the ground of the claimants' not having accepted it within the time limited; and it would have been in vain for the claimants to have contested their right, whilst they held the letter of the 22d of August, and Thompson's instructions on the subject of the acceptance. If, then, it rested with Thompson, or his agent, to retain the property in this shipment, or cast it upon the claimants, the consequence is, that the legal interest still remained in the shippers.

This conclusion on the state of interest in the parties, renders it unnecessary to consider the argument urged to except this case from the rule relative to changes of property *in transitu:* and we hope it will be, at all times, recollected, that the reasoning in this case is not founded on the implied admission of the distinction taken by the claimants' counsel on this subject.

Decree affirmed.

*Thirty Hogsheads of Sugar, Adrian B. Bentzon, Claimant, *v.* Boyle and others, the Officers and Crew of the Privateer Comet. (*a*)

Enemy's property.—Decisions of foreign courts.

The produce of an enemy's colony is to be considered as hostile property, so long as it belongs to the owner of the soil, whatever may be his national character in other respects, or whatever may be his place of residence.

An island in the temporary occupation of the enemy, is to be considered as an enemy's colony.[1]

In deciding a question of the law of nations, this court will respect the decisions of foreign courts.

The Phœnix, 5 Rob. 25, recognised and followed.

Appeal from the sentence of the Circuit Court for the district of Maryland, condemning thirty hogsheads of sugar, the property of the claimant, a Danish subject, it being the produce of his plantation in Santa Cruz, and shipped, after the capture of that island by the British, to a house in London, for account and risk of the claimant, who was a Danish officer, and the second in authority in the government of the island before its capture ; and who, shortly after the capture, withdrew, and has since resided in the United States and in Denmark. By the articles of capitulation, the inhabitants were permitted to retain their property, but could only ship the produce of the island to Great Britain. This sugar was captured in July 1812, after the declaration of war by the United Sates against Great Britain, and libelled as British property.

Harper, for the appellant, made two questions, 1. Is this case within the rule of the British prize courts, that the produce of a plantation in an enemy's country shall be considered, while such produce remains the property of the owner of the soil, as the property of an enemy, whatever may be the general national character of the owner ? 2. If it be within that rule, is the rule to be considered in this country, as a rule of national law ?

1. Sir William Scott, in laying down the rule in the case of *The Phœnix*, 5 Rob. 26, 20, refers to the case of *The Juffrow Catharina*, in 1783, and the reason of the rule seems to be, that the proprietor of the soil incorporates *himself with the permanent interests of the country. The rule is modern, and several exceptions have been made to it. In the case of *The Phœnix*, the claim was made by persons of Germany, for property taken on a voyage from Surinam to Holland, and described as the produce of their estates in Surinam, which was then a colony of Holland, with which Great Britain was at war, Germany being neutral. Sir William Scott admits, that if the estates had been purchased, while Surinam was in the possession of the British, the case would not have been within the general rule. So, in the case of *The Diana*, 5 Rob. 60 (Eng. ed.), those who settled in Demarara, while it was under British protection, were held not to be within the rule ; and the case of *The Vrow Anna Catharina*, 5 Rob. 161 (Eng. ed.), is another modification of the rule. These cases were excepted, because the proprietors had not incorporated themselves with the permanent interests of the nation.

*192]

(*a*) March 30th, 1815. Absent, Todd, Justice.

[1] S. P. Shanks *v.* Dupont, 3 Pet. 242.

In the present case, Mr. Bentzon never incorporated himself with the interests of the British nation, either permanently or temporarily. The character was forced upon him against his will; he always disclaimed it. He was, by birth, and always continued, a Danish subject. He did not voluntarily purchase a plantation in the country of the enemy. When he purchased his estate, Santa Cruz was neutral. The occupation of the island by the British was temporary; it was neither permanent in fact nor in law. Peace has restored the island to Denmark. Mr. Bentzon could not, by means of his estate in Santa Cruz, incorporate himself permanently with the interests of Great Britain.

2. But if the case comes within the British rule, are we to adopt that rule, and extend it to a neutral nation which has never itself adopted it? It is but the ordinary case of a neutral carrying on his lawful trade with our enemy; and has nothing in it contrary to the law of nations. The rule contended for is a mere arbitrary one, calculated to extend the field of rapine, and to increase the maritime power of Great Britain. We have no interest in aiding those views.

*What is the law of nations? Not a rule adopted by one nation only, but the law of nature, of reason, and of justice, applied to the intercourse of nations, and admitted by all such as are civilized. What is there in the code of any other nation to support this rule? It is to be found only in the maritime code of Great Britain; which is not more binding upon us than that of any other maritime power. It can have no force with us, but in cases where the rule of reciprocity or of retaliation will justify its use. But Denmark has never used nor acknowledged the rule; and therefore, we cannot justly enforce it against her. But if this court should adopt the rule, we trust it will be with the strictest limitation. [*193

Pinkney, contrà.—By the capture of Santa Cruz by the British, it immediately became the colony of an enemy. It is not necessary that the occupation should be perpetual; for the time, it was indefinite, and during the occupation, it was as much the colony of an enemy as any of his other possessions.

If, then, Santa Cruz was an enemy's colony, its produce, while it remained the property of the owner of the soil, was the property of an enemy. Sir W. Scott, in the case of *The Phœnix*, 5 Rob. 21 (Eng. ed.), says, that the rule has been so repeatedly decided, both in that and the superior court, that it is no longer open to discussion. No question can be made upon the point of law at this day. The opposite argument goes to show that if the property in the soil be acquired, before the capture of the island, the owner would not be considered an enemy, although the island should remain permanently a British colony. The case of *The Phœnix* contains no exception to the general rule; it is, however, said, that the case of *The Diana* shows an exception; but that was a mere question of domicil. The rule now under consideration was not discussed.

*It is said, that the party, in order to acquire the hostile character as to the produce of his estate, must incorporate himself with the interests of the enemy, while the soil is in possession of the enemy. But the rule is not so. There is no difference whether he acquire the estate before or after it come into the possession of the enemy; if he continues to [*194

hold the estate, he becomes immediately incorporated with the nation, *jure belli*.

But it is asked, is Great Britain to legislate for other nations? We say, no. But this court will pay great respect to the English decisions on this subject; especially, as the rule has been acquiesced in by all the nations of Europe. Not one of them has remonstrated—not even Denmark. It has therefore, the positive authority of England, and the negative authority of all the residue of Europe. The rule is not harder than that of domicil, to which it is analogous.

Harper, in reply.—It is said, that the rule is general, because all the nations of Europe have acquiesced in the English decisions. Several reasons may be given for this appearance of acquiescence. It is a recent rule. No authority can be produced for it, earlier than 1783, just at the close of the American war. Peace having immediately taken place, removed the cause of complaint. And as to the late war with France, no case of the kind appears to have arisen. The edicts of France, &c., had a different bearing. It is said, that the rule is analogous to that of domicil; but the rule of domicil rests upon a different principle—the principle of allegiance and the safety of the state. A man found in the enemy's country, at the breaking out of the war, receives the protection of that country, and is bound to do nothing to its injury; and if he do not remove in a reasonable time, is to be considered as having incorporated himself with the interests of that country. The rule of domicil is rather a rule of municipal than of national law; and the principal ground of the rule is the necessity of preventing treasonable intercourse with the enemy. It becomes a part of national law only when it is applied to neutrals. It has no analogy to the rule now in question,
*195] *which was adopted merely to prevent the interference of neutral with belligerent rights.

March 4th, 1815. (Absent, Todd, J.) Marshall, Ch. J., delivered the opinion of the court, as follows:—The island of Santa Cruz, belonging to the kingdom of Denmark, was subdued, during the late war, by the arms of his Britannic majesty. Adrian Benjamin Bentzon, an officer of the Danish government, and a proprietor of land therein, withdrew from the island, on its surrender, and has since resided in Denmark. The property of the inhabitants being secured to them, he still retained his estate in the island, under the management of an agent, who shipped thirty hogsheads of sugar, the produce of that estate, on board a British ship, to a commercial house in London, on account and risk of the said A. B. Bentzon. On her passage, she was captured by the American privateer, the Comet, and brought into Baltimore, where the vessel and cargo were libelled as enemy property. A claim for these sugars was put in by Bentzon; but they were condemned with the rest of the cargo; and the sentence was affirmed in the circuit court. The claimant then appealed to this court.

Some doubt has been suggested, whether Santa Cruz, while in the possession of Great Britain, could properly be considered as a British island. But for this doubt there can be no foundation. Although acquisitions made during war are not considered as permanent, until confirmed by treaty, yet, to every commercial and belligerent purpose, they are considered as a part of the domain of the conqueror, so long as he retains the possession and gov-

ernment of them. The island of Santa Cruz, after its capitulation, remained a British island, until it was restored to Denmark.

Must the produce of a plantation in that island, shipped by the proprietor himself, who is a Dane, residing in Denmark, be considered as British, and therefore, enemy property? *In arguing this question, the counsel for the claimants has made two points. 1. That this case does not come within the rule applicable to shipments from an enemy country, even as laid down in the British courts of admiralty. 2. That the rule has not been rightly laid down in those courts, and, consequently, will not be adopted in this. [*196

1. Does the rule laid down in the British courts of admiralty embrace this case? It appears to the court, that the case of *The Phœnix* is precisely in point. In that case, a vessel was captured in a voyage from Surinam to Holland, and a part of the cargo was claimed by persons residing in Germany, then a neutral country, as the produce of their estates in Surinam. The counsel for the captors considered the law of the case as entirely settled; the counsel for the claimants did not controvert this position. They admitted it; but endeavored to extricate their case from the general principle, by giving it the protection of the treaty of Amiens. In pronouncing his opinion, Sir WILLIAM SCOTT lays down the general rule thus: "Certainly, nothing can be more decided and fixed, as the principle of this court and of the supreme court, upon very solemn argument, than that the possession of the soil does impress upon the owner the character of the country, as far as the produce of that plantation is concerned, in its transportation to any other country, whatever the local residence of the owner may be. This has been so repeatedly decided, both in this and the superior court, that it is no longer open to discussion. No question can be made on the point of law, at this day."

Afterwards, in the case of *The Vrow Anna Catharina*, Sir WILLIAM SCOTT lays down the rule, and states its reason. "It cannot be doubted," he says, "that there are transactions so radically and fundamentally national as to impress the national character, independent of peace or war, and the local residence of the parties. The *produce of a person's own plantation, in the colony of the enemy, though shipped in time of peace, is liable to be considered as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation, as a holder of the soil, and is to be taken as a part of that country, in that particular transaction, independent of his own personal residence and occupation." [*197

This rule laid down with so much precision, does not, it is contended, embrace Mr. Bentzson's claim, because he has not "incorporated himself with the permanent interests of the nation." He acquired the property, while Santa Cruz was a Danish colony, and he withdrew from the island when it became British. This distinction does not appear to the court to be a sound one. The identification of the national character of the owner with that of the soil, in the particular transaction, is not placed on the dispositions with which he acquires the soil, or on his general character. The acquisition of land in Santa Cruz binds him, so far as respects that land, to the fate of Santa Cruz, whatever its destiny may be. While that island belonged to Denmark, the produce of the soil, while unsold, was, according to

this rule, Danish property, whatever might be the general character of the particular proprietor. When the island became British, the soil and its produce, while that produce remained unsold, were British. The general commercial or political character of Mr. Bentzon could not, according to this rule, affect this particular transaction. Although incorporated, so far as respects his general character, with the permanent interests of Denmark, he was incorporated, so far as respected his plantation in Santa Cruz, with the permanent interests of Santa Cruz, which was, at that time, British; and though, as a Dane, he was at war with Great Britain, and an enemy, yet, as a proprietor of land in Santa Cruz, he was no enemy: he could ship his produce to Great Britain in perfect safety.

The case is certainly within the rule as laid down in the British courts. The next inquiry is, how far will that rule be adopted in this country?

*198] *The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognised by all civilized and commercial states throughout Europe and America. This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice: but as these principles will be differently understood by different nations, under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.

Without taking a comparative view of the justice or fairness of the rules established in the British courts, and of those established in the courts of other nations, there are circumstances not to be excluded from consideration, which give to those rules a claim to our attention that we cannot entirely disregard. The United States having, at one time, formed a component part of the British empire, their prize law was our prize law. When we separated, it continued to be our prize law, so far as it was adapted to our circumstances, and was not varied by the power which was capable of changing it.

It will not be advanced, in consequence of this former relation between the two countries, that any obvious misconstruction of public law, made by the British courts, will be considered as forming a rule for the American courts, or that any recent rule of the British courts is entitled to more respect than the recent rules of other countries. But a case professing to be decided on ancient principles will not be entirely disregarded, unless it be very unreasonable, or be founded on a construction rejected by other nations.

The rule laid down in *The Phœnix* is said to be a recent rule, because a case solemnly decided before the lords commissioners in 1783, is quoted in

*199] the margin, *as its authority. But that case is not suggested to have been determined contrary to former practice or former opinions. Nor do we perceive any reason for supposing it to be contrary to the rule of other nations in a similar case. The opinion that ownership of the soil does, in some decree, connect the owner with the property, so far as respects that

soil, is an opinion which certainly prevails very extensively. It is not an unreasonable opinion. Personal property may follow the person anywhere; and its character, if found on the ocean, may depend on the domicil of the owner. But land is fixed: wherever the owner may reside, that land is hostile or friendly, according to the condition of the country in which it is placed. It is no extravagant perversion of principle, nor is it a violent offence to the course of human opinion, to say, that the proprietor, so far as respects his interest in this land, partakes of its character; and that the produce, while the owner remains unchanged, is subject to the same disabilities. In condemning the sugars of Mr. Bentzon as enemy property, this court is of opinion, that there was no error, and the sentence is affirmed, with costs.

Sentence affirmed.

Evans *v.* Jordan and Morehead. (*a*)

Patents.

The act of January 1808, for the relief of Oliver Evans, does not authorize those who erected his machinery between the expiration of his old patent and the issuing of the new one, to use it, after the issuing of the latter.[1]

This was a case certified from the Circuit Court for the district of Virginia, in which the judges were divided in opinion upon the question, whether, after the expiration of the original patent granted to Oliver Evans, a general right to use his discovery, was not so vested in the public, as to require and justify such a construction of the act passed in January 1808, entitled "an act for the relief of Oliver Evans" as to exempt from either single or treble damages, the use, subsequent to the passage of the said act, of the machinery therein mentioned, which was erected subsequent to the expiration of the original patent, and previous to the passage of the said act.[2]

The act (6 U. S. Stat. 70) authorizes the secretary of state to issue letters patent to Oliver Evans, in the manner and form prescribed by the general patent law, granting to *him for the term of fourteen years the exclusive right of making, using and vending for use the machinery [*200 in question, "provided, that no person who may have heretofore paid the said Oliver Evans for license to use his said improvements, shall be obliged to renew the said license, or be subject to damages for not renewing the same; and provided also, that no person who shall have used the said improvements, or have erected the same for use, before the issuing of the said patent, shall be liable to damages therefor."

Harper, for the plaintiff.—The former patent of the plaintiff having expired, congress, in consideration of the particular circumstances of his case, authorized a new patent to issue for another term of fourteen years. Between the expiration of the old and the issuing of the new patent, the defendants had erected and used, and continued to use, the plaintiff's machinery, in the

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(*a*) March 2d, 1815. Absent, Todd, Justice.

[1] Evans v. Weiss, 2 W. C. C. 342.

[2] See 1 Brock. 248, for the opinion of the chief justice, which was unanimously sustained by this court. And for the decisions on Evans's patent, see 3 Wheat. 454; 7 Id. 356, 453; Pet. C. C. 215, 322; 3 W. C. C. 408, 443.

manufacture of flour, contending that they were protected by the proviso of the act of January 21st, 1808.

We contend, that the proviso does not authorize them to continue the use of the machinery, after the issuing of the new patent, but merely protects them from damages for having used and for having erected for use the machinery in question, prior to the issuing of the new patent. The second patent was intended to place Evans in the situation in which he would have been, if the first patent had continued in force, except as to his right to damages for acts done in the intermediate time between the first and second patent. If the defendants chose to continue to use the machinery, after the new patent, they were bound to pay for the right to use it.

E. J. Lee, and *P. B. Key*, contrà.—If the construction contended for on the other side be correct, the proviso was wholly useless, because the defendants needed no such protection. Evans could have no claim against them, for acts done after his patent had expired, and before the issuing of the new patent. The defendants had a full and perfect right to erect and use the
*201] machinery. A law to oblige them now to abandon *their property, or to pay what Mr. Evans may choose to exact, is in the nature of an *ex post facto law*; and although it may not be absolutely unconstitutional, yet is so far within the spirit of the constitution, that this court will not give such a construction to the proviso, if it can possibly be avoided. The proviso says, that no person who shall have erected the machinery for use, shall be liable to damages therefor. The defendants had erected the machinery for use, and are, consequently, not liable therefor. What can the proviso mean, unless to give those who are in the situation of the defendants, the right to use their own machines lawfully erected? The inventions had become public property; everyone had a right to use them. Congress did not mean to take away that vested right from those who had availed themselves of it. To deprive a person of the use of his property, is equivalent to depriving him of the property itself. Congress could not mean to do this. This court will give the act such an equitable construction, as will give effect to the proviso.

Harper, in reply.—The words of the proviso are clear and explicit, and admit not of construction. The legislature may have supposed that the new patent, which was intended to be a continuation of the old one, might have subjected those who had already erected the machinery, to damages, and intended to guard against them. It is not certain, that under the law, under which the patent issued, this would not have been the effect; but it is sufficient, if the legislature supposed it would have been. We are not bound to show the motives of the legislature; if their words are clear and explicit, there is no room for construction. The acts which are protected by the proviso are acts done before the issuing the patent; the opposite counsel contend, that the legislature, when they said "before," meant after. The proviso is too plain to bear an argument.

March 4th, 1815. (Absent, Todd, J.) WASHINGTON, J., delivered the
*202] opinion of the court, as follows:—*The question certified to this court, by the circuit court for the district of Virginia, and upon which the opinion of this court is required, is, whether, after the expiration of the

original patent granted to Oliver Evans, a general right to use his discovery was not so vested in the public, as to require and justify such a construction of the act passed in January 1808, entitled "an act for the relief of Oliver Evans" as to exempt from either treble or single damages, the use, subsequent to the passage of the said act, of the machinery therein mentioned, which was erected subsequent to the expiration of the original patent and previous to the passage of the said act.

The act, upon the construction of which the judges of the circuit court were opposed in opinion, directs a patent to be granted, in the form prescribed by law, to Oliver Evans, for fourteen years, for the full and exclusive right of making, constructing, using and vending to be used, his invention, discovery and improvements in the art of manufacturing flour and meal, and in the several machines which he has discovered, invented, improved and applied to that purpose.

The proviso upon which the question arises is in the following words: "provided, that no person who may have heretofore paid the said Oliver Evans for license to use the said improvements, shall be obliged to renew said license, or be subject to damages for not renewing the same; and provided also, that no person who shall have used the said improvements, or have erected the same for use, before the issuing of the said patent, shall be liable to damages therefor."

The language of this last provision is so precise, and so entirely free from all ambiguity, that it is difficult for any course of reasoning to shed light upon its meaning. It protects against any claim for damages which Evans might make, those who may have used his improvements, or who may have erected them for use, *prior* to the issuing of his patent under this law. The protection is limited to acts done prior to another act thereafter to be performed, to wit, the issuing of the patent. To extend it, by construction, to acts which might be done subsequent to the issuing of the patent, would be to make, not to interpret the law.

*The injustice of denying to the defendants the use of machinery which they had erected, after the expiration of Evans's first patent, and prior to the passage of this law, has been strongly urged as a reason why the words of this proviso should be so construed as to have a prospective operation. But it should be recollected, that the right of the plaintiff to recover damages for using his improvement, after the issuing of his patent under this law, although it had been erected prior thereto, arises, not under this law, but under the general law of the 21st of February 1793.(a) The provisoes in this law profess to protect against the operation of the general law, three classes of persons; those who had paid Evans for a license prior to the passage of the law; those who may have used his improvements; and those who may have erected them for use, before the issuing of the patent. [*203

The legislature might have proceeded still further, by providing a shield

(a) The 5th section of the act of 21st of February 1793, which is the only section of that act which gives damages for violation of the patent-right, is repealed by the 4th section of the act of the 17th of April 1800 (2 U. S. Stat. 38), the 3d section of which act gives treble damages, for the violation of any patent granted pursuant to that act, or the act of 1793.

for persons standing in the situation of these defendants. It is believed, that the reasonableness of such a provision could have been questioned by no one. But the legislature have not thought proper to extend the protection of these provisoes beyond the issuing of the patent under that law, and this court would transgress the limits of judicial power, by an attempt to supply, by construction, this supposed omission of the legislature. The argument, founded upon the hardship of this and similar cases, would be entitled to great weight, if the words of this proviso were obscure and open to construction. But considerations of this nature can never sanction a construction at variance with the manifest meaning of the legislature, expressed in plain and unambiguous language.

The argument of the defendants' counsel, that unless the construction they contend for be adopted, the proviso is senseless and inoperative, is susceptible of the same answer. *Whether the proviso was introduced
*204] from abundant caution, or from an opinion really entertained by the legislature, that those who might have erected these improvements, or might have used them, prior to the issuing of the patent, would be liable to damages for having done so, it is impossible for this court to say. It is not difficult, however, to imagine a state of things which might have afforded some ground for such an opinion.

Although this court has been informed, and the judge who delivers this opinion knows, that the former patent given to Evans had been adjudged to be void by the circuit court of Pennsylvania, prior to the passage of this law, yet that fact is not recited in the law, nor does it appear that it was within the view of the legislature: and if that patent-right had expired by its own limitation, the legislature might well make it a condition of the new grant, that the patentee should not disturb those who had violated the former patent. This idea was certainly in the mind of the legislature which passed the act of the 21st of February 1793, which, after repealing the act of the 10th of April 1790, preserves the rights of the patentees under the repealed law, only in relation to violations committed after the passage of the repealing law.

If the decision above mentioned was made known to the legislature, it is not impossible, but that a doubt might have existed, whether the patent was thereby rendered void *ab initio*, or from the time of rendering the judgment; and if the latter, then the proviso would afford a protection against all preceding violations. But whatever might be the inducements with the legislature to limit the proviso under consideration, as we find it, this court cannot introduce a different proviso, totally at variance with it in language and intention.

It is the unanimous opinion of this court, that the act passed in January 1808, entitled "an act for the relief of Oliver Evans," ought not to be so construed as to exempt from either treble or single damages, the use, subsequent to the passage of the said act, of the machinery therein mentioned, which was erected subsequent to the expiration of the original patent, and previous to the passage of the said act. Which opinion is ordered to be certified to the circuit court for the district of Virginia.

*The Hazard's Cargo. (a)

The Cargo of the Ship Hazard *v.* Campbell, and others.

Neutral cover of enemy's property.—Further proof.

Time for further proof will not be allowed, where the court is satisfied, that the evidence, as it stands, is not susceptible of any satisfactory explanation.

Appeal from the sentence of the Circuit Court for the district of Georgia, affirming that of the district court, which condemned the cargo of the Russian ship Hazard, as British property.

The Hazard was captured in December 1813, about six milles from the land of Amelia Island, by a boat from the United States flotilla, and carried into St. Mary's, in Georgia. The boarding-officer, after examining the ship's papers, returned them to the master, and asked the latter's permission to stay on board that night, which was granted; and at the request of the master, the boarding-officer assisted in piloting the ship over the bar of St. Mary's river, and brought her to anchor, after which, he asked again for the ship's papers, and then declared his intention to take the ship to St. Mary's. The master, in his protest, states, that the ship anchored nearer to the Spanish shore and harbor than to any other. The cargo was claimed in behalf of Luning, Gogel & Co., of Gottenburg.

Charlton and *P. B. Key*, for the appellants, contended, 1. That inasmuch as Russia and the United States had both adopted the principles of the armed neutrality, the principle, that free ships should make free groods, was, as between those two nations, to be considered as part of the law of nations, and that the cargo was protected by the Russian flag. 2. That the capture was made within the territorial jurisdiction of Spain, and therefore void. 3. That the boarding-officer practised a *ruse de guerre*, not justifiable towards a neutral. Fraud in war may be *practised [*206 towards an enemy, but not towards a friend. Duponceau's Bynkershoek 15. There ought to have been a *vis major* on the part of the Americans. They ought not to have decoyed the vessel out of neutral waters in order to capture her. 4. That the testimony was not sufficient to counteract the documentary evidence as to the interest of the claimants: and, 5. That as the original German instructions from Luning, Gogel & Co. were taken away by the captors, and not produced on the trial, the claimants ought to be allowed time for further proof.

Jones and *Pinkney*, contrà, insisted, 1. That there was no foundation for the idea, that there can be a law of nations in force between Russia and the United States, which is not equally in force between the United States and all other nations. The United States do not contend, that by the law of nations, free ships make free goods. 2. That there is no foundation in fact for the allegation, that the ship was captured within the jurisdiction of Spain; and if there was, Spain has not complained. 3. The artifice used (if any was used) was perfectly justifiable. A neutral vessel must submit, at all events. The deceit produced no effect of which the claimants can complain. 4. That the evidence of fraud, in the use of the names of Luning,

(a) March 3d, 1815. Absent, Todd, Justice.

Gogel & Co., to cover this property, was too manifest to require argument: and, 5. That in a case so clearly fraudulent as this, further proof ought not to be allowed. It is alleged, that the German instructions have been fraudulently withheld by the captors; their contents have been stated in substance by the supercargo; and if they were here, they could not alter the state of the case.

*207] *March 6th, 1815. (Absent, Todd, J.) LIVINGSTON, J., delivered the opinion of the court, as follows:—The ship Hazard and cargo were libelled as prize of war, in the district court of Georgia, where the latter was condemned, and the ship restored to the master, with an allowance for freight. This sentence being affirmed by the circuit court, an appeal as to the cargo was taken to this court.

The cargo was claimed in behalf of Messrs. Luning, Gogel & Co., subjects of Sweden, and residing at Gottenburg. It is impossible to look at the proofs in this cause, without being at once convinced, that this house never had any interest in it. The papers found on board leave not the smallest doubt as to the hostile character of the property, which is also abundantly proved by the witnesses who were examined in the district court. The shipment was made by Mr. Worrall, a British merchant, at Liverpool, and an English supercargo put on board by the name of Diggles, under whom Mr. Dalmer, who filed the claim, was to act as assistant supercargo. Between Mr. Worrall and Mr. Lowden, who makes some figure in this transaction, there is proved to exist such an intimate connection as to render the one chargeable for the declarations and acts of the other, so far as they regard this shipment. Mr. Lowden, in a letter to his correspondent at Charleston, which was on board of the Hazard, says: "There is likely to be a great deal of business done betwixt this and Amelia Island. The vessel that this goes by has about 9000*l.* worth on board. The parties interested are my particular friends." And a little further on—"It may, perhaps, be satisfactory to know, that we have full and unlimited authority from a respectable house in Gottenburg, to make use of their name upon any occasion whatever; so that, in case of capture or detention, the necessary proof could easily be produced of the neutrality of the property." Mr. Worrall writes to Mr. Smith, of Charleston, that "the Russian vessel Hazard, bound to Amelia Island, was laden by him, in conjunction with some other friends." There was, also, a memorandum on board, for the government of *208] the supercargo, signed by Lowden, *containing, among others, this instruction, "should you be boarded at sea by men of war or privateers, you must uniformly declare the property to belong to Luning, Gogel & Co., of Gottenburg, as it is represented to be by the documents accompanying the cargo. Men of war are apt to board under false colors, and if you don't stick to the text, you may be deceived." It may be asked here, why was the supercargo thus cautioned to be on his guard, unless he was in the secret, as he doubtless was, that the documents were colorable, and the property in fact British?

Mr. Dalmer, in the claim interposed by him for the cargo, does not swear to its neutrality, but only that the gentlemen at Gottenburg are owners thereof, as far as he is informed; and it is deserving of attention, that Mr. Diggles, the supercargo, not only does not unite with the assistant super-

cargo in filing this claim, but, on being brought before the commissioners, refuses to be sworn or examined as a witness in the cause. On his examination, sometime afterwards, before the district judge, he states that "he is not acquainted with the owners of the cargo, or any part of it, and cannot swear that Luning, Gogel & Co. are the owners: that he received his instructions from Mr. Worrall, as agent of that house."

There was a short letter of instructions on board, to Diggles and Dalmer, dated 8th October 1813, and proved to be signed by Luning, Gogel & Co., but the body of which must, no doubt, have been written by Mr. Worrall, or under his direction. Now, although the invoice be made out in the name and for the account and risk of Luning, Gogel & Co., and a letter of instructions signed by them was found on board, it would be giving more weight to these formal documents than they are entitled to, should we say, that they have satisfied us, notwithstanding the mass of evidence which this cause presents to the contrary, that the property was other than British, through every stage of this transaction. Indeed, the advocates of the appellant, despairing to convince the court of its neutrality, rely principally on an irregularity in the capture, and on a suppression by the captors of a letter of instructions *from Luning, Gogel & Co., which it is said [*209 came to their hands.

The capture, it is alleged, was made within the limits and jurisdiction of Spain. Of this there is no sufficient evidence, which renders it unnecessary to say, what influence that fact, if established, might have on the ultimate decision of the court. The suppression of the paper in question is also very imperfectly made out; and if it had been brought into court, and formed part of the evidence in the cause, it could not possibly do the appellant any good; for a paper merely signed by Luning, Gogel & Co., and converted into a letter of instructions, by Mr. Worrall, in Liverpool, to suit his own purposes, as must have been the case here, could have but little effect in removing any one of the numerous doubts which the circumstances of this case are so well calculated to excite.

A motion has also been made for an order for further proof. If the court entertained any difficulty as to the reality of this transaction, or believed that Messrs. Luning, Gogel & Co. could prove that they were, in fact, the owners of this property, perhaps, it might listen to the application, late as it is; but believing, as it does, that the evidence as it now stands, is not susceptible of any satisfactory explanation, and that the captors have made out a clear title to the whole cargo shipped by Mr. Worrall, it cannot, in justice to them, make any such order. The sentence of the circuit court is, therefore, unanimously affirmed, with costs.

Sentence affirmed.

The Ship Societè, Martinson, Master. (*a*)

Prize goods.—Freight pro rata.

If a neutral vessel be captured on her outward voyage from England to Amelia Island, carrying a hostile cargo, which is condemned, and if, by the charter-party, the outward cargo is to be carried free of freight, but the homeward cargo is to pay at a certain rate, to be ascertained by the nature of the cargo, yet the court will decree freight *pro rata itineris* of the outward cargo, to be assessed upon the principle of a *quantum meruit*.

This court will not allow a new claim to be interposed here, but will remand the cause to the circuit court, where it may be presented.

Appeal from the sentence of the Circuit Court for the district of Georgia, affirming the decree of the district court, which allowed freight *pro rata itineris*, to the Swedish ship Societè, captured on her outward voyage
*210] *from England to Amelia Island, with a British cargo on board, which was condemned as prize of war.

By the charter-party, the outward cargo to Amelia Island was to be carried freight free, and the homeward cargo was to pay at the rate of three pence half-penny a pound for cotton, and in the same proportion for other goods.

Pinkney and *Jones*, for the ship-owner, contended, that the freight ought to have been given according to the charter-party, and not to be ascertained by assessors as ordered in the court below.

Swann stated, that he wished to interpose a claim to the cargo of the ship Societè, in behalf of the officers and crews of the United States brigs Rattlesnake and Enterprize, as having been concerned in her capture; and was not certain whether this court would now receive the claim, or whether it should be presented to the court below.

The Court said, that it must be laid before the circuit court.

March 6th, 1815. (Absent, Todd, J.) Marshall, Ch. J., delivered the opinion of the court, as follows:—William Little, a naturalized citizen of the United States, entered into a charter-party with Magnus Martinson, master of the Swedish ship, called the Societè, at London, on the 10th day of November 1813, whereby the said Martinson let, and the said Little took, the said ship to freight, for the voyage, and on the terms mentioned in the charter-party. It was agreed, among other things, that the vessel should take on board a cargo, prepared for her in the Thames, and deliver it at Amelia Island, freight free. At Amelia Island, she was to take on board such return-cargo as might be tendered to her. If she could not be loaded
*211] there, she was to proceed to such port in the *United States, as the agent of Little should direct, and there receive her cargo. There were other provisional stipulations, and it was agreed, that the freight on the return-cargo should be a sum specified in the charter-party, which exceeded what would have been paid as freight on the return-cargo alone, had it been totally unconnected with the outward voyage.

On her voyage to Amelia Island, the Societè was captured by an armed vessel of the United States, and brought into the district of Georgia, where the cargo was libelled and condemned as enemy property. A claim for

(*a*) March 3d, 1815. Absent, Todd, Justice.

freight was interposed by the master of the Societè, and the district judge appointed commissioners to ascertain the value of the freight on the voyage to Amelia Island, and decreed freight conformable to their report. The claimant of the cargo and the master of the ship both appealed to the circuit court, where the sentence of the district judge was, in all things, affirmed. From that sentence, an appeal was prayed to this court.

The cases already decided in this court on the question of domicil and trading with the enemy, having completely settled this case, so far as respected the claim to the cargo, that part of the sentence is affirmed without opposition.

On the part of the master, it is contended, that his right to freight ought to be measured by his charter-party, not by any estimated value of the freight on the voyage to Amelia Island. Had the charter-party contained any stipulation for freight to Amelia Island, that stipulation would unquestionably have governed the court. But the outward cargo was to be delivered freight free. So far, then, as the case is controlled by the express stipulations of the charter-party, the vessel is entitled to the whole freight on a return-cargo never taken on board, or to nothing.

The court knows of no case of capture where the *neutral vessel [*212
has been allowed freight for a cargo not taken with her. There is no lien on one cargo, for freight which may accrue on another. The court can perceive no principle on which a cargo to be delivered freight free, can be burdened with the freight agreed to be paid on a cargo to be afterwards taken on board. In this case, too, no sum in gross is to be paid for freight, but a sum depending on the quantity and quality of the return-cargo. As between the captor and the neutral owner, the court cannot consider this as one entire voyage, but as distinct outward and inward voyages.

If the claim to freight on the return-voyage, not commenced at the time of capture, cannot be sustained, the court perceives no other rule which could have been adopted, than that which the district court did adopt. Freight has been allowed on the whole voyage to Amelia Island as on a *quantum meruit*. The captors not having appealed, no question can arise on the propriety of having allowed the ship any freight whatever. The court, however, will say, that it is satisfied with the allowance which is made, and which is certainly an equitable one. The sentence is affirmed, with costs.

The officers of the Rattlesnake and Enterprize, armed vessels of the United States, offered a petition to this court to be permitted to claim for themselves and their crew a share of the prize in the case of the Societè; alleging that they are entitled equally with the officers and crew of the gun-boat by whom the said cargo was libelled; which petition was rejected, and the claim was not received; it being the opinion of this court, that the claim of the petitioners must be made in the circuit court, to which the cause is remanded.

Sentence affirmed.

UNITED STATES *v.* GILES and others. (*a*)

Sureties in official bonds.—Set-off against the government.

If a marshal, before the date of his official bond, receive, upon an execution, money due to the United States, with orders from the comptroller to pay it into the Bank of the United States, which he neglects to do, the sureties in his official bond, executed afterwards, are not liable therefor, upon the bond, although the money remain in the marshal's hands, after the execution of the bond.[1]

Quære? Whether the sureties in a marshal's bond, conditioned for the faithful execution of his duty, "during his continuance in the said office," are liable for money received by him, after his removal from office, upon an execution which remained in his hands at the time of such removal?

The comptroller of the treasury has a right to direct the marshal to whom he shall pay money received upon execution, and a payment according to such direction is good; and it seems, he may avail himself of it, upon the trial, without having submitted it as a claim to the accounting officers of the treasury.

No debtor of the United States can, at the trial, set off a claim for a debt due to him by the United States, unless such claim shall have been submitted to the accounting officers of the treasury, and by them rejected, except in the cases provided for by the statute.[2]

THIS was a case certified from the Circuit Court for the district of New
*213] York, in which the opinions of the *judges of that court were opposed, upon ten questions of law arising out of a special verdict.

It was an action of debt, brought by the United States against Giles, late marshal of the district of New York, and his sureties, upon his official bond, dated the 9th of January 1801, the condition of which was as follows: "Whereas, the above-bound Aquila Giles hath been appointed the marshal in and for the New York district, in pursuance of the act, entitled "an act to establish the judicial courts of the United States:" Now, therefore, the condition of the preceding obligation is such, that if the said Aquila Giles shall, by himself, and by his deputies, faithfully execute all lawful precepts directed to the marshal of the said district, under the authority of the United States, and true returns make, and in all things, well and truly, and without malice or partiality, perform the duties of the office of marshal in and for the said district of New York, during his continuance in the said office, and take only his lawful fees, then the preceding obligation to be void, or else to remain in full force and virtue."

The defendants pleaded performance. The replication set forth six breaches of the condition of the bond.

1. That the United States having, in May 1799, recovered judgment in the district court against one John Lamb, for the sum of $127,952.99, debt, and $20 damages, a writ of *fieri facias*, was thereupon issued and delivered to the defendant, Giles, then being marshal, upon which he returned, in August 1799, that he had taken goods and chattels to the value of $50, which remained unsold for want of buyers; whereupon, a writ of *venditioni exponas* and *fieri facias* was issued and delivered to the said defendant,

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(*a*) February 23d, 1815. Absent, TODD, Justice.

[1] United States *v.* Boyd, 15 Pet. 187; United States *v.* Linn, 2 McLean 500, 506.

[2] Walton *v.* United States, 9 Wheat. 651; United States *v.* Robeson, 9 Pet. 319; United States *v.* Hawkins, 10 Id. 125; United States *v.* Gilmore, 7 Wall. 491; Watkins *v.* United States, 9 Id. 759; Halliburton *v.* United States, 13 Id. 63; United States *v.* Austin, 2 Cliff. 325; United States *v.* Smith, 1 Bond 68; United States *v.* Davis, 1 Deady 294.

Giles, on the 9th of January 1800, by virtue whereof he sold the said goods and chattels for $50, which sum he received; and also, by virtue of the said writ, sold lands of Lamb, to the amount of $60,000, which sum he received, and continued to hold, until the 1st of February 1801, when he converted the same to his own use, contrary to the tenor and effect of the condition of his said bond.

*2. That by virtue of the said writ, the defendant, Giles, on the 17th of September 1800, sold other lands of Lamb, for $60,000, which [*214 he received, on the 20th day of January 1801, and on that day converted the same to his own use, contrary to the tenor and effect of the condition of the bond.

3. That on the 17th of December 1800, the comptroller of the treasury of the United States directed the defendant, Giles, to pay into the office of discount and deposit of the Bank of the United States, at New York, to the credit of the account of the treasurer of the United States, all such sums of money as should be made from the property of Lamb, by virtue of the aforesaid writ. That the defendant, Giles, afterwards, on the 23d of December 1800, by virtue of that writ, sold other lands of Lamb, to the amount of $60,000, which he received, on the 15th of January 1801, but has not paid the same, nor any part thereof, into the said office of discount and deposit, in the manner directed, contrary to the tenor and effect of the condition of his said bond.

4. That on the 1st of February 1801, the defendant, Giles, being marshal as aforesaid, had in his hands, as marshal, fourteen bonds, the property of the United States (particularly described), and on that day, converted the same to his own use, contrary to the tenor and effect of the condition of his bond aforesaid.

5. That the defendant, Giles, having, in September 1800, made the sum of $309.87, by virtue of a *fieri facias*, in behalf of the United States, against one Richard Capes, and having received the same, converted it to his own use, on the 1st of February 1801, contrary to the tenor and effect of the condition of his bond.

6. That the defendant, Giles, having so received all the several sums of money before mentioned, retained the same in his hands, until the 27th of March 1801, when he was duly removed and dismissed from his office of marshal, and ceased to be marshal of the New York district, and has retained the said several sums of money in his hands ever since. That on the 2d of June 1804, he was duly notified, according to law, by the comptroller *of the treasury of the United States, to render to the auditor [*215 of the treasury of the United States, on or before the 10th of October then next, all his accounts and vouchers for the expenditure of all moneys received by him, as marshal of the New York district, but he has never rendered the same; contrary to the tenor and effect of the condition of his bond aforesaid.

The defendants rejoined, 1. To the first breach, that the defendant, Giles, received the sum of $50, and sold the lands of Lamb for $30,000, and no more. That by the orders of the comptroller of the treasury of the United States, he received, on the 10th of December 1800, from the purchasers, $11,000, and no more, in cash, in part of the said sum of $30,000, and took from them, by the like orders of the said comptroller, their respective bonds

and mortgages, thirty in number, for $19,000 being the residue of the said sum of $30,000. That on that day, the United States were justly indebted to the said Giles in the sum of $20,000 for money paid by him, at their request, for their use, and for fees justly due by them to him as marshal, and for services performed by him for them, at their request; when he retained in his hands the said sums of $50 and $11,000, as it was lawful for him to do, in part payment and satisfaction of the sum of $20,000 so due to him from the United States, and then and there delivered to the United States, the said several bonds and mortgages in full payment and satisfaction of the said residue of the said sum of $30,000; without that, that he converted to his own use the said sums of $50 and $60,000 in the replication, in assigning the first breach mentioned, or any part thereof in manner and form, &c., any otherwise than by retaining the said sums of $50 and $11,000 as aforesaid.

2. To the second breach, they say, that on the 17th of December 1800, the defendant Giles, by virtue of the said writ, sold other lands of the said Lamb for the sum of $29,383.30 and no more, and that by order of the comptroller, he received from the purchasers only the sum of $10,000, and
*216] took their bonds and mortgages, thirty in number, for the payment *of the balance, being $19,383.30. That the United States were on that day justly indebted to him in the sum of $20,000 for moneys expended, &c., and for fees and services, &c., wherefore, he retained in his hands $8950, part of the $10,000 in part payment and satisfaction of the said sum of $20,000; and paid to the United States the sum of $1050 the residue of the said sum of $10,000, and delivered to the United States the thirty bonds and mortgages aforesaid, in full payment and satisfaction of the aforesaid sum of $29,383.30; without that, that the said Giles converted to his own use, &c., otherwise than by retaining the said sum of $8950 as aforesaid, &c.

3. To the third breach, they say, that the said Giles did not receive $39,000, parcel of the said $60,000, but that he received in all the sum of $21,000 only, from the buyers of the lands of the said John Lamb: and that the United States were on the said 15th of January 1801, justly indebted to the said Giles, in the sum of $22,000, wherefore, he did not pay the said sum of $21,000 or any part thereof into the office of discount and deposit of the Bank of the United States, &c., but then and there retained the same in his own hands, as it was lawful for him to do, &c.

4. To the fourth breach, they say, that the said Giles, on the 1st of February 1801, delivered the said bonds to the attorney for the United States; without that, that he converted them to his own use, &c.

5. To the fifth breach, they say, that on the 8th of January 1801, the United States were justly indebted to Giles, in the sum of $22,000, wherefore, he retained the said sum of $309.87, in part payment and satisfaction of the said sum of $22,000; without that, that he otherwise converted the same to his own use, &c.

6. To the sixth breach, they aver, that Giles did render his accounts to the auditor on the 10th of October 1804, as he was required to do.

*217] To these rejoinders, there were general sur-rejoinders *and issues, except as to the rejoinder to the third breach; upon which the plaintiffs took issue as to $39,000, and demurred as to the retainer of the $21,000,

upon which demurrer, the court gave judgment for the United States. The jury found a special verdict, which stated, in substance, as follows :

1. As to the first breach, they find, that the defendant, Giles, was authorized by the officers of the treasury department of the United States, in executing the aforesaid writ of *fieri facias*, to sell the lands of the said John Lamb, on the following terms, viz., one-fourth of the purchase-money to be paid in cash, one-fourth, with interest, in two years, one-fourth, with interest, in three years, and the residue, with interest, in four years from the day of sale, to be secured by bonds and mortgages ; and was directed by the comptroller of the treasury, on the 17th of December 1800, to pay over all moneys he might receive therefor, into the office of discount and deposit of the Bank of the United States, in the city of New York, to the credit and account of the treasurer of the United States. That the sales were commenced on the 26th of November, and continued, from time to time, to the 23d of December 1800. That Giles received from the purchasers, before the 9th day of January 1801 (the date of the bond), $3713.98, and no more, which sum, together with the sum of $50, which he had before received for the sales of the goods and chattels of the said John Lamb, he never had, nor any part thereof, before the said district court, to render to the United States, and never paid the same, nor any part thereof, into the said office of discount and deposit, and that he has never been required by any rule or order of the said district court to bring the said moneys into the court, nor to pay them over in any manner whatever. That between August 1800, and May 1801, he arrested one Elias Hicks, by virtue of a writ of *ca. sa.* in favor of the United States, for $80,000, and by an indorsement thereon was directed to levy, by virtue thereof, $33,156.38, besides marshal's fees and poundage. That he kept the said Hicks in custody, in execution, until he was discharged by order of the secretary of the treasury of the United States, pursuant to the act of *congress, entitled " an act providing for the relief of persons imprisoned for debts due to the United States." [*218 That the poundage fees for the service of that writ, if any such fees were due to the defendant, Giles, thereon, have not been paid to him, and that they amounted to the sum of $419.57.

That the United States also became indebted to the defendant, Giles, in the further sum of $8133.96, for his own fees and services in taking the second census or enumeration of the inhabitants of the United States in the said district ; and for moneys paid by him, as marshal as aforesaid, to his assistants in taking the said census, pursuant to the act of congress in such case provided, which several sums, so due from the United States to the said Giles, amount to the sum of $8553.53, and that he has retained the said sums of $50, and $3713.98, from the times when they were received by him, and still retains them, claiming to hold and retain the same towards the payment and satisfaction of an equal sum due to him from the United States as aforesaid. But whether upon the whole matter aforesaid, the said Giles did in law convert the said several sums of $50 and $3713.98 to his own use, contrary to the tenor and effect of the condition of his said bond, the jurors aforesaid are ignorant, &c., and if the said Giles did so convert, &c., they assess the damages at $3763.98, and if, &c.

2. As to the second breach, they find, that the said Giles, having received such instructions as aforesaid from the comptroller of the treasury, and

having sold the lands as aforesaid, afterwards, and after the 9th of January 1801 (the date of the bond), and at different times before the commencement of this suit, received of certain other purchasers of the said lands, several other sums of money, viz., before the 27th of March 1801 (when he was removed from office), the sum of $1683.52 ; and after that day, the sum of $17,191.58, which two sums amount to $18,875.10, which was all the money he received from the said purchasers, after the 9th of January 1801 ; and that the poundage and charges due to and paid by the said Giles upon
*219] the execution and the said sales, and *legally chargeable against the proceeds of the said sales, amounted to the sum of $1332.85, which being deducted from the said sum of $18,875.10, left the net sum of $17,542.25, in the hands of the said Giles, of the money so received by him, after the 9th day of January 1801. That on the 13th of April 1803, he paid part of the same, viz., $6238.35, to Edward Livingston, who was then the United States' attorney for the New York district, which payment was so made with the assent and approbation of the comptroller of the treasury of the United States, and agreeable to the usage and practice in that district ; that the said Giles never had the said sum of $6238.35, nor any part thereof, before the district court, to render to the United States, and has never paid the same to the United States, in any other manner than by the said payment to the said Edward Livingston (if such payment was a payment to the United States), and never paid the same, nor any part thereof, into the office of discount and deposit, &c.

That as to another part of the said sum of $17,542.25, to wit, as to the sum of $4479.68, the said Giles never had the same, nor any part thereof, before the district court, to render to the United States, nor paid the same into the said office of deposit, &c., but has ever since held and retained the same, claiming to hold and retain the same towards payment and satisfaction of an equal sum so due to him by the United States as aforesaid.

That as to the residue of the said sum of $17,542.25, to wit, as to the sum of $6824.25, the said Giles never had the same, nor any part thereof, before the district court, to render to the United States, nor paid the same to the United States, nor into the office of discount and deposit, &c., but still retains the same ; but whether, in law, he converted the said three sums, viz., the $6238.35, $4479.68 and $6824.25, or either of them, to his own use, contrary to the tenor and effect of the condition of his said bond, they are ignorant, &c. If, in law, he so converted the whole to his own use, then
*220] they so find and assess *damages at $20,613.12. If he did not so convert the first of the said three sums, but did so convert the other two, then they so find and assess damages at $14,374.77. If he did not so convert the first and second of the said three sums, but did so convert the third, then they so find, and assess damages at $9895.09. If he did not so convert the said third sum, but converted the two first sums, then they so find, and assess damages at $10,718.03. If he did not so convert the said second sum, but converted the first and third sums, then they so find and assess damages at $16,133.44. If he did not so convert the two last of the said three sums, but converted the first, they so find and assess damages at $6238.35. If he did not so convert the first and third of the said three sums, but converted the second, then they so find, and assess damages at $4479.68.

And if he did not so convert either of the said three sums to his own use, then they so find, &c.

3. As to the third breach, the jurors find that the defendant, Giles, did not receive the sum of $39,000, and as to the judgment upon the demurrer respecting the retainer of the sum of $21,000, they assess damages at $21,000.06.

4. As to the fourth breach, they find that the defendant, Giles, kept possession of the said fourteen bonds, from the 1st of February 1801, until the 3d of January 1803, when he delivered them, with the assent and approbation of the comptroller of the treasury of the United States, to Edward Livingston, then being the United States' attorney for the district of New York. That on the 12th day of the same January, the comptroller of the treasury of the United States directed the said Giles to deliver the said fourteen bonds to his successor in office, John Swartwout, marshal of the said district, which the said Giles did not do. But whether upon the whole matter aforesaid, he did, in law, convert the same bonds to his own use, contrary to the tenor and effect of the condition of his said bond, they are ignorant, &c., and if, &c., then they assess damages at $5255.73.

*5. As to the fifth breach, they find, that the defendant, Giles, having levied and received the said sum of $309.87, never had the same before the district court, to render to the United States, nor paid the same to the United States, but retains the same, claiming to hold it in payment and satisfaction of so much due to him by the United States as aforesaid; but whether in law he converted the same to his own use, contrary to the tenor and effect of the condition of his said bond they are ignorant; and if, &c., then they assess damages at $309.87. [*221

6. As to the sixth breach, they find that the defendant, Giles, did not render to the auditor of the treasury of the United States all his accounts and vouchers, &c., in manner and form as the defendants in their rejoinder have averred, and assess damages at six cents.

This cause came up to this court in the year 1812, with a certificate from the court below, that after argument upon the special verdict thereunto annexed, "it appeared that the opinions of the judges were opposed upon all the points submitted by and in the said special verdict, and thereupon, at the request of the attorney of the United States for the said district, the judges of the said court have directed this disagreement of opinion to be certified," &c.

The cause was argued in this court, at February term 1812, by *Dallas* and *Pinkney*, for the United States, and by *Harper*, for the defendants.

But this court, upon inspecting the record, was of opinion, that the points on which the opinions of the judges of the circuit court were opposed, were too imperfectly stated to enable this court to form an opinion thereon. Whereupon, the cause was remanded to the circuit court, and came back with a certificate that the opinions of the judges of that court were opposed upon the ten following questions arising on the said special verdict, viz: 1. Whether judgment ought to be given for the plaintiffs *or for the defendants, as to the sum of $3763.98, being the damages assessed upon the first breach? 2. Whether, &c., as to the sum of $20,613.12, being the first sum assessed as conditional damages upon the second breach? [*222

3. Whether, &c., as to the sum of $14,374.77, being the second sum assessed as conditional damages on the second breach? 4. Whether, &c., as to the sum of $9,895.09, being the third sum assessed as conditional damages on the second breach? 5. Whether, &c., as to the sum of $10,718.03, being the fourth sum assessed as conditional damages on the second breach? 6. Whether, &c., as to the sum of $16,133.44, being the fifth sum assessed as conditional damages on the second breach? 7. Whether, &c., as to the sum of $6238.35, being the sixth sum assessed as conditional damages on the second breach? 8. Whether, &c., as to the sum of $4479.68, being the seventh sum assessed as conditional damages on the second breach? 9. Whether, &c., as to the sum of $5255.73, being the damages assessed upon the fourth breach? and 10. Whether, &c., as to the sum of $309.87, being the damages assessed upon the fifth breach?

The cause was now again argued by *Jones*, for the United States, and *Harper*, for the defendants.

On the part of the *defendants*, it was contended, 1. That the obligors in
*223] this bond are not answerable *for the money received by Giles, before the date of the bond. 2. That he had a right to retain the amount due to him by the United States. 3. That his receiving the bonds was not an official act, for which his sureties are liable upon this bond; but if it was, that he was discharged by delivering them over to E. Livingston, the attorney of the United States, with the assent of the comptroller of the treasury. 4. That the sureties upon this bond are not liable for the money received by the defendant, Giles, after he was removed from office. 5. That the payment of the $6238.35, to E. Livingston, the attorney of the United States for the district of New York, with the assent and approbation of the comptroller, was a good payment to the United States, and ought to be applied to the discharge of the first money which Giles received.

1. This bond is prospective. It covers no past transgressions. He received $3763.98, before the date of the bond, and the United States being indebted to him, at the same time, in a larger amount, he immediately applied and retained it in part satisfaction of their debt to him. If he had no right so to do, it was a conversion of it to his own use; and that conversion took place before the date of the bond. The defendants, therefore, are not liable therefor upon this bond. If Giles is answerable for it to the United States, it is not in this action.

2. The defendant, Giles, had a right to retain in his hands the amount which was due to him from the United States. This is not claimed as a set-off, but as an equitable deduction, to be taken into view by the court in deciding what sum is to be recovered under the penalty of this bond. By § 26 of the judiciary act (1 U. S. Stat. 87), it is provided, "that in all causes brought before either of the courts of the United States, to recover
*224] the *forfeiture annexed to any articles of agreement, covenant, bond or other specialty, where the forfeiture, breach or non-performance shall appear, by the default or confession of the defendant, or upon demurrer, the court, before whom the action is, shall render judgment therein for the plaintiff, to recover so much as is due according to equity." If, then, in this case, there had been judgment by default, or upon demurrer, or even upon confession, the court must have decided upon the principles of equity. The

case, if not within the words of the statute, is within its spirit. He who seeks equity must do equity. But the defendant, Giles, was not a common debtor of the United States. He was an agent of the government, or a receiver of money, and bound to account for what he received. To account, is to retain what he had a right to demand, and to pay over the balance only. If this principle does not apply to the poundage in the case of Hicks, yet it does to his expenses and compensation in taking the census. By the act of congress of the 28th of February 1800 (2 U. S. Stat. 11), it was made his duty to commence the business of taking the census, on the first Monday in August 1800, and to close it in nine months, and he was authorized to employ assistants, and if he did not make his return within the period limited, he was liable to a penalty of $800. The act provides for the compensation of the marshal and his assistants, but no appropriation of money was made by congress for his payment, until after the service had been performed, nor until March 1801. (2 U. S. Stat. 120). The marshal had only three ways to obtain the money necessary for this business, viz., either to advance his own money, which he was not bound to do, or to get an advance from the treasury, which it had no right to make, or to apply the money of the United States in his hands for that purpose. Congress, having ordered him to do the work, gave him the right to use all the necessary means. The jury has found the fact absolutely that the United States was indebted to him at the time, which fact cannot now be denied. His obligation was not absolutely to pay over all the money which he received, but to account for it. If he shows that he expended it for the use of the United States, in a work which he was required to perform, he accounts for it. It was not strictly retaining the money, but applying it in a manner in which he was authorized to apply it.

*He was also entitled by law to the poundage upon the *ca. sa.* against Hicks. By the act of the 28th of February 1799 (1 U. S. Stat. 624), the marshal is allowed "for all other services" not therein enumerated, "such fees and compensation as are allowed in the supreme court of the state, wherein such services are rendered." (*a*) [*225

3. It was not the official duty of the marshal to take the bonds from the purchasers of the property. He was only bound to execute all lawful precepts, according to the law of the land. He could officially sell for money only; not on credit. If, by the order of the comptroller, he sold on credit, he did not do it as marshal, but as the agent of the treasury department. The condition of his bond is, that he shall faithfully do his duty; his sureties are not liable for any act not done in the course of his duty. But if he did act as marshal, in receiving the bonds, yet his delivery of them to the attorney of the United States, with the assent of the comptroller, is a complete discharge; and if it were not, and if the delivery of them to the attorney of the United States be a conversion of them to his own use, it was after his removal from office, and the defendants are not liable for it on their bond.

4. The sureties upon this bond are not liable for money received by the

(*a*) LIVINGSTON, J.—It has been settled in the courts of New York, that upon a *ca. sa.*, the sheriff is entitled to poundage upon the whole sum due. But upon a *fi. fa.*, he is only to receive poundage upon the sum received.

defendant, Giles, after his removal from office. The condition of the bond is, that he shall faithfully execute the duties of marshal, "during his continuance in the said office." Admitting, that, for the purpose of finishing the business in his hands at the time of his removal, his authority may continue *quoad hoc*, yet the liability of his sureties is expressly limited, by their contract, to the time of his continuance in office. It is like the case of *Arlington* v. *Merricke*, 2 Saund. 411, which was an action by the postmaster-general against the sureties of one of his deputies, upon a bond, the condi-
*226] tion of which was, "that whereas, the plaintiff had appointed *one Thomas Jenkins his deputy, &c., to execute the said office from the 24th of June next coming, for the term of six months next following: now, if the said Thomas Jenkins shall, for and during all the time that he shall continue deputy-postmaster, &c., execute all the duties," &c. The breach assigned was in not paying over moneys received by Jenkins, after the expiration of the term of six months, and upon demurrer, it was held, that the defendant was only bound for moneys received within the six months. So, in the case of *Barker, executor of Pyott*, v. *Parker*, 1 T. R. 287, the condition of the bond was, that one J. H. should pay to E. Pyott, his executors or administrators, all such moneys as he should receive, belonging to the said E. Pyott, his executors or administrators; but it was held, that the defendant was not liable for moneys received by J. H., belonging to the executors of Pyott in their own right. So also, in the case of the *Liverpool Waterworks Co.* v. *Atkinson*, 6 East 507, the condition of the bond, reciting that the defendant had agreed with the plaintiffs, to collect their revenues, "from time to time, for twelve months," and afterwards stipulating, that "at all times thereafter, during the continuance of such his employment, and for so long as he should continue to be employed," he would justly account, &c., was held to confine the obligation to the period of twelve months mentioned in the recital. A similar decision was given by the supreme court of Pennsylvania, in the case of *Commonwealth* v. *Boynton*, 4 Dall. 282, upon a sheriff's bond.

5. The payment to the attorney of the United States, which is found to have been in conformity with the usage in New York, and with the assent and approbation of the comptroller of the treasury, is a good payment to the United States. The United States are represented by their attorney, as to everything relative to actions, in the same manner as a common person is represented by his attorney; an attorney-at-law has a right, within the year and day after judgment, to receive payment of the debt, and to enter satisfaction of the judgment upon the record. *Yates* v. *Freckleton*, 2 Doug. 623;
*227] 1 Com. Dig. tit. Attorney, B, 10. The comptroller is the agent of the United *States for the purpose of assenting, and his assent binds the United States.

The defendant, Giles, received $3763.98, before the date of the bond, and $1683.52, after that date, and before his removal from office, making together the sum of $5447.50. The payment of the sum of $6238.35 to Mr. Livingston, not having been specifically appropriated to the payment of any particular part of the amount due from Giles, we contend, ought to be applied to the payment of that part of the money which he first received, which will discharge all that the defendants can be liable for upon their bond.

On behalf of the *United States*, it was said, 1. As to the money received by Giles, before the date of the bond, it remained in his hands at the time the bond was executed. It was as much his duty to pay it over afterwards, as it was before; and by not paying it over, he was guilty of default for which his sureties are liable. Besides, the writ was not returnable until after the date of the bond, and there was no breach of his duty, until after the writ was returnable, when he ought to have had the money in court to render to the United States.

2. As to the marshal's right to retain money due to him by the United States, it was said, that the claim never had been submitted to the accounting officers of the treasury, agreeable to the provisions of the act of congress of the 3d of March 1797, § 4 (1 U. S. Stat. 515), by which it is enacted, "that in suits between the United States and individuals, no claim for a credit shall be admitted upon trial, but such as shall appear to have been presented to the accounting officers of the treasury, for their examination, and by them disallowed in whole or in part," &c. If a marshal might retain money to answer his own claims, there would be no necessity of an appropriation by law; and it would subject the whole revenues of the government to the caprice of juries. The jury had no right to find a debt due from the United States. It was a matter *coram non judice*, unless it had been first submitted to the accounting officers of the treasury. *A defendant cannot set off a debt, if he could not maintain a suit for it. *Commonwealth* v. *Matlack*, 4 Dall. 303. This defendant could not maintain a suit against the United States. To give him the benefit of the set-off, would be a violation of the prerogative of the United States. [*228

The Court stopped the counsel for the United States, upon this point, saying they were satisfied.

3. As to the delivery of the fourteen bonds to the attorney of the United States, it was said, that they were made payable to the marshal for the time being, and ought to have been delivered to his successor. That in taking the bonds, he acted officially. He could only sell, as marshal, whether he sold for cash or on credit. A plaintiff may waive a rule intended for his benefit, and authorize a marshal to sell on credit. He had no authority to sell, as agent, nor had he any orders to deliver the bonds to the attorney. The assent of the comptroller is not sufficiently found, for the jurors find a fact inconsistent with such assent, viz., that the comptroller ordered him to deliver them to his successor. The violation of his duty in not delivering them to his successor, was prior to his delivery of them to the attorney.

4. As to the question, whether the sureties in this bond are liable for the money received by Giles, after the revocation of his commission, it was said, that by the 28th section of the judiciary act (1 U. S. Stat. 87), "every marshal, when removed from office, shall have power, notwithstanding, to execute all such precepts as may be in his hands at the time of such removal," and in case of the death of any marshal, his deputies shall continue in office, unless otherwise specially removed, and shall execute the same, in the name of the deceased, until another marshal shall be appointed and sworn: and the defaults or misfeasances in office of such deputies in the meantime, as well as before, shall be adjudged a breach of the condition of the bond given, as before directed, by the marshal who appointed them.

Here, a liability is imposed upon the sureties, which is not expressed in the condition of the bond. *The words in the condition, "during his continuance in the said office," mean, so long as he shall have [*229 authority to act by virtue of the said office. So far as regarded the execution and return of the writ of *fieri facias* against John Lamb, his authority to act by virtue of his office continued, after the revocation of his commission. The writ was not completely executed, until it was returned fully satisfied. *Quoad hoc* he still continued in office, within the meaning and intention of the bond. In all the cases cited by the opposite counsel, the time was limited by months, and not by such a general expression as this. The act of congress contemplates a course of duty, and intended that the bond should cover all his responsibility, and no doubt, the parties intended to give such a bond as the act required. Congress could not have intended, that upon the removal of a marshal, perhaps, for wasting the public money, or for insolvency, he should still go on to collect other moneys, after his sureties upon his official bond should be discharged, by his removal from office.

5. As to the payment of the sum of $6238.35, to the attorney of the United States, it was said, that the district-attorney, as such, has no authority to receive the public money collected by the marshal. In common cases, the authority of an attorney-at-law arises from presumption, and is limited to a year and day after judgment, in which time, if execution be not taken out, the judgment is presumed to be satisfied. But as to the attorney for a government, no such presumption of authority arises. The United States is considered as a moral person only, and can only act by proper organs legally appointed; and their acts can bind the United States only so far as they act within the powers given them by law. In no other government, does the law-officer receive the public money, without the order of the treasury. The treasury department is to manage the whole fiscal concerns of the nation. There is no exception in favor of the attorney of the United States. His duty is only to support the claims of the United States. There is no necessity that such a power should be lodged in his hands. He gives no security. Why should the money be taken out of the hands of a responsible officer and given to one not responsible?

*230] *But this payment is claimed as a credit, and it is a sufficient answer, to say, that it has never been submitted to the accounting officers of the treasury. The jury had no right to find such a credit, or even to act upon it.

But if it is to be considered as a payment to the United States, still it does not appear, that at the time of payment, it was applied to the discharge of any particular part of the money which Giles had received. The United States have, therefore, a right now to apply it to such part as they please, and this court will make such application of it as will be most beneficial to the United States. That is to say, if the court shall be of opinion, that the sureties are not liable for the money received by Giles, after his removal from office, they will apply this payment to that part of the debt, and leave the sureties liable for the part received while he was in office.

March 7th, 1815. (Absent, Todd, J.) LIVINGSTON, J., delivered the opinion of the court, as follows:—This is a joint action of debt on a bond

dated the 9th of January 1801, in the penalty of $20,000. The condition of the bond is as follows: Whereas, the above-bound Aquila Giles hath been appointed the marshal in and for the New York district, in pursuance of an act, entitled "an act to establish the judicial courts of the United States:" now, the condition of the preceding obligation is such, that if the said Aquila Giles shall, by himself and his deputies, faithfully execute all lawful precepts directed to the marshal of the said district, under the authority of the United States, and true returns make, and in all things, well and truly, and without malice or partiality, perform the duties of the office of marshal in and for the said district of New York, during his continuance in the said office, and take only his lawful fees, then the obligation to be void, &c. General performance is pleaded by the defendants, to which a replication is filed assigning six breaches, to all of which there was a rejoinder, surrejoinder and issue.

*On the issue joined on the first breach, the special verdict finds, [*231
that on the 20th of January 1800, the said writ of *vend. exp.* and *fi. fa.* was delivered to Giles, who, before he proceeded to execute it, was authorized by the officers of the treasury to sell the land of Lamb, under said writ, for one-fourth part of the purchase-money in cash, one-fourth part payable in two years from the time of sale, one-fourth part in three years, and the other fourth part in four years, with interest from the time of sale, to be secured by bonds and mortgages, payable to Giles, as marshal, or to the marshal of the district for the time being, to and for the use of the United States. That on the 17th of December 1800, John Steele, being comptroller of the treasury, did instruct and order Giles to pay into the office of discount and deposit of the Bank of the United States, in New York, to the credit of the treasurer of the United States, all the moneys which might be levied from the property of Lamb, by virtue of the said writ of *vend. exp.* and *fi. fa.* That under these instructions, Giles proceeded to sell the lands of John Lamb; the sales of which commenced on the 26th of November 1800, and were continued until the 23d of December, in the same year. That during the sales, and afterwards, and before the execution of the bond by the defendants, Giles received from some of the purchasers several sums, amounting to $3713.98, and no more, which sums were paid as the fourth of the purchase-money of the lands bought by them. That Giles has never brought into court, or paid into the bank, either of the said sums of $50, which was received on the 20th of January 1800, on a sale, by Giles, of the chattels of Lamb, or of $3713.98, and that he never was required so to do by any order of the district court. That while Giles was marshal as aforesaid, a writ of *capias ad satisfaciendum* was issued out of said court, and delivered to him, against Elias Hicks, on a judgment recovered by the United States, on which was indorsed a direction to Giles to levy the sum of $33,156.38, besides marshal's fees and poundage; that Hicks was arrested by Giles, and in custody on said writ, until discharged therefrom by the secretary of the treasury; that the poundage fees of Giles thereon, if any were due, have not been paid to him by any one, and that they amount, if due at all, to $419.57. *That the United States became indebted [*232
to Giles, while marshal as aforesaid, in the sum of $8133.96, for his fees and services, in taking the second census in his district, and for moneys

paid to his assistants, in taking the said census, pursuant to the act in such case made and provided, which sums amount to $8553.53, in part payment of which, Giles retains the two sums of $50, and of $3713.98. But whether in law he converted them to his own use, contrary to the form and effect of the condition of the said bond, the jurors pray the advice of the court. If the court shall think that it was such a conversion, the jurors assess damages on this breach at $3763.98. But if the court shall be of opinion, that such retaining was no conversion, then the jury say that he did not convert the same to his use.

2. The second breach assigned is, that Giles having, on the 17th of December 1800, sold other lands of Lamb, under the writ aforesaid, for the further sum of $60,000, received the said sum on the 20th of January 1801 (which was after the execution of the bond), and converted and disposed of the same to his own use. On the issue joined on this breach, the jury find that Giles, having made the sales as aforesaid, and under the instructions and orders aforesaid, received from the purchasers, after the 9th of January 1801, and before the 27th of March 1801 (when he went out of office), the sum of $1683.52 ; and after that day, the sum of $17,191.58, amounting in the whole to $18,875.10, which sums were paid by the purchasers, as the cash payment which was to be made by them for the land so purchased (which sales took place between the 26th of November, and the 23d of December 1800). That the poundage and charges due to and paid by Giles, and *legally* chargeable against the proceeds of these sales, amounted to $1332.85, which leaves in the hands of Giles the net sum of $17,542.25, of the moneys received by him after the 9th of January 1801. That on the 13th of April 1803, he paid to Edward Livingston, who was district-attorney, the sum of $6238.35, which was receipted for on the said writ of execution.

*233] That it was then, and yet is, the usage and practice *within the said district, for the marshal to pay to the district-attorney all moneys levied by executions issued by the said attorney, in suits in which the United States are plaintiffs. That this payment was made by and with the approbation of the comptroller of the treasury, and that Giles has never in any other way paid the said last-mentioned sum to the United States, or brought it into court in any other way, than by paying it as aforesaid, to the district-attorney. That as to another part of the said sum of $17,542.25, to wit, the sum of $4479.68, Giles retains the same towards satisfaction of an equal sum due to him as aforesaid from the United States. That the residue of the said sum, to wit, the sum of $6824.22, Giles retains to this day. But they pray the advice of the court, whether Giles converted to his own use, contrary to the condition of the said bond, the said several sums of $6238.35, $4479.68 and $6824.22.

1. If he converted all of the said sums contrary, &c., then they assess damages at $20,613.12. 2. If he did not convert the said sum of $6238.35, paid to Livingston, but converted the other two sums, then they assess damages at $14,374.77. 3. If he did not convert the two first sums, to wit, the sum of $6238.35 and $4479.68, but did convert the sum of $6824.22, to his own use, then they assess damages at $9895.09. 4. If Giles did not convert to his own use the sum of 6824.22, but did convert the other two sums, then they assess damages at $10,718.03. 5. If Giles did not convert to his own use the said sum of $4479.68, but did so convert the other two sums,

they assess damages at $16,133.44. 6. If Giles did not convert to his own use the two sums *of $4479.68 and $6824.22, but did so convert the other sum of $6238.35, then the damages are assessed at $6238.35. 7. If Giles did not so convert the two sums of $6238.35 and $6824.22, but did so convert the other sums of $4479.68, they then find damages to the amount of $4479.68. 8. If, in the opinion of the court, Giles converted neither of those sums, to his own use, contrary to the effect of the said condition, then the jury find that he did not so convert either of them. [*234

On the issue joined on the fourth breach, the following facts appear on the special verdict. That on the 1st of February 1801, Giles had in his hands, as marshal, fourteen bonds, described in assigning the fourth breach belonging to the plaintiffs. That Giles continued marshal until the 27th of March 1801, when he was duly removed and dismissed from office, and John Swartwout, on the same day, appointed marshal of the said district in his place, who continued marshal until the commencement of this suit. That the said bonds continued in the hands of Giles, until the 3d of January 1803, when they were delivered by him to Edward Livingston, who was then district-attorney, by and with the assent and approbation of the comptroller of the treasury. That on the 12th of January 1803, Gabriel Duval, being comptroller of the treasury, as such, did instruct, order and direct Giles, as late marshal, to deliver immediately the said fourteen bonds to the said John Swartwout, his successor in office, which he did not do. If the court shall think this was a conversion of these bonds, the jury assess damages at $5255.73. If the court think otherwise, the jury find it to be no conversion.

On the subject of the fifth breach, it is found, that Giles, on the 1st of September 1800, received as marshal, $309,87, on an execution issued against one Richard Capes, at the suit of the plaintiffs, which he retains towards satisfaction of an equal sum due from them to him. If this be deemed a conversion by the court, *the jury assess damages at $309.87. But if the court shall not think so, then the jury, on this breach, find for the defendants. [*235

It is certified, that the circuit court, were divided in opinion on the following points arising on this record. 1. Whether judgment should be given for the plaintiffs, or for the defendants as to the sum of $3763.98, being the damages assessed upon the first breach assigned? 2. The like question as to the sum of $20,613.12, being the first sum assessed as conditional damages, on the second breach? 3. The same question as to the sum of $14,374.77, being the second sum conditionally assessed on the second breach? 4. The like as to the sum of $9895.99, being the third sum assessed conditionally on the second breach? 5. The like as to the sum of $10,718.03, being the fourth sum assessed on the second breach? 6. The like question as to the sum of $16,133.44, being the fifth sum assessed on the second breach? 7. The like question as to the sum of $6238.35, being the sixth sum assessed on the second breach? 8. The like question as to the sum of $4479.68, being the seventh sum assessed on the second breach? 9. The like question as to the sum of $5255.73, being the damages assessed on the fourth breach? 10. The like question as to the sum of $309.87, *being the damages assessed on the fifth breach? [*236

The first point on which the direction of this court is asked, will require a decision of the following questions. 1. Had Giles a right to retain out of

the public moneys in his hands, any sums which might be due to him for his services, or for advances made by him as marshal? 2. Are the defendants liable, under the condition of their bond, for the two sums of $50, and of $3713.98, received by Giles, the first sum on the 20th of January 1800, and the other on some day prior to the 9th of January 1801, which is the date of their bond?

The act of congress providing for the settlement of accounts between the United States and the receivers of public moneys, is so explicit, as to preclude every difficulty in deciding on the first question. The third section of the law provides, that where a suit shall be instituted against any person indebted to the United States, the court shall grant judgment at the return-term, on motion, unless the defendant shall, in open court, make oath or affirmation, that he is equitably entitled to credits, which had been, previous to the commencement of the suit, submitted to the consideration of the accounting officers of the treasury, and rejected, specifying each particular claim so rejected in the affidavit. The next section declares, that in suits between the United States and individuals, no claim for a credit shall be admitted upon trial, but such as shall appear to have been submitted to the accounting officers of the treasury for their examination, and by them disallowed, unless it shall appear that the defendant, at the time of trial, is in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit, by absence from the United States, or by some unavoidable accident.

It is clear, then, that if this had been an action against Giles for moneys received by him as marshal, he could not *have availed himself of any credit against the public, however well founded the claim might be, unless he had previously submitted his title to such a credit to the accounting officers of the treasury, and they had rejected the same, or unless he had been prevented from so doing, by one of the accidents mentioned in the law. *237]

On this subject, the special verdict, on the issue joined on the sixth breach, finds that Giles did not render to the auditor of the treasury all his accounts and vouchers for the expenditure of moneys received by him as marshal as aforesaid. If, then, in a suit against Giles himself, a claim for these credits, under existing circumstances, could not be sustained, neither can it, in an action on this bond, without permitting the defendants to do indirectly, what the marshal could not have done directly, and in this way, avail themselves of what the law seems to regard as a default, or, at least, a negligence on the part of their principal.

We are next to consider, whether the defendants are liable for the sum of $50, and the sum of $3713.98, received by Giles. The first sum was received on the 20th of January 1800, on the *fi. fa.* and *vend. exp.* issued against the estate of John Lamb; and the other was received on the same writ, after the 27th of November 1800, but before the date of the bond upon which the action is brought.

It is contended by the defendants, that the retaining of moneys which were received by Giles anterior to the date of the bond, cannot be considered a conversion by him, within the terms of its condition; while the plaintiffs, on the contrary, maintain, that as these sums were in his hands, at the time of its execution, and have not been paid over to this day, his official

delinquency is made out within the meaning of this instrument, and the responsibility of the defendants thereby established.

On this point, two of the judges think that the conversion of these sums by Giles was complete, by his not paying them into the bank, agreeable to the directions of the comptroller of the treasury, under which he acted; and that this having taken place prior to the execution of the *bond, the defendants are not liable therefor, within the terms of its condition, which are entirely prospective. Two other members of the court are of opinion, that no demand appearing on the record to have been made on the marshal for these sums, either by rule of court or otherwise, no conversion of them is made out; and that, therefore, the defendants are not liable. The other two judges think, that although these two sums were received before the date of the bond, yet as they remained in the hands of the marshal, afterwards, and have not been paid over to this day, the defendants are accountable for them. Judgment must, therefore, be rendered for the defendants as to the sum of $3763.98, being the damages assessed upon the first breach assigned. [*238

The next question on which the court below was divided, related to the sum of $20,613.12, being the first sum assessed as conditional damages upon the second breach. By recurring to the special verdict, it appears, that Giles, having had a *fieri facias* put into his hands, on the 20th of January 1800, against the real estate of John Lamb, was directed by the officers of the treasury, to make sales of it for one-fourth of the purchase-money in cash, and for the other three-fourths on certain credits and securities specified in said instructions. These sales commenced on the 26th of November 1800, and continued until the 23d of December following. After the 9th of January 1801, and before he went out of office, which was the 27th of March following, Giles received of the purchasers of Lamb's estate, $1683.52, and after that day, the sum of $17,191.58, amounting in the whole to $18,875.10. Deducting the poundage and charges which the special verdict finds to be *legally* chargeable against this sum, there was left in Giles' hands the net sum of $17,542.25, of the moneys received by him after the 9th of January 1801. On the 13th of April 1803, he paid to E. Livingston, who was district-attorney, with the assent and approbation of the *comptroller of the treasury, the sum of $6238.35. [*239

Before we examine into the deductions claimed by the defendants against the sums received by Giles for cash payments, it will be necessary to settle for what portion of these sums they are chargeable, under the condition of their bond. Of these sums, a majority of the court think, they are liable for the sum of $1683.52, which was received between its execution and the marshal's dismissal from office.

Are they also responsible for the sum of $17,191.50, which was received by Giles after another marshal came into office? The bond on which this action is brought having been given for the faithful performance of the duties of Giles, as marshal, during his continuance in office, two of the judges are of opinion, that his sureties are not liable for the conversion of the last-mentioned sum, which took place after he was out of office, by not paying it as directed by the comptroller of the treasury. Two of the judges do not consider the finding of the jury as fixing upon Giles a conversion of this sum, at any time, inasmuch as it does not appear, that he was ever demanded

to pay the same into court, or in any other way. The other two judges are of opinion, that the marshal, being authorized to do certain acts even after his removal from office, the condition of the bond embraces defaults committed after such dismissal, as well as before, and that the defendants are therefore liable for the said sum of $17,191.50, although received by Giles after he ceased to be marshal. It is, however, the opinion of a majority of the court, that the defendants are not so liable, under this bond.

Another question arises under this opposition of opinion in the circuit court; and that is, whether the payment to Edward Livingston, in April *240] 1803, was a payment to the United States? *It is supposed, that this payment, being made contrary to the comptroller's order of the 17th of December 1800, which was to pay all moneys received under this execution, into the branch bank at New York, cannot be regarded as valid. It is true, such instructions are found by the jury, which certainly do not authorize such payment, yet it is also found, possibly, from some subsequent instructions of the comptroller, which do not appear, or at any rate from evidence, which must have satisfied the jury, that such payment was made with the assent and approbation of the comptroller of the treasury. This finding, correct or not, must conclude the court; and it has only to say, whether a payment be good, if made under such authority. The comptroller is authorized by law, "to direct prosecutions to be commenced for all debts due to the United States." During such prosecutions, he gives directions how they shall be conducted, and how the moneys recovered shall be paid. If, therefore, he directed, or assented to, the payment to Livingston, it is difficult to say, that Giles erred, or was guilty of any fault, either in pursuing his instruction, or in making a payment with his assent and approbation.

It yet remains to settle, under this branch of the division of the circuit court, how the payment to Livingston is to be applied. For although the sum paid to him is much greater than the sum of $1683.52, for which it is decided that the defendants are liable, the benefit which they may derive from such payment, will depend in some measure on the manner of its application.

It does not appear, that any direction was given by Giles, or that any election was made by either party, how it should be applied. Nothing more is known than that Giles, being then indebted to a much larger amount for moneys received at different times, under the execution against the property of Lamb, made this payment, without declaring what particular item in the account of the United States against him should thereby be discharged. *241] If there be no designation how a sum paid on account *shall be credited, and there be sureties for part of the debt, as was the case here, it seems reasonable to some of the judges, to let them have the benefit of it, by applying the credit in such a way as to exonerate them, so far as the sum paid shall be sufficient for that purpose. If regard be had to the order of time in which the moneys were received by Giles, it will be seen, that the sum of $3763.98, which is the first sum for which he is in arrear, was received by him prior to the 9th of January 1801; and the next sum for which he is accountable, to wit, the sum of $1683.52, came into his hands after that day, but previous to the 27th of March 1801, and after this,

other moneys were received by him. These two sums together are not equal to the payment which was made to Livingston.

Following this order, the sum for which the defendants are liable, being among the first that were received, and being recoverable, with interest, on their bond, would, on this principle, be extinguished by the first payment, if it were sufficient, as was the case here, to discharge all the moneys which had been received prior to the receipt of the sum for which the defendants are answerable, and that also. But this is not the opinion of a majority of the judges. They think, and such is the decision of the court, that the United States have yet a right to apply these payments in a way most beneficial to themselves, and so as not to extinguish the sum of $1683.52, for which the defendants are accountable.

The court then is of opinion, that judgment must be given for the defendants as to the sum of $20,613.12, being the first sum assessed as conditional damages upon the second breach. Judgment must in like manner be given for the defendants as to all the other sums assessed as conditional damages upon the second breach.

It is next to be decided, whether the conditional damages of $5255.73 assessed on the fourth breach be recoverable against the defendants. These damages are given in consequence of a supposed *conversion by Giles [*242
of the fourteen bonds mentioned in the special verdict. But it being found, that these bonds were delivered to Edward Livingston, by and with the assent and approbation of the comptroller of the treasury, the court is unanimously of opinion, for reasons already assigned, that such delivery was no conversion of these bonds by Giles, and that, therefore, judgment must be rendered for the defendants, as to the said sum of $5255.73, being the damages assessed as aforesaid on the fourth breach.

The last question which is submitted to us regards the sum of $309.87, which it appears by the finding under the fifth breach assigned, was received by Giles, on the first of September 1800, on an execution at the suit of the United States against Richard Capes, which was retained by Giles towards satisfaction of an equal sum due to him. This sum being received prior to the execution of the bond, must be regarded within the reasons assigned for not considering the defendants liable for the two sums of $50 and of $3713.98, herein before mentioned, and judgment must, accordingly, in the opinion of a majority of the court, be given for the defendants, as to the said sum of $309.87, being the damages assessed upon the fifth breach.

It will be seen, that the court is of opinion, that the defendants are liable under their bond, for the sum of $1683.52, which was received by the marshal, after its execution, and before he went out of office ; but by not one of the findings on the different breaches assigned, does it appear to have been contemplated, that this sum alone might be recoverable in this action, and accordingly no conditional damages are assessed to suit that state of the case.

The court, therefore, can only give its directions as to the questions submitted to them, which are, that it must be certified to the circuit court for the district of New York in the second circuit :

1. That judgment must be given for the defendants as to the sum of $3763.98, being the damages *assessed upon the first breach of the [*243
condition of the bond assigned in the replication of the plaintiffs.

2. That judgment must be given for the defendants as to the several sums of $20,613.12, of $14,374.77, of $9895.09, of $10,718.03, of $16,133.44, of $6238.35, and of $4479.68, being the several sums assessed, as conditional damages on the second breach.

3. That judgment must be given for the defendants, for the sum of $5255.73, being the damages assessed upon the fourth breach, and

4. That judgment must be given for the defendants for the sum of $309.87, being the damages assessed upon the fifth breach.

United States *v.* Job L. Barber. (*a*)

Hostile trade.

Fat cattle are provisions, or munitions of war, within the meaning of the act of congress, of the 6th of July 1812, to prohibit American vessels from proceeding to or trading with the enemies of the United States, and for other purposes.

This was a case certified from the Circuit Court for the district of Vermont, the opinions of the judges of which court were opposed.

Barber was indicted, "for that he being a citizen of the United States, and inhabiting the same, with force and arms, at," &c., "did attempt to transport overland thirty head of fat cattle, which were then and there articles of provision and munitions of war, and were all of the value of $300, from a place in the United States, to wit, from Berkshire, in the said district of Vermont, to a place in the province of Lower Canada, to wit, to St. Armons, in the province aforesaid, contrary to the form, force and effect of the statute of the United States, in such case made and provided," &c. There was another count in which he was charged with the actual transportation of them. After a verdict against him, he obtained a rule to show cause why judgment *should not be arrested, because fat cattle were neither provisions nor munitions of war, within the meaning of the act of congress, entitled "an act to prohibit American vessels from proceeding to or trading with the enemies of the United States, and for other purposes," or any other act of congress.

*244]

By the second section of the act referred to, which was approved on the 6th of July 1812 (2 U. S. Stat. 779), it is enacted, "that if any citizen of the United States, or person inhabiting the same, shall transport, or attempt to transport, overland, or otherwise," "naval or military stores, arms or the munitions of war, or any article of provision, from any place of the United States, to any place in Upper or Lower Canada, Nova Scotia or New Brunswick," "the person or persons aiding or privy to the same shall" "be considered as guilty of a misdemeanor, and be liable to be fined in a sum not exceeding five hundred dollars, and imprisoned for a term not exceeding six months, in the discretion of the court."

March 7th, 1815. (Absent, Todd, J.) This Court ordered it to be certified to the circuit court, that it is the opinion of this court, that fat cattle are provisions, or munitions of war, within the true intent and meaning of the act, entitled "an act to prohibit American vessels from proceeding to, or trading with, the enemies of the United States, and for other purposes."

(*a*) March 7th, 1815. Absent, Todd, Justice.

The Schooner Adeline and Cargo. (*a*)

Salvage on re-capture.—Test-affidavit.—Prize.—Further proof.

American property, re-captured, may be restored on payment of salvage, although the libel pray condemnation of it as prize of war, and do not claim salvage. Salvage is an incident to the question of prize.[1]

A test-affidavit ought to state, that the property, at the time of the shipment, and also at the time of capture, did belong, and will, if restored, belong to the claimant; but an irregularity in this respect, is not fatal.

A test-affidavit, by an agent, is not sufficient, if the principal be within the country, and within a reasonable distance from the court. But if test-affidavits, liable to such objections, have been acquiesced in by the parties in the courts below, the objection will not prevail in this court.

By the act of the 3d of March 1800, one-sixth part only is allowed to a privateer for salvage, upon the re-capture of the cargo on board a private armed vessel of the United States, although one-half be allowed for the re-capture of the vessel.

The property of persons domiciled in France (whether they be Americans, Frenchmen or foreigners), is good prize, if re-captured, after being twenty-four hours in possession of the enemy, that being the rule adopted in the French tribunals.

Further proof will be allowed by this court, where the national character and proprietary interest of goods re-captured do not distinctly appear.

Property unclaimed will be decreed as good prize.

This was an appeal from the sentence of the Circuit Court for the district of New York.

The American letter of marque schooner Adeline sailed from Bordeaux, for the United States, with a cargo, owned in part by citizens of the United States, and *in part by French subjects. On the 24th of [*245 March 1814, she was captured, in the bay of Biscay, by a British squadron, who put a prize-crew on board and ordered her for Gibraltar. After being six days in the possession of the British she was re-captured, near Gibraltar, by the American privateer Expedition, who put a crew on board, and ordered her for the United States, where she arrived, and was libelled, with her cargo, by the re-captors, in the district court at New York, as prize of war.

The vessel was claimed by citizens of the United States, residing therein, as was also part of her cargo; another part of the cargo was claimed by French subjects, resident in the United States; another part by French subjects, resident in France; another part by citizens of the United States, resident in France; another part by French subjects, whose residence was not stated; and another part by citizens of the United States whose residence was not stated; and another part by "alien friends," without stating of what nation, or where resident. Some of the claims stated the property, at the time of capture, to belong to the persons therein mentioned, and did not state to whom it belonged at the time of shipment.

The district court condemned, as good prize, all the property owned by Frenchmen, and other persons resident in France, and all the property of those persons whose residence was not stated; and restored all the property belonging to persons resident in the United States, upon payment of one-sixth for salvage. The vessel was restored, by consent of parties, on payment of one-half for salvage. The sentence was affirmed, *pro formâ*, by consent, in

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(*a*) March 3d, 1815. Absent, Todd, Justice.

[1] See The Star, 3 Wheat. 78; The Lilla, 2 Spr. 177; The Ann Green, 1 Gallis. 275; Marshall *v.* Delaware Ins. Co., 2 W. C. C. 54.

the circuit court. The re-captors appealed as to the rate of salvage, which they contended ought to have been one-half, and those claimants whose property was condemned, also appealed.

The case was submitted to the court, by *J. Woodward* and *Emmet*, for the re-captors, and by *Irving* and *D. B. Ogden*, for the claimants, upon their written notes for argument.

*246] *J. Woodward*, for the re-captors, made the following points: 1. That such claims as date the property from the time of capture, instead of the time of shipment, are insufficient and invalid. 2. That the re-captors are entitled to the whole of the French property, by the rule of reciprocity. 3. That the captors are entitled to a rate of salvage of one-half upon the American property, or such other and higher rate than the rate decreed in the courts below, as this court may adjudge. 4. That the re-captors are entitled, by the same rule of reciprocity, to the whole of the property of such Americans as were at the time of capture domiciled in France, or resident there for commercial purposes. 5. That the re-captors are likewise entitled to all property, the national character of which is not defined by the evidence. 6. That the property of those Frenchmen who are described as having a mere temporary residence in the United States, cannot be considered as American. 7. That the property of persons described as alien friends, without mentioning to what nation they belong, or where they reside, must also be taken to be French, or decreed to the captors for uncertainty. 8. That the persons described in the claims as citizens of the United States, without stating their residence, at the time of shipment, or at any other time, must, under the circumstances of the case, be considered as residing in France.

There are claims which date the property from the time of capture; this, we say, is insufficient. The claims should state the property from the time of shipment at least. This is necessary to prevent transfer *in transitu*, and to give effect to, and preserve the simplicity and dispatch of the *preparatorio* investigation.

*247] *An important question in this case is, what is to become of the American part of the cargo of an armed American vessel, re-captured by an American private armed vessel? The re-captors, in the first place, contend, that the part of the cargo above mentioned is *casus omissus* as to the act of congress of the 3d of March 1800. If the court should decide, that there is a *casus omissus*, then the fate of this part of the cargo will depend upon the common law. The re-captors contend, that the common law is, that if property so situated has remained twenty-four hours in possession of the enemy of the captured party, they are entitled to the whole of the property as prize of war. To this they cite Grotius *de jure belli ac pacis*, lib. 3, ch. 16. Vattel, lib. 3, ch. 13, § 196. This right upon re-capture is here clearly laid down to privateers, to be divested only by the laws of each state, and treaties. Our treaty with France is silent, except as to restoration on capture by pirates; this being *ex delicto*, there is no change of property by the original capture. See also Professor Marten's Summary of the Law of Nations, book 8, ch. 3, § 10. "In order to encourage privateering, those concerned in it are allowed to hold all the merchant vessels and merchandise they take

from the enemy or his subjects, without any reserve whatsoever with respect to the redemption of them by the proprietor."

The only remaining question on this point would be, what kind of possession consummates the right of the privateer. Twenty-four hours' possession has been considered "firm" possession, and sufficient to consummate this right by an almost common usage, and recognised by almost all the treaties of maritime powers. 1 Rob. 151 (Am. ed.); 2 Azuni 306, 308, 312, in a note, 275, 276 and 282.

If the above considerations are inapplicable, and the salvage of this part of the cargo is governed by the acts of congress, then by those acts, the re-captors are entitled to one-half. *The unqualified right of the privateer to the property captured, or re-captured, is, after firm possession, clear at common law, and the doctrine of taking away that right by salvage is derogatory to that law. If this be so, the act of congress is derogatory to the common law, and must be liberally construed in favor of privateers. The reward has always been out of the whole subject-matter; the cargo, as well as vessel and armament; and it is with confidence contended, that a separation of the cargo, so as to subject it to one-sixth salvage, while the vessel and armament affords one-half, is, if it exist at all, anomalous to the act of the 3d of March 1800, and at war with the usage and treaties of all maritime states. The reason of increasing the salvage upon an armed vessel is the merit of battle, and it is evident, that the cargo is as well won by battle as the armament and vessel. [*248

But if the whole of the act of congress be to be taken together, and the 2d section be permitted to reflect a light upon the 1st section, it will appear, that congress could have had no other meaning, than that the salvage should be increased upon the cargo, as well as the vessel and armament. In the second section, where they give a salvage upon their own property, thus captured by a private armed vessel, they give one-half of the goods on board as well as of the vessel and armament. But should not the cargo be considered as a mere incident to the vessel, and follow its fate and character?

As to the French property, we are entitled to the whole as prize of war, by the foregoing rule of twenty-four hours' possession, which is the rule in France. Reciprocity is the rule in this case. See the act of 1800, § 3. The twenty-four hour rule is established in France by ordinance of 15th June 1779, with respect to all re-captures by privateers. France, in her treaty with Holland, 1st May 1781, secures the twenty-four hour right to privateers. The court will find those acts of France referred to in 2 Azuni 276, 282. **Miller* v. *The Ship Resolution*, 2 Dall. 2. This is a strong case, establishing the twenty-four hour right. It refers to an ordinance of congress declaring this rule as to us, and refers to the French ordinance to the same point. It admits the twenty-four hour rule, but excludes its application to that case, that being the case of a neutral capture which conveyed no right. See also the case of *The Mary Ford* (*McDonough* v. *Dannery*), 3 Dall. 188. [*249

On the right of the re-captors, on the 4th point of the case, they will not enlarge by argument, as they consider it well established; nor on that of the 5th point, than merely to observe, that it appears to be just, *ex necessitate*, and comes under the description of confusion in the civil law; nor as to the 6th point, than to observe, that there is no standard by which a char-

acter can be reflected upon these claimants but the voyage itself; which makes them either American or French. The description of the claim negatives the idea of their being American; they must, of course, be French. The 7th point must meet the same constrnction for the same reason.

As to the principle contended for in the 8th point of the case, it may be remarked, for elucidation, that some of the claimants, described as in this point, turn out, by the evidence, to be resident in France for commercial purposes.

Is the owner of the vessel entitled to freight, exclusive of salvage? The re-captors say, the vessel is not entitled to freight, because she would have been condemned had she been brought into England. But if entitled to freight, the captors have saved that freight, and are, therefore, entitled to one-half as salvage. Freight may remain, after all the rights of the captors are deducted, to be adjusted between the vessel and the freighters. This question can only apply to the American part of the cargo; for as to the French, the rule is to vest the property absolutely, in cases of re-capture, after twenty-four hours' possession, the *postliminii* right and all its incidents are destroyed.

*250] *Irving*, in behalf of the owners of the vessel, and of such parts of the cargo as were claimed by persons resident in the United States. —The schooner Adeline is a registered American vessel, owned by Isaac Levis and William Weaver, native citizens of the United States, and residents of Philadelphia, and was commissioned as an American letter of marque. She commenced her voyage from Bordeaux, to a port in the United States, in the month of March 1814, having on board a cargo owned principally by citizens of the United States and others residing in our territory. In the course of this voyage, she was first captured by two British vessels of war, and was afterwards, and before her condemnation as prize, re-captured by an American private armed vessel. Upon her first capture, most of her papers were taken from on board, by the captors, and those which were left, have been delivered up to the district court at New York, and transcripts of the same are contained in the record before this court.

In these cases, most of the claims and test-affidavits specify the property respectively claimed, at the time of shipment in the Adeline, and at the time of capture, to have been owned by citizens and residents in the United States. Many of the claims and test-affidavits testify that the goods thus claimed vested in the claimants, before and at the time of capture and re-capture; and generally, all the claims are supported by the respective bills of lading. In truth, there is not a paper attached to this record which falsifies any claim, or casts any suspicion upon them. An objection has been taken to some of those claims, because they do not state that the property vested in the claimants, at the time of shipment, and that, for aught that appears to this court, the property might have been transferred *in transitu*.

Admitting this to be the fact, how can such transfer prejudice those claimants? The vessel was an American vessel, coming from a French port,

*251] to a port of the United States. The rule, that the character of property must be determined *by its shipment, that the same cannot be transferred in its transit, but as regards belligerent rights, must be con-

sidered as remaining the same as at the time of shipment, applies only to enemy property. *The Danckebaar Africaan*, 1 Rob. 90 (Am. ed.) ; *The Vrow Margaretha*, Ibid. 285.

But the claims objected to will be found, on examination, to agree with those which are in common use in the admiralty courts of England, even in cases where the property is captured as prize of war. *The Fortuna*, 2 Rob., appendix, 313. It is sufficient to assert property in the claimants, and to negative the allegation of title in the enemy at the time of capture. Those claims and test-affidavits are testimony in a prize cause, and will be deemed satisfactory, unless there is some evidence in the ship's papers or preparatory examinations, to invalidate them. See the Duke of Newcastle's letter in the appendix to Chitty ; *The Haabet*, 6 Rob. 55.

But to proceed to the merits of this case. Upon examining the libel of the captors, the first inquiry will be, whether this property could be captured as prize, for it has been so libelled? The commission to our private armed vessels, under the act declaring war, authorizes the re-taking of property captured, which was originally American. The property thus re-taken can only present a case of salvage, because the title of the original proprietors never has been divested ; and that equally whether the property was originally American or neutral.

The interest of the captured property does not vest in the captor until after final adjudication. *The Elsebe*, 5 Rob. 167 (Am. ed.) ; Act 26 June 1812, § 4 (2 U. S. Stat. 759). And the fifth section of the prize act provides, "that all vessels, goods and effects the property of any citizen of the United States, or of persons within and under the protection of the United States, or of persons permanently resident within and under the protection of any foreign prince, government or state in amity with the United States, which have been captured by the enemy, and which have been re-captured by vessels commissioned as aforesaid, shall be restored to the rightful owners, upon *payment by them respectively of a just and reasonable salvage, to be determined by the mutual agreement of the parties concerned, or by the decree of any court having competent jurisdiction, according to the nature of each case, agreeably to the provisions heretofore established by law." [*252

The present case, then, before the court, determines itself to be a case of salvage, if there was a right to re-capture, and if the service rendered was meritorious. The right is not questioned, for the re-capture was from the enemy ; nor is the service questioned, for the property would have been otherwise lost.

It becomes however a matter of inquiry, whether the re-captors, under their present libel, can have a decree for salvage. The papers taken from on board the vessel and the examinations *in præparatorio* proved that the re-captured vessel was an American vessel, and that her cargo was in part American and in part French. It was evident, therefore, that the re-capture could only present a case of salvage ; and as such the vessel and cargo should have been libelled. But the libellants have proceeded against the property as prize of war, and have asserted title to it as such, in all their allegations. Must they not make out their allegations, and, if they fail, can they, as a last resort, seek for salvage, when such has not been prayed for in their libel, nor in any manner spread upon the record before this court?

But if the court should be of opinion, that a decree for salvage can be made upon the libel, claims and disclosures in this record, then the only question will be, the amount of this salvage. The re-captors contend for a moiety, and we, that they should have but a sixth. Which is right must depend upon a just construction of the act, in cases of re-capture, passed 3d March 1800 (2 U. S. Stat. 16). The first branch of the first section of this act provides, that "a re-captured vessel, other than a vessel of war or private armed vessel, shall be restored, on payment of one-eighth (if taken by a public armed vessel) of the value of the re-captured vessel and cargo; and if re-taken by a private armed vessel, of one-sixth." *The second
*253] branch of that section provides, "that if the re-captured vessel shall appear to have been set forth and armed as a vessel of war, before such capture, or afterwards, and before the re-taking, the salvage shall be one moiety of the true value of such vessel of war or privateer."

The act contemplates two descriptions of cases as to vessels, viz., armed and unarmed; the former are to pay a moiety, the latter a sixth. The law having settled the amount, the court, when it ascertains what the law is, will adhere to the provision. Now, the construction must depend on the evident meaning and intent of the legislature, as clearly to be gathered from a view of the whole provision; and it may be adopted as a fundamental rule, that where there is an express provision, there shall not be a provision by implication; *expressio unius est exclusio alterius.*

The first clause provides for the case of unarmed vessels and goods. It commences by stating "that when any vessel, unarmed, or when any goods" (not on board such vessel, but wholly in the disjunctive)—when any goods (reaching any and every case of goods)—when any such are captured by a private armed vessel, one-sixth shall be allowed. It proceeds throughout the whole clause in the disjunctive, saying that such vessel or goods shall be restored on payment of one-sixth as salvage.

The second clause is studiously confined to vessels, "and if such vessel" (passing by goods altogether and leaving the general provision for goods unimpaired)—and if such vessel is armed, then one moiety of the true value of such vessel is to be allowed; repeating and carefully confining the provision to the vessel, and that, too, with a peculiar particularity. Congress, in express words distinguish—they place private unarmed vessels and all goods re-captured on the same footing. The fifth section of the prize act (2 U. S. Stat. 760), declares, that the above provisions are to regulate cases of salvage.

*254] But it is contended, that the intent of a statute is to be *considered, that the design of the legislature is to be consulted. I grant it, wherever there is any ambiguity in a statute. In such case, it is the privilege and duty of the court to give a just construction. But this only holds in cases where there is great obscurity, not in cases where the provisions of the statute are clear and explicit. To hold that a court can intermeddle with such provisions, is to clothe the court with legislative as well as judicial powers—to authorize it to make laws instead of only expounding them. It is laid down in Parker 233, that "where the words of a statute are express, plain and clear, they ought to be construed according to the genuine and natural signification and import, unless by such exposition a construction or inconsistency would arise in the statute, by reason of some subsequent clause

from whence it might be inferred that the intent of parliament was otherwise."

But is is said, that from the provision contained in the second section of the statute, we may gather, that it was the intent of the legislature, to give a moiety of the goods on board a private armed vessel to the re-captor, as well as a moiety of the vessel. When we come to examine this section, which is thus pressed into the service of the first, we shall find that it relates entirely to the property of the United States which may be re-captured. It has no reference to the first section, it speaks of property of a different description, differently owned. In the last clause, it provides, that if a vessel of war of the United States is re-captured by a private armed vessel, a moiety of any goods on board shall be allowed. The government, deeply interested in the preservation of our public vessels; the national character, deeply interested in the rescuing from the enemy our vessels of war and in not permitting them to exist as mementoes of their triumph; the national prosperity, deeply interested in preserving to us the means of our own strength, and in preventing the same from being added to that of the enemy; these are sufficient inducements for our government to make an extraordinary provision. The service is not rendered to an individual, it is rendered to the nation; it is more meritorious; feelings of patriotism more than of interest may have impelled to the performance of the *duty; the [*255
danger was greater, the object more important; the recompense should therefore be increased.

But the first and second sections of this statute are wholly independent. The first relates to the re-capture of private property, either by our public or private armed vessels. The second relates to the re-capture of public property, either by our public or private armed vessels. Each section is perfect in itself, and each independent of the other; neither requires the interposition of any court to explain them. "Wherever any words of a statute are obscure or doubtful, the intention of the legislature is to be resorted to, in order to find the meaning of the words." *Wimbish* v. *Tailbois*, Plowd. 57. Where words of a statute are plain and positive, it is not the province of the court to search after new constructions. Justice BULLER remarks, in the case of *Bradley* v. *Clark*, 3 T. R. 201, "that, with regard to the construction of statutes according to the intention of the legislature, we must remember, that there is an essential difference between the expounding of modern and ancient acts of parliament. In early times, the legislature used to pass laws in general and in few terms; they were left to the courts of law to be construed, so as to reach all the cases within the mischief to be remedied. But in modern times, great care has been taken to mention the particular cases in the contemplation of the legislature, and therefore, the courts are not permitted to take the same liberty in construing them, as they did in expounding the ancient statutes."

But the provisions in this statute respecting salvage were not unadvised provisions, hurried over without deliberation. Congress, in consequence of the partial war with France, had been called on to legislate repeatedly upon the subject. The first provision was by statute 28th June 1798, [*256
§ 2 (1 U. S. Stat. 574). This is general, *for vessel and cargo, armed or unarmed, one-eighth; all are placed on the same footing. The second provision was by statute of March 2d, 1799 (1 U. S. Stat. 716). That gives

(if detained 24 hours) one-eighth ; if 48 hours, one-fifth ; if 96 hours, one-half ; without any distinction between vessel and goods, or armed and unarmed. The next year, induced by the inconvenience or inequality of the former laws, they made a deliberate provision. The subject was fresh ; every clause was weighed. Those provisions had been a matter of investigation for three successive sessions of congress, and had been successively amended. Can it be said, then, that congress had not a view of the whole ground, that they were hurried in the passing of this law? The very law they were considering was an amendment, and would naturally cause inquiry and reflection. On mature deliberation, therefore, they, in the year 1800, enact the present law. They discriminate between private unarmed vessels and goods, allowing one-sixth for salvage, and for the vessel alone, if armed, a moiety. The re-captured property of the United States is placed in a distinct section, wholly unconnected with the other.

If we attend to the language of the last clause of the first section, giving to the re-captors the moiety of a private armed vessel, we shall ascertain the reason why a greater salvage was given for the vessel than the goods. The section states, " and if the vessel so re-taken shall appear to have been set forth and armed as a vessel of war." If the enemy are thus possessed of the means of injuring our trade and of capturing other vessels, then, as the wresting those weapons from their hands prevents the perpetration of further mischief, for this meritorious service, we will give to you one-half of those instruments of annoyance and destruction. The same reasoning will not apply to the goods ; the public reap not the same benefit from their re-capture.

But it has been heretofore argued in this cause, that a greater rate of
*257] salvage should be allowed than one-sixth, *and that a construction to that effect should be given to the statute, because the service was very meritorious ; the property had almost reached an enemy port, and but for the management and intrepidity of the re-captors, would have been wholly lost. And is not that the case in every capture by a belligerent ? Did not congress know, when they passed this law, the difficulty of getting prizes home ? Were they not then, in fact, more destitute of a navy than at present ? In pursuance of this argument of extraordinary merit upon the present occasion, it has been urged, that the re-captured vessel was armed ; and that life was hazarded equally in re-capturing the goods as in re-capturing the vessel. In the present instance, it is idle to talk of danger ; the Adeline, from her armament, was incapable of making resistance, and whether she did or not is problematic, as from the preparatory examinations, there appears to be an uncertainty whether any resistance was attempted. It is, however, certain, that the resistance, if any, was a mere parade, and that, having fired one or two guns, the vessel instantly surrendered. Not a soul was hurt on either side, and the privateer did not deem the resistance sufficiently important to return.

But admitting that the service, by any chance, might have been very meritorious ; that great gallantry might have been displayed and many lives lost ; yet, under this statute, I know not how any court can interfere with its settled provisions. In the case of *The Apollo*, 3 Rob. 250, which vessel was cut out from under the guns of a French fortress, where much daring spirit was evidenced on the part of the re-captors, and much danger hazarded,

and where extraordinary salvage was applied for, Sir WILLIAM SCOTT says, "all re-captures within the act are put upon the same footing of merit and reward; therefore, all that is said on the particular gallantry of the service is foreign to any singularly favorable application of this act, which has provided but one measure for all cases, without reference to circumstances."

With respect to the property of alien friends, resident in the United States, and re-captured in this vessel, I *only remark, that the provisions in the prize act apply equally to them as to our own citizens, residing within our territory. [*258

A claim has also been interposed by the owners of the schooner Adeline, for freight and primage of that part of the cargo which is not owned by them. That such should be allowed, I would respectfully contend, there can be no question, as the voyage has been performed, and the cargo delivered at its port of destination. But the re-captors assert, that they are entitled to a salvage of this freight. On the part of the owners, this is opposed; first, because salvage of the freight is not given by the statute, and second, because it is in fact allowed in the value of the goods.

The act has prescribed the terms on which the vessel and goods are to be restored. The court cannot add to those terms. The re-captors have no means of procuring this salvage, except by withholding the goods; but the act declares, that the goods shall be given up, upon payment of one-sixth of their value, without making any provision for salvage of freight. Against whom could the decree for a salvage of the freight lie? Not against the goods, for they are delivered up; not against the owners of the goods, for they are not before the court.

But salvage of freight is, in fact, paid in the increased value of the goods. The presumption is, that the merchandise is enhanced that value by the importation. Now, the salvage is not on the invoice value, but on the true value of the goods. This value is ascertained by sale or appraisement, at the place where the property is brought; no deduction is made, except imports and duties. Besides, the re-captors should not claim an additional recompense for perfecting that without which they could not participate in the cargo. The bringing this property safely in, entitles them to the one-sixth of its value, and that alone is specified in the statute as their reward.

The district court, from whose decision the re-captors have appealed, decreed, on the 9th of August 1814, that the re-captors should have as salvage one-sixth part of all the goods on board this vessel owned by American *citizens, and alien friends residing in the United States, and also a moiety of the vessel, her tackle, apparel, &c. In this decree, the claimants of that description acquiesced. The re-captors have, by successive appeals, brought this case before this court. The funds arising from a sale of this property, which sale took place before the decision of the district court, have been lying unproductive in the last-mentioned court ever since. If this court should affirm the decree of the circuit court in the above mentioned cases, then those claimants pray that costs and damages may be awarded them. [*259

D. B. Ogden, for all the claimants.—This vessel and cargo were re-captured by the Expedition, from the English, who had captured her, on a voy-

age from Bordeaux to New York. The Adeline is American property, and her cargo part of it American, part French. The Adeline and cargo are libelled as enemy's property, and the libel prays that they may be condemned as such. The claims deny the fact of its being enemy's property, and aver, that in some cases it is American property, in others, that it is the property of alien friends.

Before I consider the questions raised by the captors, I must first beg leave to call the attention of the court to some observations upon the nature of this cause, as it appears from the libel, claims and evidence. The libel charges the property as being enemy's, and prays for its condemnation as such. The claim denies the fact of enemy's property, and avers, that it is American or the property of alien friends. It is evident, that the only point in issue, the only question arising between these parties upon the claim and libel, is whether this property be or be not enemy's, and as such liable to condemnation?

*260] In all cases of prize, there must be a regular judicial *proceeding, and so in all other cases, in a court of admiralty, as well as in any other court. (See the answer to the Prussian memorial, in the appendix to Chitty's Law of Nations 314, also to be found in *Collectanea Juridica.*) All regular judicial proceedings consist of the proofs and allegations of the parties. The allegations of the parties are first made, and then the proofs are produced to support them. I understand the rule to be universal, in all courts in which there are regular judicial proceedings, that as a party cannot recover upon allegations without proof, so neither can he recover upon proofs without proper allegations. The judgment of the court must be according to the proofs and allegations.

What are the allegations of the parties in this case? The libel is in the nature of a declaration in a common-law court, or of a bill of complaint in a court of equity. It must state sufficient facts for condemnation, with sufficient certainty, and conclude with a proper and sufficient prayer. It must apprise the person claiming the property libelled, of the grounds upon which a condemnation will be asked; otherwise, it would be more than useless to require a libel at all. Now, this libel alleges or charges that this is enemy's property, and asks for a condemnation of it as such. Unless the evidence in the cause proves it to be enemy's property, I apprehend, the court never will, under this libel, condemn it.

The documents on board the captured vessel, and all the examinations *in præparatorio*, so far from proving the property to be enemy's property, prove directly the reverse; and indeed, it is not pretended by the counsel for the captors, that there is the least ground to suspect the property or any part of it to be hostile. Can the captors have a decree for salvage in this case? I think not, because they do not ask for it, in their libel; because the question here is, not whether the captors are entitled to salvage or not,

*231] but whether this is enemy's *property or not? I do not believe a single case can be produced in the books, where salvage has been decreed, unless it was specially asked for by the libel. A libel, like a declaration, may contain several grounds of a decree, or, to speak in common-law language, several counts. And there must be a count for salvage, or it cannot be decreed. In Hall's Admiralty Practice, 144, will be found a precedent of a libel, where salvage is claimed, drawn by one of the most

learned and experienced lawyers, particularly as a civilian, in the United States; which, although no authority, will certainly be considered as entitled to some weight, as showing the opinion of an enlightened lawyer upon the subject.

It is no answer to this argument, to say, that where property has been libelled as prize, property of friends is frequently condemned upon the ground of residence in an enemy's country or trading with an enemy, because such property is considered, *quoad hoc*, as enemy's property, and therefore, comes within the allegation of enemy's property in the libel. If I am right in the argument upon this subject, then I think it follows, of course, that if this is not enemy's property, it cannot be condemned to the captors, but must be wholly restored to the claimants, without any salvage whatever. It is no hardship to the captors, to acquit the property; they knew the facts, when they filed their libel; they made their election in what way to proceed against it; and, like all other parties in a court of justice, they must be bound by that election.

This, being property re-captured from the enemy, must be considered, *primâ facie*, not as enemy's property. It cannot be presumed, that they would capture their own property. Now, property re-captured from an enemy never can be proceeded against as prize of war; it is not considered as enemy's property, until, in some countries, it has been carried *infra præsidia;* in others, has been twenty-four hours in possession of the enemy; in England, and *under our prize act, until it has been condemned in a competent court. [*262

If the captors have any claim to any part of this property, it must be because re-captured from the enemy. But no such claim is set up in the libel; the right of property remains in the claimants; it has never been changed, and must, therefore, be restored to them.

But it is said, that some of these claims are insufficient, because they do not say, that the property belonged to the claimants at the time of ship ment, but merely at the time of capture. I answer, if the property belongs to the claimants now, it is all which the court will require in this case. I have already endeavored to show that the captors have no claim to the property; it follows, then, that the court will restore it to the proper owners, at the time of the decree. Suppose, however, that I am wrong in the principles which I have endeavored to establish, and that the captors can have a decree in their favor in this case; let me inquire whether the claims above alluded to are not sufficient? All that is necessary for the claim is to deny the material allegations in the libel. The allegation here is, that the property is enemy's property, and as such liable to be condemned. This allegation is expressly denied by the claim. Nothing more is ever required in a claim.

Where there are any circumstances which raise a presumption that the property is enemy's, such as coming from an enemy's port, found on board an enemy's vessel, &c., then it becomes necessary for the claimant to explain away those circumstances, to prove the friendly nature of the property, to show it to have been friendly at the time of its shipment, &c., which is done in what is called "the test-affidavit," not in the claim. But in cases where the property, from the circumstances of the case, must necessarily be presumed to belong to our own citizens or our friends (as in the case of a re-cap-

ture), then no test-affidavit can be necessary; then no explanation is asked, because none is required.

*263] *If these claims are insufficient, does it follow, that this property must be condemned? The claims being insufficient, the court will either suffer the claimants to amend them, or they will consider them as no claims, and dispose of the property accordingly. If an amendment is allowed, there can be no difficulty in removing this objection. If the claims are considered as no claims, is the property to be condemned as a matter of course? If the captors, in case of capture, send in a vessel, after taking out the master, supercargo and every other person who would probably claim, and leave on board only one or two of the crew, whose examinations may be taken in *præparatorio*, and who are wholly ignorant as to the property on board—if a vessel and cargo thus sent in, is libelled as prize, it is to be condemned, of course, as prize, because no claim is put in or filed for it? If all the papers and documents, and evidence in *præparatorio* prove the property not liable to condemnation, is it to be condemned, because no claim is filed for it by the owner? This doctrine would follow from the arguments upon the other side, but it is too monstrous to be supported by any court.

I take the law upon this subject to be this, viz: The proceedings in a court of admiralty are *in rem;* the subject-matter is, in substance, in possession of the court, and they never will decree it to the captors or to any other person, unless they can show a right to it. They never will give the captors my property, because I do not claim it, not being possibly in a situation to know that it has been captured or libelled. If there be no claim filed, the court will examine the papers and examinations *in præparatorio*, and if, from

*264] *the face of them, there appears good ground of condemnation, they will condemn, otherwise not.

It is not like the case of a judgment by default, in a court of common law, where the plaintiff takes judgment for his debt; because, at common law, the process has been personally served upon the defendant, he is actually in court, or has been proceeded against to outlawry. No surprise can be complained of by him. Not so in a court of admiralty, where the proceeding is *in rem;* and when the owner may never know that his property is in jeopardy. The court, being possessed of it, are bound to give it up to no body but him who has a good right to it. If, from the libel and the proofs before the court, it appears that the captors are entitled to the property, the court will decree it to them; otherwise not. And for this, among other reasons, it is an invariable rule, that a claim must always be put in under oath, so that if the court order property to be restored to the claimant, they may at least have some evidence of his right to it. For these reasons, if there was no claims put in to this property at all, yet, as from the proofs in the case taken *in præparatorio*, it is clearly not enemy's property, I contend, that the court could not condemn it as prize of war.

This case, being that of a re-capture, is a case in which the questions are, whether the property shall be restored to the original owners, and upon what terms? As there is no pretence that the property belongs to an enemy, there is no reason that the claim should negate a transfer *in transitu;* which transfer is void only when its effect would be to neutralize belligerent property.

If the libel in this case be such as the court can proceed upon to award

salvage to the captors, I shall now briefly examine upon what terms the property in question must be restored to its former owners. This property consists, 1. Of the vessel, claimed as American property and proved to be so. *2. Of property of American citizens, stated to be resident in [*265 the United States. 3. Of property of American citizens, whose place of residence is not stated. 4. Of property of alien friends, resident in the United States. 5. Of property of subjects of France, residing in France.

I. As to the vessel. By the act of congress of 26th June 1812, entitled "an act concerning letters of marque, prizes and prize goods," § 5 (2 U. S. Stat. 759), it is enacted, "that all vessels, goods and effects, the property of any citizen of the United States, or of persons resident within and under the protection of the United States, or of persons permanently resident within and under the protection of any foreign prince, government or state in amity with the United States, which shall have been captured by the enemy, and which shall be re-captured by vessels commissioned as aforesaid, shall be restored to the lawful owners, upon payment by them, respectively, of a just and reasonable salvage, to be determined by the mutual agreement of the parties concerned, or by the decree of any court having competent jurisdiction, according to the nature of each case, agreeably to the provisions heretofore established by law."

Now, the provisions heretofore established by law are to be found in an act of congress passed on the 3d March 1800. (2 U. S. Stat. 16.) This act, after providing for the restoration of vessels and goods, after re-capture, upon the rates of salvage therein mentioned, proceeds in these words, "and if the vessel so re-taken shall appear to have been set forth and armed as a vessel of war, before such capture, or afterwards, and before the re-taking thereof as aforesaid, the former owner or owners, on the restoration *thereof, shall be adjudged to pay, for and in lieu of salvage, one [*266 moiety of the true value of such vessel of war or privateer." Under this act, I presume, the court cannot hesitate in affirming the judgment of the circuit court, with costs and expenses of prosecuting this appeal.

II. As to the property of American citizens, resident in the United States. The act of March 1800 (2 U. S. Stat. 16), is positive in its provisions upon this subject: the property must be restored upon one-sixth salvage. The decree of the circuit court upon this property, I contend, ought also to be affirmed with costs.

III. As to the property of American citizens, whose place of residence is not stated. This, in my view of the subject, is the only point in the cause upon which the mind can at all hesitate, and when this is fully considered, I trust, all doubt upon it will vanish. It is contended on the part of the captors, that as no place of residence is mentioned, these American citizens must be considered as resident in France, and that the rule as to the restoration of the property of French subjects must therefore apply to them. To this I answer—

1. I do not think the presumption a fair one, that because no place of residence is mentioned, they are, therefore, to be considered as residing in France. As they are citizens of the United States, it would seem to me, that they ought fairly to be presumed as residing in the United States, until some evidence is produced to the contrary. If, however, the court think it

important, that the claimants should prove their place of residence, they will, I presume, give us an opportunity of doing so.

*267] *2. That the place of residence is wholly immaterial; because, being American citizens, and there being nothing unlawful in their residing in France, or any other country, with which we are at peace, they have not forfeited any of their rights as citizens of the United States. And the doctrine that residence abroad gives a national character, applies only to the case of the subjects of two nations which are at war with each other; or to neutrals residing in one of the two belligerent nations; but cannot be applied to such a case as this. I forbear, however, to enlarge upon this point as unnecessary; because, the question, as to the terms upon which this class of claimants are to have their property restored, depends upon the construction of the act of congress, which I shall now consider.

By the act of March 1800, before referred to, it is declared, that when any goods which shall hereafter be taken as prize, "by any vessel, acting under authority from the government of the United States, shall appear to have before belonged to any person or persons resident within or under the protection of the United States, and to have been taken by an enemy of the United States," &c. This question depends upon the construction of the above clause of the section. In order that the property should be restored, upon the payment of one-sixth salvage, it must belong "to some person or persons resident within, or under the protection of the United States." If it belongs to any person resident within the United States, it is to be so restored; or if it belongs to any person who is under the protection of the United States, whether he resides therein or not, it is to be restored upon the same terms. All foreigners who are permitted to reside in the United States, are under their protection, but no person who resides out of the

*268] United States is under the protection of the United States, but their own citizens. *In 2 Cranch 120, this court held, "that an American citizen residing abroad is entitled to the protection of his government."

Again, every foreigner who resides in the United States, must necessarily be under their protection; the words, therefore, "or under the protection of the United States," would be nugatory, if intended to be applied to such foreigners, and no effect can be given to those words, unless they are applied to citizens, residing out of the United States, but who are still under their protection. But if the words of the act of March 1800, are of doubtful import, their true construction is, I think, put out of all doubt, by the act of 26th June 1812, before referred to. These two acts of congress, being *in pari materia*, must be considered as one act, and construed accordingly. The 5th section of the act of June 1812, declares, "that all vessels, goods and effects, the property of any citizen of the United States, or of persons resident within and under the protection of the United States," shall be restored "agreeably to the provisions heretofore established by law." Now, there was no other provisions established by law, than those contained in the act of March 1800. It is evident, that congress must have intended, by the act of March 1800, to provide for restitution of the property of any citizen of the United States, whether he resided within the United States or not. This is the only construction by which the provisions of these two acts can be reconciled.

That this was the construction intended by congress, when these laws

were passed, will be still more evident, when we examine with a little more care, the different phraseology of them. The act of March 1800, says nothing about citizens of the United States, but speaks of property belonging to persons resident within or under the protection of the United States, thereby meaning, as I contend, all persons who reside within the United States, and all citizens *under the protection of the United States, let them [*269 reside where they may. The act of June 1812, provides for the cases of property "of any citizens of the United States," and of "persons resident within and under the protection of the United States." A foreigner, residing in and under the protection of the United States, is entitled to have his property restored under this act. This clause of the sentence does not apply to citizens at all, because their property is already provided for by the words "any citizen of the United States." By the act of March 1800, the property of all persons resident within, or of persons under the protection of the United States, is to be restored; without which latter words, no provision was made for citizens out of the country, these words were for that reason unquestionably inserted.

For these reasons, I contend, that it is immaterial where the American citizen reside, they are entitled to have their property restored, upon paying one-sixth as salvage.

IV. As to property of alien friends, resident in the United States. No observations are necessary to prove that under the acts of congress referred to, they are entitled to restoration upon paying one-sixth salvage. As to them, the decree, I presume, will be affirmed, with costs and expenses.

V. As to the property of subjects of France, residing in that country. By the 3d section of the act of March 1800 (2 U. S. Stat. 17), this property is to be restored upon the same salvage on which, by the laws of France, the property of American citizens would have been restored to them under similar *circumstances. And if no law or usage of France is known [*270 upon the subject, the same salvage is to be allowed as if it were the property of a person resident in the United States (viz., one-sixth). Now, I confess, I have not been able to find what was the rule in France upon that subject. Whether the ordinance of 1779, made upon this subject, and which is referred to in the argument on the other side, was in force at the time of this re-capture or not, or whether that ordinance, like almost everything else in that country, was destroyed, during the dreadful revolution which she has just passed through, I know not. I confess my ignorance, and I have endeavored in vain to obtain information about it. If no such French rule is known to the court, then I claim this property, belonging to French subjects, residing in France, upon the same salvage which by the act of congress, it ought to be restored to them, if they resided in the United States.

Emmet, for the re-captors, in reply.—Most of the cargo has been claimed; but no claim whatsoever has been put in for the property expressed in the bill of lading, No. 23 (26 bundles of steel to be delivered to C. W. Huty, of Philadelphia), nor to that expressed in No. 35 (a harp and case of strings to be delivered to T. Delort, who has come in and claimed other property), nor to that expressed in No. 39 (one case of pencils, on account and risk of Mr. Fongarolly, of New York). This circumstance would not have been

noticed here, but that it is called for by part of Mr. Ogden's argument, who (partially admitting that a bad claim is tantamount to none at all) contends, that the want of one is no ground for condemnation. In England, by the prize acts, regulations are made in case of non-claims for a limited time. In our courts, for want of any such regulations, defaults, as I understand, are usually taken, but the property not put out of the power of the court for a reasonable time. It is unnecessary to discuss the propriety of that arrangement, in the present case; for certainly, after the lapse of a year, where the
*271] parties, who ought to claim, *are in the immediate vicinity of the court, and have come forward with no claim at all, or one not disclosing what is necessary to ascertain the innocent character of the property, or the foundation or terms upon which restoration should be had; where they have refused the sanction of an oath to verify documents that, without it, may well be questionable; there can be no ground for awarding restitution to them. Their silence, or evasive mode of claiming, must be regarded as intentional; and indicating that they cannot make out a fair case for restoation.

Mr. Ogden contends for restitution, without salvage, on another ground; that this libel being for condemnation as enemy's property and prize of war, salvage cannot be awarded under it; therefore, says he, it must be restored, without salvage. That conclusion is clearly illogical, for if it were true, that salvage could not be awarded, under these proceedings, the only consequence would be, that the property should be retained, and the re-captors turned round to libel for salvage. The position itself, from which the conclusion is drawn, is also erroneous; for in all cases of military salvage, the proceedings are as against a prize, and the payment of salvage is a condition necessarily imposed, by the decree of restitution, on the claimant. It is not properly the thing sought for by the libellant and contested by the claimant. I do not mean to say, that it may not have been done from greater caution, and perhaps, want of practical experience, in the United States; or that, if done, it ought not to be supported, but it is neither usual nor necessary.

Mr. Ogden refers to a precedent of that kind in Hall's Admiralty Practice; I have not the book by me, and cannot refer to the authority, but if it be a libel for mere military salvage, the introduction of it in that book shows that the author's ideas were not very well arranged upon the subject which occupied him; for his book is only a translation of Clerke's *Praxis Curiæ Admiralitatis*, which treats exclusively of the instance court, and has no relation to the prize court of admiralty. It is sufficient, however, for me to say, that no precedent of a libel for military salvage is to be found in Maryatt's Formulary, or any English book of authority, and that, obviously, all the cases in Robinson's reports, where such salvage is decreed, are brought
*272] up under the prize jurisdiction, *and were proceeded against as prize of war.

Let me ask, by what right was the Adeline taken by the Expedition and held? Unquestionably, *jure belli*. By what right, or by what course of proceedings, were the re-captured crew examined *in præparatorio*, or the papers on board her opened and inspected by the prize commissioners? Because she was subject to be dealt with according to prize law. By a former prize act of England (33 Geo. III., c. 66, § 42), it was enacted, that

re-captured ships set forth by the enemy as vessels of war, should wholly belong to the captors, and not be restored to the original owners. How was such a vessel to be proceeded against, but by libelling her as prize, and condemning her as enemy's property? So, in the present case, part of the re-captured property is French, which we contend (and for the present, I shall take for granted), ought to be condemned to the captors and not restored at all. How are we to proceed for that condemnation, but by libelling as prize of war? Why, under the rule of reciprocity, is it not to be restored? Because, by the French law, belligerent property, of which an enemy has had twenty-four hours' possession, is considered to have changed owners, to be the absolute property of that enemy, and when re-captured, it is treated as the absolute property of that enemy, and condemned as such by libel for prize of war. The rule of reciprocity (1 Rob. 53, Am. ed., in the case of *The Santa Cruz*) induces us to consider French property (placed in such circumstances as would, under the laws of that country, be held to make a complete change of ownership of American belligerent property), as also acquired by the enemy; and to adjudicate upon it as actual enemy's property: of course, to libel and condemn it as prize of war. *Non constat*, till the claims are put in and sworn to, but that property, apparently American, is actually French; and it is necessary to proceed for prize, in order to get those claims and ascertain that fact.

A remarkable instance of that occurs, even in the present case. The bill of lading (No. 15) of 280 cases of claret, states them to be shipped by order and for account and risk of David Dunham (presenting a *primâ facie* case of American property), but when Mr. Dunham comes to claim on oath, he states them to be the property of Messrs. Johnson & Dowling, subjects of the French empire. How was the knowledge of that fact to be obtained, but by forcing a claim on oath? and if we *had proceeded by libelling only for salvage of the property, as American, how should we have learned [*273 that it was really subject to total condemnation as enemy's property, under the reciprocal application of the French law? The proceedings in this way are also the most simple. The libellant claims the benefit of his *primâ facie* right arising from capture out of enemy hands *jure belli*. If there be any title to be opposed to this, it must be shown and sworn to, and the court will then decree, according to the extent of that title, either total restitution or restitution on terms of salvage.

In ordinary civil salvage, which falls within the jurisdiction of the instance court (3 Rob. 178, Am. ed., note on the case of *The Hope*), the salvors never acquire a right of seizing the property, and their first step (if they proceed against it) is a warrant of arrest; they then libel for salvage, because they have no superior or *primâ facie* title to the thing itself; and the contestation is about the amount.

But a careful examination of Robinson's reports, Am. ed. (*The Aquila*, 1 Rob. 32; *The Santa Cruz*, Ibid. 42; *The Two Friends*, Ibid. 228; *The Apollo*, 3 Ibid. 249; *The Franklin*, 4 Ibid. 120; *The Carlotta*, 5 Ibid. 54; *The Sansom*, 6 Ibid. 410), will show, that is not the course of proceeding, where the property has been re-captured in war; and the only reason why it is not more clear, is, that the matter, being long established, and of course, is not noticed in the very brief statements which that reporter prefixes to the arguments of counsel and judgment of the court. Enough, however, is

given to establish my position. *The Aquila* (1 Rob. 32, 35), was a case of derelict, and, properly speaking, would have belonged to the instance court. It appears, however, from the judgment, that "some suspicions occurred that it was in fact the property of an enemy; and under these circumstances, it became expedient to proceed against it as prize, for the purpose of meeting the pretensions of the ostensible neutral owner, and of bring the examination of his claim, where alone it could be properly discussed, into the prize court, These measures were highly necessary, and therefore, no objection can justly be made against the mode of proceeding."

In the case of *The Two Friends*, 1 Rob. 228, 231, 238, a protest was made against the jurisdiction of the court over an American ship. The counsel on both sides allow that re-capture is a matter of prize jurisdiction; and in the judgment, *Sir WILLIAM SCOTT says, "but whatever may
*274] be the law as to wreck and derelict, I conceive it does not apply to these goods, which I consider to be goods of prize; for I know no other definition of prize goods, than that they are goods taken on the high seas, *jure belli*, out of the hands of the enemy; and there is no axiom more clear than that such goods, when they come on shore, may be followed by the process of this court."

In the case of *The Franklin*, 4 Rob. 140, the property was libelled as enemy's property and prize of war, and further proof was ordered of the property and destination. It was made and deemed satisfactory; but the captors insisted, that restoration should only be made on terms of salvage. This was resisted by the claimants, with arguments which, perhaps, have given rise to the present point by the claimants, although it was not a case of re-capture or seizure *jure belli* from an enemy. Sir WILLIAM SCOTT held, it was a case in which no military salvage was due; but directed (as the price of restoration in this prize cause), a civil salvage of 500*l.* to be paid.

In the case of *The Jonge Lambert*, 5 Rob. 54, reported in a note to *The Carlotta*, a Dutch ship and cargo captured by a French privateer and re-captured, was libelled as enemy's property and prize of war. She was condemned in the court below. The sentence was reversed on appeal, but as it was neutral property re-captured, the Lords of Appeal referred it to their surrogates, to decide whether any what salvage was due, with provisions for executing their decree. The surrogates decided that no salvage was due; but it is clear, that if it had been a case for salvage, the restitution, on this reversal of the sentence of condemnation, would have only been on payment of it.

It is unnecessary to discuss the arguments drawn from our different and totally inapplicable modes of proceeding under our municipal code. And I shall only add, that if the objection taken to this mode of proceeding should be sustained, as the error, though fallen into after much consideration, arose from want of sufficient light and information in our books, it is hoped that the opportunity will be afforded to the salvors of instituting such proceedings as may be thought adapted to their case.

There is a matter about which the counsel for the claimants have fallen into a mistake: they state the libellants *to have appealed from that
*275] part of the decree which restores the ship, on payment of a moiety of the value for the salvage. There is no such decree on the record. The restoration of the vessel, on paying a moiety for salvage, was agreed to by

all parties, and therefore, has in fact never been decreed at all, and never has been disputed. If the vessel were understood to be included in the words of the decree, "American property," we should, indeed, have ample grounds of appeal; for the salvage ordered would be only one-sixth. That, however, is not the case, and nothing is brought before this court, but the questions relating to the re-captured goods. The same answer applies to the mistake, that we have appealed from the decree of the court refusing us salvage on the freight. There is no such decree, and we never asked it, as our libel shows, though the case of *The Dorothy Foster*, 6 Rob. (Eng. ed.) 88, shows, we are entitled to it. No question of freight was ever presented in this case, but by the claim of Alexander Cranston (for the ship-owners) of freight for the goods not claimed by him for them; meaning to make our salvage on the goods pay a proportion of it, and so diminish its amount. That was not adjudged, and of course, we have not appealed; though if it had been decreed, we certainly should; for it could be supported by no principle, and would be directly contrary to the act of congress.

These questions being out of the way, nothing more remains, but to consider what is to be the fate of the re-captured goods which have been claimed, with the incidental consideration of costs and expenses. Part of this property has been claimed, and sworn to, only as belonging to the alleged owners, before and at the time of capture, without saying anything as to its ownership at the time of shipment. On this insufficient mode of claiming, and its consequences, I shall add nothing to Mr. Woodward's argument, except a reply to Mr. Ogden's observation, that there is no reason why such transfers *in transitu* between belligerent friends should be prevented. This very case shows otherwise; for if the property continued French, it would be subject to condemnation as enemy's property and prize of war; which belligerent right would be defeated by such a transfer.

I shall endeavor to simplify the discussion, by first *considering the great general division of French property, and of American property re-captured; and will endeavor to class the doubtful cases under one or other of those heads. [*276

As to the French property, it clearly must be judged upon according to the rule of reciprocity. In France, American belligerent property which had been twenty-four hours in the possession of the enemy captors, would be treated and considered as their property, and not restored on salvage. The law of twenty-four hours' possession has, in truth, been always the rule adopted by France and Spain, and most, if not all, the powers on the continent; for although they may desire a decree of condemnation, they desire it only as the most portable and compendious proof of the facts (including twenty-four hours' possession), from which the title has accrued. They do not regard the decree as creating a title to the property, which doctrine is in truth only confined to England and this country; and was not held, even by this country, during the revolutionary war. France has also made an ordinance on that subject, which is to be found in 2 Azuni 276, and of which this court must well be held to have judicial knowledge; for the prize court, to which it has succeeded, has recognised it in the case of *Miller* v. *The Resolution*, 2 Dall. 2. That this was the law of France, down to and long after the revolution, has not been doubted; and indeed cannot; for Azuni's work was published after 1803 (*Vide* 2 Azuni 218); but it is thought pos-

sible, that it may have been subsequently altered; and from the pretended ignorance on that subject, a claim for restoration on American salvage is made. The claim is singular; for it is predicated, not on the rights of the parties, but on the supposed ignorance of the court. It is not sanctioned by the words of the act of March 3d, 1800, § 3 (2 U. S. Stat. 17), which provides that "where no such law or usage shall be known," the same salvage shall be allowed as is provided by the first section of that act. That means, where no such law or usage shall be made known or promulgated or acted upon. It refers to cases in which, on inquiry, a state shall not be found to have adopted any precise law or usage on the subject; but it founds no right to a suitor, on supposed judicial ignorance. The ordinance of 1779 is, however, a known law, and it must be considered as valid, until those who
*277] insinuate *its abrogation give some proof of their assertion. The *onus* is with them, and the means of proof, coming from their own country, are certainly within their power. 1 Rob. (Am. ed.) pp. 56, 57, The presumption as well as the fact, therefore, is, that there has been no variation or abrogation of the ordinance of 1779.

The property of American citizens resident in France must, as I conceive, be considered as French, and subject to the same rule. This effect of domicil or national character is produced in every case, where that character is judged of merely by the law of nations. Birth, by the municipal laws of many countries, is considered as fixing an indelible national character; but that doctrine seems entirely dependent on municipal law, and is not to be found in the writers on the law of nations. Birth, with them, affords a *primâ facie* presumption of residence, and serves to establish it, where other facts are equivocal or silent; and in that sense Sir W. Scott must be understood, when he says, in the case of *La Virginie*, 5 Rob. 98, 99, "that the native character easily reverts, and that it requires fewer circumstances to constitute domicil, in the case of a native subject, than to impress the national character on one who is originally of another country." But birth ceases to afford evidence of the national character, under the law of nations, when opposed to a clear residence, *animo manendi*, in another country; for, says Sir William Scott, in *The Indian Chief*, 3 Rob. (Am. ed.) 23, "no position is more established than this, that if a person goes into another country, and engages in trade, and resides there, he is by the law of nations to be considered as a merchant of that country." In some of these cases (the particulars of which I shall hereafter point out), it may perhaps be contended, that, although the owner of the property appears to be resident in France, the permanency of his residence, or the *animus manendi*, does not appear; but to that I again answer in the words of Sir William Scott, in the case of *The Bernon*, 1 Rob. (Am. ed.) 87, 88, "wherever it appears that the purchaser was in France, he must explain the circumstances of his residence there: the presumption arising from his residence is, that he is there *animo manendi*, and it lies on him to explain it. For every purpose,
*278] therefore, either of commerce or of war, to be decided upon *solely by the law of nations, these American citizens resident in France must be regarded as Frenchmen.

But it is contended, that with respect to salvage, they are protected by the words used in the act of congress of March 3d, 1800, § 1 (2 U. S. Stat. 16), "any person or persons resident within or under the protection of the

United States;" which last expression, it is said, necessarily includes American citizens everywhere. If this were the intention of the legislature, it is very singular, that it did not simply say "any citizen of the United States, or any person or persons resident therein." It seems to me, however, that the word "resident" which is expressed in the first, is understood in the second member of the sentence; and that it should be read, "any person or persons resident within, or resident under the protection of the United States." An inhabitant of one of the territories comes within the last, but not the first description; so does a consul or other public minister who has not, by habitual commerce and residence, acquired another national character. Other instances of residence under the protection of the United States might be produced; but an American who has changed his national character, and become, for every purpose of war and commerce, a member of another community, can no longer be regarded as under the protection of the United States. I am at a loss to see how America could afford protection to him. If she were neutral, and the country of his residence belligerent, would his commerce from that country be under her protection? The laws relating to re-capture and salvage were made with a view to America's being belligerent, and must be construed in relation to that state of things. In that state, does she or can she afford any protection to a merchant, residing abroad, whose protection and character must exclusively depend on the hostility or neutrality of the country to which he belongs as a permanent member? The interpretation put upon this phrase by Mr. Ogden would make the first and third sections of the act of March 3d, 1800, at variance with each other, and the same person subject to two inconsistent measures: for, unquestionably, such an American, permanently resident in a foreign friendly country, comes under the description of a "person permanently resident within the territory and under the protection of a foreign prince," &c.

*The fifth section of the act of June 1812, cannot explain the antecedent law of March 1800; for it is, obviously, inadvertently [*279 worded, and not intended for any purpose of explaining, altering or affecting that law. If the mistaken substitution of the word *and* for *or*, could have any effect, it would be only to show that no person residing out of the United States in a consular or public capacity could be deemed under their protection. The truth, however, is, that the last act contemplates nothing more than to place re-captures by private armed ships, on the same footing with those made by public vessels of war; and it accomplishes that by a very loose phraseology.

If I am well founded in the foregoing arguments, it will follow, that the decrees of the courts below respecting French property and that of all the residents in France, whether native Americans or not, should be affirmed; and if costs and expenses are to be at all given in this case, with both.

I shall now consider the question as to clear American goods re-captured. The Adeline was a private vessel of war, having a letter of marque; and when in the possession of the English, she fought with and made resistance to the privateer Expedition. There can, therefore, be no question but that the salvage of the vessel itself must be one-half. The claimants, however, contend, that such a rate of salvage only extends to the vessel; but that goods re-captured, on board of even an armed and commissioned vessel, must be restored on paying one-sixth—that being the rate specified in the act of

March 3d, 1800: and in support of this opinion, several rules for the construction of statutes have been cited. It is my duty, and I trust, I shall do it successfully, to maintain the opposite doctrine. In order to do so, I shall observe, that salvage has, in every country and in every code of laws, been considered as a matter of general average: the service is an act done for the common benefit, and to be recompensed by common and proportionate contributions. Vessel and cargo always contribute expressly; freight, in some cases, expressly; in others, really, but less obviously, where the salvors receive their proportion of the cargo, or its value, without paying freight.

*280] If the act of 3d March 1800, meant to *break in upon this established principle of proportionate contribution for a common benefit, it is without precedent in any other code; and an unreasonable departure from an universal usage founded on justice and common utility. Such a supposition should not be indulged in; and it is indeed fully contradicted by the second section of the same law; for there, regulating the salvage on the re-capture of a public armed vessel, it enacts, that for the re-capture of a public armed vessel or any goods therein, one moiety of the true value thereof shall be paid. No satisfactory reason has been or can be assigned, why the United States should be obliged to pay differently, and in a greater proportion, for the benefit of re-capture, than private individuals deriving equal advantage from the act.

This second section of the act naturally presents the question, how it happened that the legislature omitted to mention expressly in the first section, goods on board such armed vessel? I think, I can answer it. The first section is copied from the English statutes on the same subject, varying the proportion of salvage, and with one addition, the operation and force of which, perhaps was not sufficiently adverted to at the time. Statutes of 13 Geo. II., c. 4; 17 Geo. II., c. 3; 29 Geo. II., c. 34; 16 Geo. III., c. 5, and 33 Geo. III., c. 66. They give one-eighth for salvage of vessel and goods, but enact, that if the re-captured vessel shall have been set forth as a vessel of war, during its possession by the enemy, the salvage for the vessel shall be one-half. Here, the principle of proportionate contribution for a common benefit was not departed from; for to set the vessel out for war, it must have been conducted into port, and of course, the cargo which it carried at the time of capture discharged, and the connection between them broken; the goods which such a vessel might have on board, when re-captured, would be enemy's property, and condemned as prize of war. The British acts, therefore, made no mention of such goods, they not being a fit subject for restoration on salvage.

Congress, in preparing their system, although they adhered to the phraseology of the English code, thought that the same service was rendered by capturing an armed vessel, whether it was originally fitted for war by Americans or their enemies, and therefore, awarded an equal compensation in both cases; but, perhaps, they did not advert to the fact, that, in the new

*281] case which they were introducing, re-captured *goods would have to be restored, and they, therefore, adopted the language of the British laws, without inserting a provision to meet a situation of things that could not exist under them. Or else, considering the character of average contribution as necessarily fixed on salvage, by universal usage and equal justice, they thought it unnecessary to do more than settle the rate of contribution;

and the state of the vessel being the circumstance that was to affect that rate, they spoke of it alone; but conceived and intended that a proportionate contribution from everything connected with it in danger and benefit conferred, would follow as an incident.

If the first supposition be true, the awarding of salvage for the re-captured goods on board an armed vessel is a *casus omissus;* and the least we can be warranted in saying is, that it is in the discretion of the court to settle that rate. If it be, I trust it will be settled by analogy to the rule made in the act itself, and so as to preserve the harmony of the whole system. If the second supposition be correct, then the word "vessel" must be considered with a liberal interpretation, as also including all on board of it. And in support of such an interpretation, calculated to preserve received and established usage against a literal meaning, I may refer to the opinion of the court as delivered in the case of *Talbot* v. *Seaman*, 1 Cranch 1. There, the court had occasion to consider the meaning of the expression "any nation in amity with the United States" used in the act of March 2d, 1799, relating also to re-captures from the enemy: the counsel for the captors contended, that the words of this law gave salvage on the re-capture of neutral property; founding themselves, like our adversaries, on the literal extent of the expression. On which the court observes (1 Cranch 43), "The words of the act would certainly admit of this construction. Against it, it has been urged, and we think with great force, that the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law."

The impossibility of having access to authorities, prevents my citing many instances of statutes similarly construed, which I have no doubt could be easily furnished. The following however happen to be within my power: *Zouch* v. *Stowell*, Plowd. 366, "a thing which is within the intention of the makers *of the statute, is as much within the statute, as if it were within the letter." In *Eyston* v. *Studd*, Plowd. 467, that equitable construction which enlarges the letter of a statute is thus defined, "*Æquitas est verborum legis directio efficatius cum una res solummodo legis cavetur verbis ut omnis alia in æquali genere eisdem caveatur verbis.*" And there the remedy given by the 9 Edw. III., c. 3, against executors, it is said, has been always extended by an equitable construction to administrators; because they are within the equity of the statute. *Platt* v. *Sheriff of London*, Plowd. 36, the words of the 13 Edw. I. are "*circumspecte agatis de negotiis tangentibus Episcopum Norwicensem;*" yet this statute, although only the bishop of Norwich be named, has been always extended, by an equitable construction, to other bishops. [*282

Some of the claims in this cause are for property owned by aliens resident in the United States. Where that residence is not clearly made out to be permanent, the claimants must take the consequence of the insufficiency of their claims and proofs. They are all Frenchmen, and if they have not shown a sufficient domicil to obtain for them the American national character, they must be considered as Frenchmen and abide the reciprocity resulting from their law. Where they are clearly permanent residents within the United States, they will be entitled to the benefit of that character, if my reasoning as to Americans domiciled in France be correct; if it be not, they

must suffer under the rule the court will then lay down, and be regarded as Frenchmen.

It only remains for me now to say a few words of costs and expenses which are asked for by the claimants. This case is brought before this court by their voluntary act and a clear consent, without which it could not have been presented on appeal. The district judge declared the principles he would adopt for his decision; but, strictly speaking, he made no decree on the case of any individual claimants. Those principles were considered in some respects erroneous by the counsel for the captors, and in others, by those for the claimants. It was, therefore, considered better to bring all the principles in review before the supreme court, as the expense would be little, if at all, increased by so doing; and if any claimant had been unwilling to
*283] become a party *to this arrangement, he might have withheld his consent; and his case could not have been brought up on appeal, until a decree had been made on his individual claim. I submit, that it is, therefore, now too late, for him to talk of costs and expenses; and in truth, impossible to ascertain what proportion of costs or expenses he can sustain.

March 10th, 1815. (Absent, Todd, J.) STORY, J., delivered the opinion of the court, as follows:—The American letter of marque schooner Adeline, with a valuable cargo on board, was captured on her voyage from Bordeaux to New York, on or about the 14th of March 1814, by a British squadron; and on or about the 19th of the same month, was re-captured by the American privateer Expedition, James Clayton, commander, and brought into New York for adjudication. Prize proceedings were immediately instituted against the vessel and cargo as enemy property; and various claims were interposed in behalf of American and French merchants. Upon the hearing of the cause, the district court decreed a restoration of all the property of American citizens, and other persons resident in the United States, upon the payment of one-sixth of the value as salvage, and condemned all the property of French subjects, and of American citizens domiciled in France, and of all others whose residence remained unexplained, as good and lawful prize to the captors. From the former part of the decree, the captors appealed, and from the latter part, the claimants appealed to the circuit court; and from an affirmance *pro formâ* of the decree in that court, the parties have appealed to this court. It does not appear in the record, that any decree was pronounced in respect to the vessel; and it is, therefore, probable, as intimated by counsel, that she has been restored, on a compromise between the parties interested.

Before we proceed to the consideration of the principal questions which have been argued, it will be proper to notice several objections to the regularity of the allegations, proceedings and proofs in the cause.

*284] It is, in the first place, asserted, on behalf of the claimants, *that if this should turn out not to be a case of enemy property, but of salvage merely (as most certainly as to some of the claims it must be held to be), the re-captors can take nothing by the present libel, because it proceeds upon the mere footing of the property being prize of war. And it is likened to the case of a declaration at common law, where the party can only recover *secundum allegata et probata;* and if no count hit the precise case, the party must be nonsuited.

If, indeed, there were anything in this objection, it cannot, in any beneficial manner, avail the claimants. The most that could result would be, that the cause would be remanded to the circuit court, with directions to allow an amendment of the libel. Where merits clearly appear on the record, it is the settled practice, in admiralty proceedings, not to dismiss the libel, but to allow the party to assert his rights in a new allegation. This practice, so consonant with equity and sound principle, has been deliberately adopted by this court on former occasions. After all, therefore, the claimants would, in the language of an eminent civilian, but change postures on an uneasy bed.

But we are all of opinion, that there is nothing in this objection. No proceedings can be more unlike than those in the courts of common law and in the admiralty. In prize causes, in an especial manner, the allegations, the proofs and the proceedings are, in general, modelled upon the civil law, with such additions and alterations as the practice of nations and the rights of belligerents and neutrals unavoidably impose. The court of prize is emphatically a court of the law of nations; and it takes neither its character nor its rules from the mere municipal regulations of any country.

In cases of mere civil salvage, it may be fit and proper, that the libel should distinctly allege and claim salvage, though we do not mean to assert that, even in such cases, it is indispensable. In cases of military salvage, also, the party may, if he please, adopt a similiar proceeding. But it is by no means necessary, and, in most cases, would be highly inexpedient. Recaptures are emphatically cases of prize; for the definition of prize goods is, that they are goods taken on the high seas, **jure belli*, out of the hands of the enemy. When so taken, the captors have an undoubted [*285 right to proceed against them as belligerent property, in a court of prize: for in no other way, and in no other court, can the questions presented on a capture *jure belli* be properly or effectually examined. The very circumstance that it is found in the possession of the enemy, affords *primâ facie* evidence that it is his property. It may have previously possessed a neutral or friendly character; but if the property has been changed by a sentence of condemnation, or by such possession as nations recognise as firm and effectual, the neutral or friendly owner is for ever ousted of his right.

It depends altogether upon future proceedings; upon the examinations taken in preparatory, and the documents on board; upon the verity of the claims, and the diligence and good faith of the claimants; and upon the principles of international law, comity and reciprocity, whether a restoration can be decreed or not. How can these questions be decided, unless the customary proceedings of prize are instituted and enforced? How can it be known, whether all the documents on board be not colorable and false, or whether the conduct of the claimants be not unneutral or fraudulent, unless the truth is drawn from the parties entrusted with the property for the voyage, by the trying force of the standing interrogatories and the test-affidavits? The very case before us presents a strong illustration of the propriety of these proceedings. There is a large shipment on board, which, on the bill of lading, purports to be the property of an American claimant; yet the claimant himself expressly swears, that it is the sole property of the French shipper. What the consequences are of that fact will be presently seen.

The court, then, has a legitimate jurisdiction over the property as prize; and, having it, will exert its authority over all the incidents. It will decree a restoration of the whole, or of a part; it will decree it absolutely, or burdened with salvage, as the circumstances of the case may require: and whether the salvage be held a portion of the thing itself, or a mere lien upon it, or a condition annexed to its restitution, it is an incident to the principal
*286] question of prize, and within *the scope of the regular prize allegation. If, therefore, the case stood upon principle alone, we should not doubt as to the sufficiency of the libel for this purpose; but it has, also, the clear support of the practice of the admiralty. *The Aquila*, 1 Rob. 37; *The Franklin*, 4 Ibid. 147; *The Jonge Lambert*, 5 Ibid. 54, note.

Another objection urged on behalf of the captors, is to the sufficiency of the claims and test-affidavits. It is asserted, and truly, that the goods are not alleged, in the claim or affidavits, to have belonged to the claimants at the time of shipment; it is only alleged, that they so belonged at the time of capture. Regularly, the test-affidavit should state that the property, at the time of shipment, and also at the time of capture, did belong, and will, if restored, belong to the claimant; but an irregularity of this nature has never been supposed to be fatal. It might, in case of doubt or suspicion, or in a case calling for the application of the doctrine as to the legal effect of changes of property *in transitu*, have justified an order for further proof: or, in cases of gross negligence or pregnant fraud, have drawn upon the party more severe consequences. But in ordinary cases, it is not deemed to work any serious consequences: in this instance, it probably passed unnoticed in the courts below, where, if the blot had been hit, it might have been instantaneously removed by an amendment.

Another irregularity undoubtedly was, that the test-affidavits were put in, on behalf of many of the claimants, by their agents, although the principals were resident in the United States, and within the reasonable reach of the court. Where the principal is without the country, or resides at a great distance from the court, the admission of a claim and test-affidavit by his agent, is the common course of the admiralty. But where the principal is within a reasonable distance, something more than a formal affidavit by his agent is expected. At least, the suppletory oath of the principal, as to the facts, should be tendered; for otherwise, its absence might produce unfavorable suspicions. If, indeed, the principal might always withdraw himself from the view of the court, and shelter his pretensions behind the affidavit of an innocent or ignorant agent, there would be no end to the impositions practised upon the court. The court expects, in proper cases,
*287] something more than the mere formal test-affidavit *of an agent, who may swear truly, and yet, from his want of knowledge, be the dupe of cunning and fraud. It is not meant to assert that any such imputations belong to the present case. This irregularity, like the former, probably passed in silence; and it would be highly injurious, if an objection of this sort should now prevail, when all parties have hitherto acquiesced in its immateriality.

We are now led to the principal question in this cause, viz., what rate of salvage is to be allowed to the re-captors? This depends upon the true construction of the salvage act of congress of 3d of March 1800, ch. 14. That act provides, that, upon the re-capture of any vessel (other than a vessel of

war or privateer), or of any goods belonging to any persons resident within or under the protection of the United States, the same, if re-captured by a private vessel of the United States, shall be restored on payment of one-sixth part of the value of the vessel or goods; and if the vessel, so re-captured, shall appear to have been set forth and armed as a vessel of war, before such capture, or afterwards, then upon a salvage of one-half of the true value of such vessel of war. It is argued, in behalf of the re-captors, that the Adeline being an armed vessel, they are entitled to a moiety of the value of the cargo as well as of the vessel; either upon an equitable construction of the statute, or upon general principles, as a case not within the purview of the statute.

We are all, however, of a different opinion. The statute is expressed in clear and unambiguous terms. It does not give the salvage of one-sixth part of the value upon goods, the cargo of an unarmed vessel; but it gives it upon any goods re-captured, without any reference to the vehicle or vessel in which they are found. We cannot interpose a limitation or qualification upon the terms which the legislature has not itself imposed; and if there be ground for higher salvage, in cases of armed vessels, either upon public policy or principle, such considerations must be addressed with effect to another tribunal. This decision affirms the decree of the circuit court as to the claims of all the parties domiciled in the United States.

*As to the claims of the parties domiciled in France, whether natives or Americans, or other foreigners, their rights depend altogether upon the law of France as to re-captures; for by the act of congress, as well as by the general law, in cases of re-capture, the rule of reciprocity is to be applied.[1] If France would restore in a like case, then are we bound to restore; if otherwise, then the whole property must be condemned to the re-captors. It appears, that by the law of France in cases of re-capture, after the property has been twenty-four hours in possession of the enemy, the whole property is adjudged good prize to the re-captors, whether it belonged to her subjects, to her allies, or to neutrals. We are bound, therefore, in this case, to apply the same rule; and as the property in this case was re-captured, after it had been in possession of the enemy more than twenty-four hours, it must, so far as it belonged to persons domiciled in France, be condemned to the captors; and the decree of the circuit court as to them must be affirmed. [*288

As to the claims of the other persons whose national character and proprietary interest do not distinctly appear, considering all the circumstances, we shall direct further proof to be made on both points. As, indeed, the master has not been able to swear directly to the proprietary interest of the cargo, but simply says, that the goods were, as he presumes and believes, the property of the shippers or the consignees, perhaps, in strictness, further proof might have been required in the court below as to the whole cargo. It was not, however, moved for there by the captors; and as we are satisfied in relation to the claims which we shall restore, it would be useless now to make such a general order.

Upon these principles, the property embraced by the claims by and in behalf of Alexis Gardere, of William Weaver and Isaac Levis, jointly, and

[1] The Star, 3 Wheat. 78.

of William Weaver alone, of Andrew Byerly, of George I. Brown and William Hollins, of Peter A. Karthous, of William Bayard, Harman Leroy, James McEvers and Isaac Iselm, of William Hood, of Theophilus De Cost, of John Dubany, of Messrs. John B. Fonssatt & Co., of Edward Smith, James Wood and Samuel W. Jones, of Victor Ardaillon, of Lewis Chastant, of Lewis Labat, of Benjamin Rich, of Nath'l Richards, Nayah Taylor and
*289] Gustavus Upson, of *Ferdinand Hurxthal; must be restored on payment of the salvage of one-sixth part of the value. The property embraced in the claims on behalf of Peter Boue, jun., of R. Henry, of P. Doussault, of William Johnston and James Downing, of G. Brousse, must be condemned to the captors. The remaining claims must stand for farther proof. And as to the property unclaimed, it must be condemned as good and lawful prize to the captors.

The decree of the circuit court is to be reformed so as to be in conformity with this decision.

The Brig Ann, McClain, Master. (*a*)

Jurisdiction in case of seizure.

If a seizure, by a collector, for a violation of the revenue laws of the United States be voluntarily abandoned, and the property restored, before the libel or information be filed and allowed, the district court has no jurisdiction of the cause.[1]

Appeal from the sentence of the Circuit Court for the district of Connecticut, which reversed that of the district court, and restored the property to the claimant.

Story, J., delivered the opinion of the court, as follows:—This is an information against twelve casks of merchandise, part of the cargo of the brig Ann, alleged to have been imported, or put on board with an intent to be imported, contrary to the non-importation act of 1st March 1809, ch. 91, § 5.

It appears from the evidence, that the Ann sailed from Liverpool for New York, in July 1812, haqing on board a cargo of British merchandise. She was seized by a revenue-cutter of the United States, on her passage towards New York, while in Long Island sound, about midway between Long Island and Falkland Island, and carried into the port of New Haven, about the 7th of October 1812, and immediately taken possession of by
*290] *the collector of that port, as forfeited to the United States. On the morning of the 12th of October, the collector gave written orders for the release of the brig and cargo from the seizure, in pursuance of directions from the secretary of the treasury, returned the ship's papers to the master, and gave permission for the brig to proceed without delay to New York. Late in the afternoon of the some day, the present information was allowed by the district judge, and on the ensuing day, the brig and cargo were duly taken into possession by the marshal, under the usual monition from the court. On the trial in the district court, the property now in

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(*a*) March 10th, 1815. Absent, Todd, Justice.

[1] The Abby, 1 Mason 360. But a valid seizure confers jurisdiction, notwithstanding an improper removal of the *res* from the marshal's custody. The Rio Grande, 23 Wall. 458.

controversy was condemned ; and upon an appeal, that decree was reversed in the circuit court.

It has been argued, that the decree of the circuit court ought to be affirmed, because, on the whole facts, the district court had no jurisdiction over the cause : and this argument is maintained on two grounds : 1. That the original seizure was made within the judicial district of New York ; and 2. That if the seizure was originally made within the judicial district of Connecticut, the jurisdiction thereby acquired by the district court was, by the subsequent abandonment of the seizure and want of possession, completely ousted.

It is unnecessary to consider the first ground, because we are all of opinion, that sufficient matter is not disclosed in the evidence, to enable the court to decide, whether the seizure was within the district of New York or of Connecticut, or upon waters common to both.

The second ground deserves great consideration. By the judiciary act of the 24th September 1789, ch. 20, § 9, the district courts are vested with "exclusive original cognisance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas." Whatever might have been the construction of the jurisdiction of the district courts, if the legislature had stopped at the words "admiralty and maritime jurisdiction," it seems manifest, by the subsequent clause, that *the jurisdiction as to revenue forfeitures, was intended to be given to the court of the district, not [*291 where the offence was committed, but where the seizure was made. And this with good reason. In order to institute and perfect proceedings *in rem*, it is necessary that the thing should be actually or constructively within the reach of the court. It is actually within its possession, when it is submitted to the process of the court ; it is constructively so, when, by a seizure, it is held, to ascertain and enforce a right or forfeiture which can alone be decided by a judicial decree *in rem*. If the place of committing the offence had fixed the judicial *forum* where it was to be tried, the law would have been, in numerous cases, evaded ; for, by a removal of the thing from such place, the court could have had no power to enforce its decree. The legislature therefore, wisely determined that the place of seizure should decide as to the proper and competent tribunal.

It follows, from this consideration, that before judicial cognisance can attach upon a forfeiture *in rem*, under the statute, there must be a seizure ; for until seizure, it is impossible to ascertain what is the competent *forum*. And, if so, it must be a good subsisting seizure, at the time when the libel or information is filed and allowed. If a seizure be completely and explicitly abandoned, and the property restored by the voluntary act of the party who has made the seizure, all rights under it are gone. Although judicial jurisdiction once attached, it is divested by the subsequent proceedings ; and it can be revived only by a new seizure. It is, in this respect, like a case of capture, which, although well made, gives no authority to the prize court to proceed to adjudication, if it be voluntarily abandoned, before judicial proceedings are instituted.

It is not meant to assert, that a tortious ouster of possession, or fraudu-

lent rescue, or relinquishment after seizure, will divest the jurisdiction. The case put (and it is precisely the present case) is a voluntary abandonment and release of the property seized, the legal effect of which must, as we think, be to purge away all the prior rights acquired by the seizure. On the whole, it is the opinion of the majority of the court, that the decree of the circuit court ought to be affirmed.

Decree affirmed.

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*292] *Town of Pawlet *v.* Daniel Clark and others. (*a*)

Appellate jurisdiction.—Grant.—Church property.—Pious uses.—Glebe lands.

This court has jurisdiction, where one party claims land under a grant from the state of New Hampshire, and the other under a grant from the state of Vermont, although, at the time of the first grant, Vermont was part of New Hampshire.[1]

A grant of a tract of land, in equal shares, to 63 persons, to be divided amongst them, into 68 equal shares, with a specific appropriation of five shares, conveys only a sixty-eighth part to each person.

If one of the shares be declared to be "for a glebe for the Church of England, as by law established," that share is not holden in trust by the grantees, nor is it a condition annexed to their rights or shares.

The Church of England is not a body corporate, and cannot receive a donation *eo nomine.*

A grant to the church of such a place, is good at common law, and vests the fee in the parson and his successors.

If such a grant be made by the crown, it cannot be resumed by the crown, at its pleasure.

Land, at common law, may be granted to pious uses, before there is a grantee in existence competent to take it, and in the meantime, the fee will be in abeyance.[2]

Such a grant cannot be resumed, at the pleasure of the crown.

The common law, so far as it related to the erection of churches of the Episcopal persuasion of England, the right to present or collate to such churches, and the corporate capacity of the parsons thereof to take in succession, was recognised and adopted in New Hampshire.

It belonged exclusively to the crown, to erect the church, in each town, that should be entitled to take the glebe, and upon such erection, to collate, through the governor, a parson to the benefice.

A voluntary society of Episcopalians, within a town, unauthorized by the crown, could not entitle themselves to the glebe. Where no such church was duly erected by the crown, the glebe remained as an *hæreditas jacens*, and the state, which succeeded to the rights of the crown, might, with the assent of the town, alien or incumber it; or might erect an Episcopal church therein, and collate, either directly or through the vote of the town, indirectly, its parson, who would thereby become seised of the glebe *jure ecclesiæ*, and be a corporation capable of transmitting the inheritance.

By the revolution, the state of Vermont succeeded to all the rights of the crown to the unappropriated, as well as appropriated glebes.

By the statute of Vermont of 30th October 1794, the respective towns became entitled to the property of the glebes therein situated.

A legislative grant cannot be repealed.

No Episcopal church, in Vermont, can be entitled to the glebe, unless it was duly erected by the crown, before the revolution, or by the state, since.

This was a case certified from the Circuit Court for the district of Vermont, in which, upon an action of ejectment, brought by the Town of Pawlet, to recover possession of the glebe lot, as it was called, in that town, the

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(*a*) March 10th, 1815. Absent, Todd, Justice.

[1] Colson *v.* Lewis, 2 Wheat. 377.

[2] Beatty *v.* Kurtz, 2 Pet. 566; Vincennes University *v.* Indiana, 14 How. 269; Ould *v.* Washington Hospital, 95 U. S. 303.

opinions of the judges of that court were opposed, upon the question whether judgment should be rendered for the plaintiff or for the defendants, upon a verdict found, subject to the opinion of the court, upon the following case stated :

"In this cause, it is agreed on the part of the plaintiffs, that the lands demanded in the plaintiffs' declaration, are a part of the right of land granted in the charter of the Town of Pawlet, by the former governor of the province of New Hampshire, as a glebe for the Church of England as by law established ; and that in the year 1802, there was, in the town of Pawlet, a society of Episcopalians, duly organized agreeable to the rules and regulations of that denomination of Christians, heretofore commonly known and called by the name of the Church of England. That in the same year, the said society contracted with the Reverend Bethuel Chittenden, a regular ordained minister of the Episcopal church, who then resided in Shelburn, in the county of Chittenden (but had not any setlement as a clerk or pastor therein), to preach to the said society in the town of Pawlet, at certain stated times, and to receive the avails of the lands in question, and that the said Chittenden, thereupon, gave a lease of the said land to Daniel Clark and others, who went into possession of the premises, and still hold the same under the said lease, and that the said Chittenden regularly preached and administered the ordinances to the people of the said society, according to his said contract, and received the rents and profits of the said land until the year of our Lord Christ *1809, when the said Chittenden deceased; [*293
and that in 1809, the said society contracted with the Rev. Abraham Brownson, a regular ordained minister of the Episcopal church, residing in Manchester, and officiating there, a part of the time, to preach to the said society, a certain share of the time, and to receive the rents and profits of the said land ; and that the said Brownson has regularly attended to his duty in the said church, and administered ordinances in the same, until September 1811, about which time, the said society regularly settled the Rev. Stephen Jewett, who now resides in the said town of Pawlet, and who, from the time of his settlement, is to receive all the temporalities of the said church. And it is further agreed by the said parties, that the general assembly of the state of Vermont, on the 5th of November 1805, did grant to the several towns in this state, in which they respectively lie (reference being had to the act of the general assembly aforesaid), all the lands granted by the king of Great Britain to the Episcopalian church by law established (reference being had to the charter of the town of Pawlet aforesaid for the said grant of the king of Great Britain), and that the lands, in the plaintiffs' declaration mentioned and described, are part of the lands so granted by the king of Great Britain to the Episcopalian church."

The charter of Pawlet is dated the 26th of August 1761, and purports to be a grant from the king, issued by Benning Wentworth, governor of New Hampshire, and has these words : "Know ye, that we, of our special grace," &c., "have, upon the conditions and reservations hereinafter made, given and granted, and by these presents, for us, our heirs and successors, do give and grant, in equal shares, unto our loving subjects, inhabitants of our said province of New Hampshire, and our other governments, and to their heirs and assigns for ever, whose names are entered on this grant, to be divided amongst them into sixty-eight equal shares, all that tract or parcel of land

situate, lying and being within our said province of New Hampshire, containing by admeasurement 23,040 acres, which tract is to contain six miles square and no more," &c., "and that the same be and hereby is incorporated into a township by the name of Pawlet," &c. *"To have and to hold the tract of land as above expressed, together with all," &c. "to them and their respective heirs and assigns for ever," &c.

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On the back of which grant were indorsed, "the names of the grantees of Pawlet, viz., Jonathan Willard," and others, being in all 62, then follow these words, "His excellency, Benning Wentworth, Esquire, a tract of land to contain five hundred acres as marked in the plan B. W., which is to be accounted two of the within shares; one whole share for the incorporated Society for the Propagation of the Gospel in Foreign Parts; one share for a glebe for the Church of England as by law established; one share for the first settled minister of the gospel; one share for the benefit of a school in said town."

The act of the 5th of November 1805, is entitled, "an act directing the appropriation of the lands in this state, heretofore granted by the government of Great Britain to the Church of England as by law established."

"Whereas, the several glebe rights granted by the British government to the Church of England as by their law established, are in the nature of public reservations, and as such became vested by the revolution in the sovereignty of this state; therefore—

"§ 1. Be it enacted by the general assembly of the state of Vermont, that the several rights of land in this state, granted under the authority of the British government to the Church of England as by law established, be and the same are hereby granted severally to the respective towns in which such lands lie, and to their respective use and uses for ever, in manner following, to wit: It shall be the duty of the selectmen in the respective towns, in the name and behalf, and at the expense, of such towns, if necessary, to sue for and recover the possession of such lands, and the same to lease out, according to their best judgment and discretion, reserving an annual rent therefor, which shall be paid into the treasury of such town, and appropriated to *the use of schools therein, and shall be applied in the same manner, as moneys arising from school lands are by law directed to be applied."

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This cause was argued, at last term, by *Pitkin* and *Webster*, for the plaintiffs, and by *Shepherd*, for the defendants.

Pitkin, for the plaintiffs.—On the part of the plaintiffs, it is contended, that the share in question, or the sixty-eighth part of the town of Pawlet, which in the charter was granted or reserved "for a glebe, for the Church of England, as by law established," did not, at the time of the grant, pass from the king, for want of proper persons to take; that it remained in the grantor, until the revolution, when it passed over and vested in the state of Vermont, who had, therefore, full right to dispose of it. By the words of the charter, the tract of land therein described is to be divided among those whose names are entered on the charter into 68 equal shares. The names of 63 persons are mentioned, including Benning Wentworth, who has two shares, making for those 63 persons 64 shares, leaving four shares; one of which is for the incorporated Society for the Propagation of the Gospel in

foreign parts; one for a glebe for the Church of England as by law established; one for the first settled minister of the gospel; and one for schools; making in the whole 68 shares.

It is clear, from the terms of the grant, that no person named on the back of the charter, or intended as grantee, except B. Wentworth, can take but one share, as the town is to be divided into 68 shares, and those shares are to be equal. B. Wentworth is to have 500 acres, which are particularly designated and marked in the plan annexed to the charter, and are to be counted two shares. This exception also proves that the other grantees are to have one share only. In no event, therefore, could the share in question, or the two other public shares, as they have been called, be divided among the individual persons named. Nor has this ever been the case. In the division of the town of Pawlet, the share intended for a glebe was located by itself, and called the glebe lot. It was intended, in the grant, as a name; and if it could not pass, as designated, for *want of proper grantees, [*296
it remained in the king, the grantor (as if one-half of the names inserted han been fictitious), and at the revolution, vested in the state of Vermont.

The nature of the estate intended to be conveyed, is expressed in the word "glebe," well known in the English law, as a provision for the parson of a parish. The law says that the freehold only vests in the regular parson; not the fee: consequently, the grant or disposition of land, in such case, for a glebe, does not make or imply a disposition of the fee; the fee, therefore, remains in the grantor.

The words "for a glebe for the Church of England as by law established," express clearly the intention of the grant, viz., for the support and extension of the national church, considered in its political connection. It is not a grant to the national church as a body. No such grant ever was made, or if made, would be valid. Every provision for its support is to some organ of the church, as to the bishop of such a see, or the parson of such a parish, and his successors. A parish church, in the English law, is the building consecrated and endowed. There must be a glebe, which may be the church yard only. The parson has, in the glebe, no more than a freehold estate. He is considered in law as a sole corporation, and the freehold passes by succession. Parishes are a civil and ecclesiastical division; the inhabitants of a parish, the parishioners, the members of the national church, are never said to be members of the parish church; neither the parishioners nor the vestry have any right in, or power over the glebe, not even during a vacancy. (See 1 Black. Com. 417.) The Church of England never was established by law, either in New Hampshire or Vermont, before or since the revolution. Neither the civil nor ecclesiastical law, as applicable to glebes, was known or recognised at the date of the charter; nor has it been adopted or recognised since, in either of those states. The intention of the grant, therefore, even before the revolution, could never have been carried into effect. It is also well known, that at the date of the charter, the land therein granted was a wilderness, and so continued for a long time afterwards.

*At the time of the grant, therefore, there was not only no Church [*297
of England established by law, but in the town of Pawlet, there was no organ of that or any other church, capable of taking the share in question.

The grant, of course, could not take effect; and the revolution has rendered it utterly impossible that it ever can take effect, agreeable to the intention of the donor. By the revolution, we have become completely severed from the Church of England as by law established. Individuals and societies may profess the same creed, have the same mode of worship, and the same ordinances administered in the same manner, and submit to the same discipline, so far as may be effected without the assistance of the civil arm. But this constitutes, in the view we are now taking of the subject, similarity, not identity. It furnishes no ground for legal derivation of civil or legal connection. In every political, civil and legal view, and in all the civil and legal consequences, the dissolution of the Church of England, as by law established, was, in the United States, as total and complete, on the revolution, as that of the civil power of the British government. Nor has there ever been, in the state of Vermont, a substitute adopted. Every idea of a national or state religion has been exploded. The court will consider how many things are requisite to the legal possession and enjoyment of a glebe; how much of the common law of England, and how much of the canon law must be adopted or considered as in force; although in every civil and political view, the institution or establishment to which they applied is abolished. There must be a parish, a church with cure, a parson, legally and canonically introduced: four things are requisite to constitute a parson: 1, holy orders; 2, presentation or collation; 3, institution; 4, induction; he must be a sole corporation. No part of the common law on this subject has been adopted in the state of Vermont; either by the constitution, by statute, or by legal adjudications.

It would be absurd, to consider any number of Episcopalians, formed into a society, in Vermont, as standing in the place of a parish, and capable, contrary to the doctrine of the common law under which they must derive title, of succeeding to the freehold of a glebe, or of taking and *holding, by
*298] succession or otherwise, by or under a grant of lands for a glebe, made by the king of Great Britain, before the revolution. There is a statute in Vermont (see an act for the support of the gospel, passed in 1797, Revised Laws, vol. 2, page 474), under which religious societies may be formed; but it does not appear in the case, that the society in the town of Pawlet is formed under that act. But if so formed, the members of such society are not confined to any particular limits, and if associated from four or five different towns, they may have a claim equally good to the glebe lands, in each town. This statute, which extends equally to all denominations of Christians, constitutes societies or associations formed under it, corporations, or *quasi* corporations; and enacts, "that they shall never have power to hold to themselves and successors, all such estates and interests, as they may hereafter acquire, by purchase or otherwise, and the same to sell and transfer, for the benefit of such association." A society so formed, has the precise power given by the act and no other. The power is limited to future acquisitions; the power to sell is co-extensive with the power of acquisition. Nothing is to be holden which shall be perpetually appropriated, as a glebe is. Such society is not empowered to succeed to estates, rights or interests, granted previous to their existence, although limited to objects similar to its own. Indeed, the expression in the act seems to have intended an exclusion of such claim.

If the share in question should be considered as a reservation for a future particular use, it then remained in the king, the donor, until a state of things should arise, when it could be applied to such use. This use is specified in the charter, viz., for a glebe, &c. We have before proved, that prior to the revolution, it had not been, and could not, consistently with the institutions of the country, be so applied. It, of course, remained in the king, at the revolution, and at that time, vested in the state of Vermont.

At the date of this charter, a separation of the provinces or colonies from the mother country was not contemplated. It was undoubtedly intended, at that time, by the donor, that the Church of England should be established by law, in the province of New Hampshire, as *it had been in some of the other provinces, and particularly in Virginia. In [*299 this charter, therefore, as well as in all other charters granted by the governor of New Hampshire, provision was made, by a reservation of a certain share of every township, for such an establishment.

If the share in question be considered in the nature of a grant, then, as we have before stated, the grant of a "a glebe," if it took effect at all, is of the freehold only, and not of the fee; of the freehold to be taken and held by the incumbents in succession. The fee, of course, not being granted, remained in the grantor. By the English law, as well as our own, on the dissolution or political death of a corporation, all estates granted to such corporation revert to the grantor or donor. And if a grant was made by the king to any person, or number of persons, incapable of taking or holding, or if the objects ceased to exist, or never came into existence, the estate was considered as never having passed, or as reverting to the king, according to the nature of the case.

On the revolution, the state of Vermont, as a sovereign state, succeeded, in full and sovereign right, to all the property and rights of property within the same, which, at the time, were vested in or appertained to the king of Great Britain, whether in possession or reversion. The case, then, stands thus: a tract of land in the town of Pawlet was, by the king of Great Britain, before the revolution, granted "for a glebe for the Church of England, as by law established;" that is, the freehold to vest to a particular use, when that use should arise, the remainder or reversion in the crown. There is no securing, in the constitution of Vermont, to any man or body of men, of any rights or benefits, which, under the crown, were intended for the Church of England as by law established. At the time of the revolution, there had never been, within the territory, now state, of Vermont, a regular parson, who could make any possible legal claim or pretence to the use of any of the glebe lands within the same. The sole corporation, as the parson was denominated, was not dissolved or extinguished by a political death, because, in Vermont, it *never came into existence, but the possibility of such [*300 existence ceased. A provision might have been made by the constitution, or by statute, in favor of Episcopalians; but it must have operated as a new grant, or new organization. No such provision has been made; the right, therefore, vested in the state of Vermont, and the grant is well made to the town of Pawlet.

Shepherd, contrà.—It is contended by the counsel for the plaintiff, that nothing passed by the grant contained in the charter of Pawlet; so as to

divest the king of Great Britain of the title to the premises in question. If this position be correct, it must be admitted, that the plaintiff is entitled to recover; because it cannot be denied, that the title of the crown to any lands, antecedent to the revolution, within the jurisdiction of the now state of Vermont, would, of course, become the property of the state. If, however, the ground taken by the plaintiff's counsel shall be found untenable, and that the title of the king was divested by the grant; then, whether the defendants have a title or not, will be a matter of indifference; so long as the plaintiffs must recover on the strength of their own title, and not on the weakness of ours.

If, by the grant, the title passed from the then king, the state of Vermont could acquire no right by the revolution; but the title must remain, unless forfeited, as at the time of the grant. The reason given by the counsel for the plaintiff to show that, notwithstanding the charter, the title remained in the grantor is, that when made, there was no grantee *in esse* capable of taking the fee, or other estate, so as to divest the king of his. If this be true, on a fair construction of the letters-patent, it must also be admitted that the plaintiff is entitled to judgment.

It is believed, that on examination of the charter, the court will be of opinion, that there was a sufficient grantee *in esse;* and that the title did pass by that instrument. And if there was, then, no matter what has
*301] *happened since, unless there has been a forfeiture, and office found, which are not pretended.

1. The words of the granting clause are, "Do give and grant, in equal shares, unto our loving subjects, inhabitants of New Hampshire, and our other governments, and to their heirs and assigns for ever, whose names are entered on this grant, to be divided to and amongst them, into sixty-eight equal shares, all that tract, or parcel of land, &c.," describing and bounding the whole township of Pawlet. It is contended, here, that the whole of the land, contained within the boundary lines of the township, was designed to be granted, without any saving or reservation to the crown, of any part of the same. The whole of the six miles square was granted; to whom? To the loving subjects of his majesty in New Hampshire and elsewhere. How was it granted? In fee simple; and in sixty-eight equal shares, to be equally divided to, and amongst the king's loving subjects named on the grant. He granted to them (be they more or less in number) the whole township of Pawlet, as tenants in common, and not in severalty. Hence, each man named on the grant became entitled to his proportionable part of the whole township, whether he was one of the sixty-eight, or one of three.

It is presumed, the court, in this case, will be much inclined to do, as courts have generally done, if possible, by their construction, to satisfy the object of the grant, and give it a meaning which was intended by the grantor. It is a rule of construction, to search out the intention, and make that a landmark. Possessing liberal views of this instrument, it will no doubt be found, that the grantor designed to pass the title to the whole town of Pawlet, to his loving subjects named thereon, and not to confine the grant to a sixty-eighth part of the township to each, but in proportion to the
*302] whole number, more or less.

Now, supposing that a part of the names written on *the grant

should have been fictitious, the grant of a proportion would not have been to them, but directly to the others, who answer the description given, "Loving subjects of the grantor." Fictitious persons could not be loving subjects; therefore, the whole land would pass to the real persons. Most unquestionably, the whole tract was granted to those capable of taking a title. It will be seen by the grant, that the lands were not allotted; of course, no partition was made amongst the patentees, until after the charter was made. The grant was in common and not in severalty; therefore, no inference of an intention to give each proprietor but a single share can be drawn from the circumstance of the whole town being required to be divided into sixty-eight equal shares. As well might the counsel contend, that it was inferrible from a law incorporating a bank, with 3000 shares, that the stockholders could have but one share each.

If the foregoing be a correct construction of the instrument before the court, then it results, as a certain inference, that the crown had not a rood of land remaining in Pawlet; and consequently, the state of Vermont could have none; as the state pretends to no greater right or title than that of the king.

2. It will be attempted to be shown, that on the 26th day of August 1761, there was *in esse* a Church of England as by law established, which could be a grantee of the crown. If so, the title passed directly to the church, in fee-simple; and would need no auxiliary to sustain her right. It is said by the counsel, that lands granted for the benefit of the church, are granted to the bishop, or some other ecclesiastical person; but it would be strange doctrine, to say, that the king had not power to grant directly to the church established by law, and therefore, distinctly identified as a Christian society. The position will here be ventured, that such a grant to the Church of England as by law established was, and still is, valid.

*To maintain the point that the church existed at the date of the grant, we need only appeal to historical facts in the English books, and the still more authentic testimony of the body of the English law, the statutes and adjudged cases of the realm, within the recollection, and familiar to the mind of the court. It is said, "that when the grant was made, there was no church in Pawlet; it was all new. There was no established church in New Hampshire or New York." Whether true or not, as it respects this part of the argument, is not worth inquiry; for it will be remembered, that the words of the grant do not confine the bounty of the sovereign to Pawlet, New Hampshire, or the American continent: it is coextensive with his dominions, and may be claimed by the church, wherever found within them. [*303

That there was a church established by law in Great Britain, no one will deny: if so, what should prevent that church from being the grantee? It can hardly be denied, that the king could grant lands lying in one of his American colonies, to his subjects beyond the Atlantic, as effectually as those who resided in that colony. It was all within his territorial jurisdiction; and place of residence could have no influence. It may be said, that the grant is to the king's subjects in New Hampshire. True, but the words "and our other governments," are added. These words may embrace the whole governments and dominions of his majesty.

If, however, this ground should fail us, there can be no difficulty, it is

presumed, to ascertain the existence of a church in the colonies, capable of taking a title to the property in question. In Virginia, if information is correct, the Episcopal church was established by a law of that colony, before the date of the grant; but whether so or not, we feel indifferent, because by a future construction of the grant, we have the utmost confidence that the true meaning is not a church established by any law in the American colonies, but that the words "as by law established" are used as descriptive of the denomination of Christians, intended as the subjects of
*304] royal munificence. *As much as to say, that sect of Protestants who are known in England as the established Episcopal church. That you, churchmen of America, must embrace the same creed; the same church government must be the rule of your discipline; and your ordinances must be administered in every respect as by the established church in England. You must be neither Catholics nor Dissenters, but be identified in every part of your religious establishment, in faith and practice, with the mother church.

That this is a natural construction is manifest, from the fact that the government could not have been ignorant of the state of the church in the colonies, and it would be the height of absurdity, to suppose a grant to be made to a body of Christians, which the grantor well knew did not exist. The court surely will never impute to the officers of any government such trifling and mockery. If, therefore, the colonial Episcopal church was intended as the subject of this bounty, and if she was not established by law, it must follow, as an irresistible inference, that the words "as by law established," are words of description and not of identity.

Having established this point, we will show, by historical proof, a church in the state of New Hampshire, long antecedent to the date of the grant. In Belknap's Hist. of New Hampshire, 2 vol. 118, it is stated, that in the year 1732, a building for an Episcopal church was erected at Portsmouth, in New Hampshire. In 1734, the church was consecrated; and in 1736, they obtained a clergyman of that order by the name of Arthur Browne. If this church was capable of taking a title to land, as I shall hereafter show, all the difficulty suggested on the part of the plaintiff will be removed.

Some reasons will now be given, to show that such a church as was established in New Hampshire was capable of taking a title to real property.

1. The king, by the act of granting, creates sufficient corporate powers,
*305] to carry into effect his designs. That *he can create corporations, cannot be doubted. He did, by the very instrument before the court, create in the town of Pawlet all the corporate powers and prerogatives which they now possess; a body sufficiently known in law, to be invested with the supposed legal estate in the premises in question; and by an act of the very legislature who have authorized them to bring this action. If the king had the authority to incorporate, it can be easily and legally inferred from the grant, that this body was sufficiently incorporated thereby. Should congress, by law, give to the Presbyterian church of the city of Washington, a portion of the public lands, would the court endure to be told, that there was no proof of the incorporation of the church, *ergo*, the law was void—the title never passed, either by the law, or grant made in pursuance thereof?

In a case thus situated, the court may, indeed, they ought to infer, for it is a just legal deduction, and bottomed upon the soundest judgment of law, that a sovereign granting power (always supposed, *primâ facie* at least, to be right) had not indulged in the foolish blunder of granting real property, for most desirable ends, to shadows and nonentities. And it is confidently believed, that the court will determine, as a reasonable and legal intendment, that the church of New Hampshire was made capable of holding this property.

There is a further reason to suppose the church capable of taking a title. The grant being a governmental act, and of such high and incontrovertible authority, every statement and fact contained in it is so far proved that it cannot be denied. If this be correct, the grant itself proves the whole that need be proved, to make this part of the grant valid, and to vest the title in the church. The court, therefore, will not receive any statements, history, conjectures or Vermont preambles, to contradict the acts of the British government, made in solemn and official form. It is true, that a prior grant from the same authority may be shown to defeat a subsequent. But that is permitted for very different reasons; because the first act of a government, granting away its lands, vests a title in the grantee, and there is nothing left to give.

*In support of this position, it is submitted, whether the words [*306
"one share as a glebe for the Church of England, &c.," are not tantamount to a positive averment of an existing church in this country, which could be the legal subject of donation by letters-patent. There is this strong reason to support such an opinion, that we never can impute ignorance or error to a sovereign, while exercising the high prerogatives of his station. We never can say, that he, as the organ of the government, has been granting land, without a grantee; that he has mistaken the facts or the law, and consequently, nullify his acts. It is enough, that the instrument points to the grantee, and gives the object; its legal attributes are to be presumed.

The plaintiff comes, claiming under the very title granted to us; in which grant, we are acknowledged to have a prior right. Had this grant been from other than the government, on whom the doctrine of estoppel cannot fasten, it would be enough for us, to hold up the charter between the claim and our possession, and shut the plaintiff at once from even a view of the court. Even now, whether the doctrine of estoppel will apply or not, one thing is true—that what the king, under whom the plaintiff claims, has solemnly recognised as correct, must be binding upon the government of Vermont, and consequently, upon the plaintiff in this cause.

The act of the British government is not the only governmental act which the church has, to secure their possession. The legislature of Vermont, on the 26th day of October 1787, passed an act "to authorize the selectmen in the several towns of the state to improve the glebe lands, &c." And after enacting that the selectmen should have power to lease out the glebe lands, receive the rents, bring actions of ejectment, recover the possession thereof, when possessed by persons without right, they make a proviso in the words following: "Provided, nevertheless, that nothing contained in this act shall extend so far as to prevent any Episcopal minister, during the time of their ministry, that now are, or hereafter may be, in

possession of any glebe-lot or right, or actually officiating *in said town where the land lies, and who is an ordained minister of the Episcopalian church, from having the management of said lots, and the avails arising therefrom." By this proviso, it is perfectly obvious, that the legislature intended to manifest a legal recognition of the right of the church to the property.

It is also equally obvious, that by the act authorizing the selectmen to take care of the glebe lots, and obtain possession, by action of ejectment, of those which were possessed by squatters, the legislature designed, not to filch away the land from the church, and in the plenitude of their power to forget right, but to secure the title and promote the interests of the church. If not, why, in the proviso, are the Episcopal clergy preferred to other clergy, in the management of the lands? and why are they preferred, even to the selectmen, as the guardians of the property? The proviso is high and indisputable proof, that the object of the statute was solely to preserve the property from waste, for the benefit of the church, to preserve for it the income which might result from its prudent management, and to save the title from loss by long adverse possession.

After all this, one would suppose, that the state would never indulge itself in attempting to divest the church of their property; yet, strange as it may appear, on the 30th of October 1794, the legislature of Vermont make another act concerning the glebe-lots, and the following is its preamble: "Whereas, by the first principles of our government, it is contemplated, that all religious sects and denominations of Christians, whose religious tenets are consistent with allegiance to the constitution and government of this state, should receive equal protection and patronage from the civil power: And whereas, it is contemplated in the grants heretofore made by the British government, commonly called glebe-rights, that the uses of the said rights should be to the sole and exclusive purpose of building up the national religion of a government, diverse from and inconsistent with the
*308] rights of our own; for which reason, and on the *principles of the revolution, the property of said lands is vested in this state." They, therefore, go on to enact, that the rents and profits of all the glebe-lots shall be appropriated to the support of religious worship, in their respective towns, for ever; without regard to the sect of Christians, and all should share alike, according to the number of taxable inhabitants, in the parishes respectively.

In this preamble, they seem to admit, that the title to the glebe-lots was vested in the church. They do not deny such a construction of the grant, nor do they urge, as a reason for taking away the property from the Episcopalians, that the grant was void, or that the title was in the crown, before the revolution; and that thereby they became entitled to the property; but they say, these lots were granted "exclusively to build up a national religion of a government, diverse from and inconsistent with the rights of their government;" and for these reasons, they attempt to divest the church of their title, in order to give the property, or the income of it, to other sects of Christians.

The reason given for enacting this law is strong evidence of the opinion of the legislature, that the title had passed out of the crown and vested in the church. But as they disliked an established religion, supposed it anti-

republican, and, what was more to be dreaded, it was established in a government "diverse from the government of Vermont," and inconsistent with their rights, or rather their religious and political opinions—being disagreeable in these particulars, they take away the income of the land from the Episcopalians, to appropriate it to other, and, no doubt as they supposed, better purposes.

Notwithstanding the length and force of this preamble, and the cogent reasons given for making the law, on the 5th day of November 1799, the legislature repeal this act; and in so doing, most manifestly abandon all pretensions to the church property; for in the repealing law, they take care to secure those, who have trespassed upon those lands, from actions which might be brought for so trespassing—admitting, in the fullest sense, that men who had intermeddled with the property, *by the authority and in pursuance of their law, had so trespassed. Hence, the court will [*309 see, that the legislature, both in the making and in the repealing of the law of 1794, show that the act was an unjust attempt at usurpation.

By the record of the case of *Pettibone* v. *Barber*, tried before the late Justice PATERSON, at a Vermont circuit, it appears, that the plaintiff failed in an action brought in pursuance of this law. It is said, that the judge pronounced the law unconstitutional and void. This decision might have induced the repeal, as the trial was had in the intermediate time between the passage and repeal of the act.

The legislature, in the year 1805, passed another act, and by that discover less solicitude for the Christian church in any form. This too has a preamble, contradicting in its terms the old, in which they say, "Whereas, the several glebe-rights, granted by the British government to the Church of England as by law established," are in "the nature of public reservations," they, therefore, give them to the selectmen of the towns where they lie respectively, for the use of schools, &c.

The first act contains, by implication, a decided confirmation of the title in the church. The second, although contradictory in its provisions and repugnant to that right, exhibits in a striking light, in its preamble and in the repealing clause, a thorough conviction in the mind of the legislature, of the fallacy of their pretensions, urging facts, which, if true, would contribute nothing in support of those pretensions. In the last, they urge a new reason for their law, and, as we suppose, equally unsound. Here, they become wiser, and not only act the legislators but judges, scout what had been done by their predecessors, and give a construction of the grant which is indeed a strange one, but which, if correct, is supposed, as will be hereafter shown, to defeat the right to recover in this case.

3. In the third place, it is supposed, the grant of the crown may be considered valid, by adopting the opinion that this is one of the cases where the fee may be in abeyance, *until the existence of the church, in the [*310 town of Pawlet, so organized as to be capable of receiving it. To maintain this point, the court are referred to 2 Bl. Com. 106, Co. Litt. 342, where it is laid down, that an estate may be granted to John, for life, and then ot the heirs of Richard, although Richard has no heirs, at the time of the grant. Here, although the life-estate vests in John immediately, yet the fee must be in abeyance, until the heirs of Richard are *in esse*. Indeed, the happening of the event is perfectly contingent, for those in remainder may

never exist. Should it be said, that the fee remains in the grantor, during the life-estate, ready to vest in the heirs of Richard, if they exist at the determination of the life-estate, or to continue in him, by *reverter*, if Richard has no heirs ; it is met, by urging that if this doctrine be correct, then, with equal propriety, may it be contended on our part, that the fee remained in the king, ready to vest, whenever there should be a church. But, says the state of Vermont, "we have a right by forfeiture, to the king's property." True, but no greater right than the king had ; which was a naked legal title ; the use belonged elsewhere. Of this, hereafter.

In the 2 Black. Com. 318, it is said, that ecclesiastical estates must sometimes necessarily be in abeyance, and that where there is no person in whom the fee can vest, it potentially exists in abeyance ; as between the death of the incumbent and the next presentation. The parson having but a life-estate in the glebe, unless it could so exist, on his death, it must revert to the grantor. Christian, in his notes on Blackstone, supposes the fee to be all the while in the lord of the manor. This is by no means the opinion of Blackstone, or of the still greater lawyer, Coke ; both of whom, if they are correctly understood, lay down the law to be, that the fee exists, between the death of the parson, and his successor, not in the lord, but in abeyance.

*311] *4. If the construction of the patent contended for in the inception of this argument be correct, there will be no difficulty in finding a grantee, to uphold the fee, and make it subservient to the benevolent intentions of the crown. It would not be a violent or unnatural construction, to say, that the town of Pawlet was granted to the persons named on the grant, in fee, upon condition that they should, in the location of the town, lay out and set apart "one share as a glebe for the Church of England, &c.," together with the other shares for Benning Wentworth, the first settled minister, and the school, according to the directions indorsed. Under such a construction, whether the church were incorporated or not, they might reap the benefit of the use ; for as soon as they become organized, and a clergyman settled, they would be capable of receiving the income of the land. This construction was adopted by the proprietors of the town. In locating the same, they did survey a share and mark it off as a glebe-right. This appears from the several acts of the state, and in the argument of the counsel for the plaintiff.

The present inhabitants of the town must all hold their lands, under the grant before us, and not only so, but from the original proprietors who so located and consecrated the glebe-right which is now claimed by those persons. By the laws of England, and probably, of all civilized countries, the claimer or possessor of land is bound by the acts and confessions of those under whom he holds the claim or possession. By this rule, then, the present inhabitants of Pawlet are bound by the act of their predecessors. That act was a complete recognition of the right of the church to the property ; an act which spoke louder than any language.

It may be said, that the share was located by the proprietors of the town, in their corporate capacity. If that was the case, it is still the worse for them, because a corporation never dies, and the location was the act of the

*312] plaintiff upon the record in this cause ; and they are now *claiming property which they once voluntarily admitted to belong to the church.

Again, it appears, that the plaintiff in this cause is now enjoying the benefits of this construction, in the share given to a school and the first minister settled in the town. Without this, or the third position taken in this argument, the town would have but slender pretences to the use of those two shares; but it seems, they claim those two lots by the same, or a more uncertain title, hold them by the same tenure, derive the right from the same source, and yet claim the glebe also, and in order to support that claim, are driven to the necessity of denying the legal and efficient properties of the instrument by which they, as well as the church, claim.

5. This is a trust estate. The patentees named upon the grant are the trustees for the use of the church, whenever it should be organized in the town of Pawlet, so as to be enabled to receive the rents of the land. If a use can result from a grant, by implication, it is supposed, this is a case of that kind. In expectation that objections will be made to such an interpretation of the case, those objections are endeavored to be answered.

1st. It may be said, that the grant is silent as to any use or trust, and therefore, it is not to be implied. The answer is, wherever, from the nature of the grant, a trust-estate can be implied, with propriety, where it is necessary to carry into effect the object of letters-patent, the court will adopt the implication. The court are referred to 7 Bac. Abr. (new ed.) 89; Sand. on Uses 208, for the doctrine of the implication of uses. In *Jones* v. *Moxley*, 12 Mod. 162, it is said, that a use may be declared, without the word use. Any words that show the meaning of the party are sufficient. If the court can suppose, that the legal estate was granted in fee, to the patentees, there can be no difficulty in deciding the nature of their title. The instrument, upon *which such legal estate depends, will indubitably show that their only right was for the use of the church. [*313

2d. It may be said, that as there is no church in existence, the legal estate must fail, for the want of a use. It has already been shown, that a church was *in esse*, when the grant was made, and whether the church was or was not incorporated, cannot be material; in either case, the title in the trustee would be valid. To this point, the court are desired to look at 1 Co. 23, 24, 25, and Gilb. Law Cases 44, where it will be found, that public institutions are capable of enjoying a trust, and it was decided, that the poor of the parish of Dale, although not incorporated, were capable of a trust. Without adopting the principle, that the church can take an equitable interest in these premises, there would, in many cases, be an end to the workings of benevolence. Science might often lose her patrons; the needy their benefactors; and religion her warmest supporters.

Before we part with this point, we will once more look at the act of 1805, upon which the plaintiff founds his right to recover; and to its preamble, which declares the glebe lands in the nature of public reservations. If this mean anything, it must mean that the legal estate was reserved to the crown. As a proof that the legislature so meant, observe the following language, "and as such, by the revolution, became vested in the sovereignty of this state." Now, sovereign as the state may be, she can have no other or greater title than the crown of Great Britain had, after the grant, and before the revolution, and that right could be no more than a right reserved for the use of the church; because it never ought to be supposed, that the crown made this grant with no other design than to reserve to

itself, what it before had. If the king had an intention to retain for his own use a few shares of the land, he might have done it directly; in the same manner as the pine trees were reserved for his royal navy. This, then, is the right of the state of Vermont, on their own construction, a right to do what, by the act of 1787, the legislature did, like honest men, and added security to the already existing title of the church.

*314] *If the right of the crown was of the nature described, and if the court can suppose the land reserved to the crown, and that the king could be a trustee, they will then say, that the state of Vermont could take no estate, to the exclusion of the equitable right of the *cestui qui trust*, but any forfeiture of the king, or any act of his, could only prejudice his own rights, and not the rights of third innocent parties. This doctrine will be found in *Burges* v. *Wheate*, 1 W. Black. 123; Sand. on Uses 152–3, 252, 257.

If, therefore, the construction of the legislature of Vermont should be adopted, it would only help the plaintiff to be defeated in this action; for it cannot be believed, that the use as well as the legal estate could be reserved by the grant before the court.

Webster, in reply.—I. It is said to be the obvious intention of the grantor, to pass, by the grant, all the territory of Pawlet, without any saving or reservation. But this is against the express words of the grant: the grant is made, "upon the conditions and reservations hereafter made;" nor is there anything in the grant, to which the term "reservation" can be properly applied, except it be the public rights, as they are usually called, of which the part appropriated for a glebe, &c., is one.

The defendants' counsel further supposes, that although the territory was to be divided into sixty-eight equal parts, yet this was not to designate the proportion which each grantee was to receive; but that if any person, named in the grant, should not accept, or not be capable of taking, or not happen to be a person *in esse*, or in other such case, then the whole tract would be to be divided among the residue. This is believed not to be a sound construction of the words of the grant: those words are, "do give and grant in equal shares unto our loving subjects, &c., whose names are entered on this grant, to be divided amongst them into sixty-eight equal shares, all that tract," &c. To what purpose was the tract to be divided into sixty-eight equal shares, if it were not to ascertain what portion each grantee should have?

*315] *But what is conclusive on this point, is the disposition made of B. Wentworth's right. He was to be entitled to two shares. These are actually severed from the common mass, by the grant itself, and marked out on the land. This shows, that the share of each proprietor was not thought liable to be increased, by any incapacity in others to take, or other such cause.

A great part of the states of New Hampshire and Vermont were granted by charters, issued in the name of the crown, by the provincial governors of New Hampshire, which charters were in all respects like this. These charters or grants have received a settled construction, which has been followed by long usage, in both states. No case is known to have existed, in which any grantee has claimed a greater portion of the whole land, than his name bore to the names on the charter, including the public right; nor has any sever-

ance or partition been made, in any case, upon any other rule or principle. To divide the land into sixty-eight equal parts, and then adopt the plan of appropriating the whole to a less number of owners, as, in the example supposed by the defendants' counsel, to three, giving each twenty sixty-eighth parts, and two-thirds of one sixty-eighth part more, would be to act without object or motive. Such, therefore, has never been supposed to have been the course contemplated in the grant. The division or partition of lands holden under these charters has been, as is believed, in every instance, by dividing the whole into as many parts, commonly called rights, as there were individuals named on the charter, together with the public rights, and allowing two parts to B. Wentworth. The shares allotted to the public rights, are usually designated as the "school right," "minister right," "society right," and "glebe right," respectively. These have never been claimed by the original proprietors.

In New Hampshire (where the plaintiff's counsel is better acquainted with judicial proceedings and judicial history than in Vermont), no legislative provision is recollected to have been made. The first settled minister has usually possessed the right designated for him. The town corporations, bodies totally distinct from the original proprietors, and owing their corporate existence, in all cases, to their charters, or to acts of the legislature (for although this charter *undertakes to erect a corporation, yet, in fact, no corporation ever existed, or was erected by these grants), [*316 have had the management and disposition of the school right. The statutes of the state make it the duty of the towns, in their corporate character, to make provision for the support of free schools, within the town, and under the management of the town authority. These school rights having been originally intended to aid in the support of schools, it has been holden, that the law, throwing the duty of this support on the town, has given them the disposition of this fund for that purpose. There being no manner of privity between the town corporations and the original grantees of the soil, the former can derive no title to these school rights, but from the law of the state. That they have right to them, has been settled by many decisions, followed by uniform practice.

The grant to the Society for Propagating the Gospel presented a different case. That was a corporation, then existing, and still existing in England, capable, by its charter, of holding lands; and doubtless entitled, originally, to take the portion intended for it in this grant. Whether this society was not so far connected with the national church and the realm of England, as that its rights were divested by the revolution, has never been decided. Actions are pending, both in the circuit and state courts, in which this society is party, in relation to these lands.

The glebe-right has, generally, in point of fact, been occupied or disposed of by the town. No individual has been able to maintain a right to one of these lots, or portions, upon his ecclesiastical character. It has been holden, on the contrary, that the grant, so far as it undertook to give one sixty-eighth part for a glebe, was void, for want of a grantee. The plaintiff's counsel have been obligingly favored, by the present Chief Justice of New Hampshire, with notes of the case of *Mead* v. *Kidder*, in the supreme court of that state, in 1806; in which court the same judge then presided. To which case, this court is respectfully referred.

Whether the better construction is, that there is a reservation of these
*317] lands, by charter, pointing out *merely the future use, or, that a grant was intended, which cannot take effect, for want of a grantee, is immaterial in this case. The result is the same.

II. The defendant contends, that there was a Church of England as by law established, capable of taking. On this point, the plaintiff's counsel will only remark—

1. That no grant to the Church of England, *eo nomine*, could avail, even in England, to pass the fee. Would such a grant inure to the see of Canterbury, or the diocese of London? The Church of England, in the aggregate, is not a corporation, but one of the estates of the realm.

2. But the grant is limited by the words of the charter itself, to the Church of England as by law established, in the town of Pawlet. Just as the school right is to be for the support of schools in that town, and the right of the minister, first to be settled there. It is hardly necessary to draw into the argument even the obvious intent of the grantor. The words themselves are unequivocal: and does not the defendant himself rest his title upon his connection with the Episcopal society in Pawlet?

As to the laws of Vermont, before 1805, they all show, that the legislature acted on the opinion, that it might dispose of these lands, as public property, in any way it thought proper. It was a question of expediency and propriety; and provision is made, in some of the laws, allowing Episcopal clergymen, already in possession, to remain seven years.

With respect to the opinion ascribed to a late judge of this court, it need only be remarked, that if the cause turned on the point supposed (which does not appear at all from the record), it was but the opinion of an able judge; formed and pronounced instantly, in the course of a jury trial, without case reserved, or solemn argument; and it is no disrespect to say, possibly, without a knowledge of all circumstances, or a full view of all consequences.

*318] III. The defendants contend, that the fee may have *passed out of the king, and yet not vested anywhere, but remained in abeyance. But the text of Blackstone, which he cites, does not bear him out. The estate in abeyance, in the case put by Blackstone, is a fee, remaining after a freehold has been granted and vested. With respect to the freehold of a glebe, after the death of the parson, and before the naming of a successor, both Fearne and Christian maintain the contrary of Blackstone's opinion; but that is not at all this case. To meet this case, the defendants must show, that if a grant be made to a person not *in esse*, the land nevertheless passes out of the grantor, and remains in abeyance, until, in the course of events, some person arises into being, who answers the description in the grant.

IV. The observations already made are deemed a sufficient reply to the remarks of the defendant's counsel under this head.

V. It is not supposed possible to give in to the opinion, that this is a trust-estate, granted to the individuals named in the charter. The idea is wholly novel. Not a syllable in the grant itself intimates any such thing, All is the other way. How can it be imagined, that the intention was to convey an estate in trust to a large number of individuals, who were to be, at first, tenants in common; then, to divide and hold in severalty; and whose estates, by law, would descend in gavelkind, to their heirs? Was

B. Wentworth to be a trustee, whose estate was severed by the charter itself? Was the corporation in England to be one of the trustees? It is hardly necessary to add, that the court would not very willingly construe this grant so as to raise a trust, which from the nature of the case never could be executed.

This, then, is a case, in which the highest courts of both states have concurred in giving to the grant in question a practicable and beneficial construction; under which very many estates are holden, and the court would not incline to disturb these titles, but for irresistible reasons. It must be remembered, that there are two hundred townships, granted by charters precisely like this. In the whole, there are not probably more than a dozen associations of Episcopalians. If the court should decide, that the legislatures may not dispose of *these lands, what shall be done with them, [*319
in towns where there are no Episcopal societies to claim them? Are they to remain, without owners or rightful occupants, until such changes in religious opinions shall take place, as that there shall be an Episcopal society in each town.

If this case is to be considered, not as a reservation, but a grant; and if this grant is not void for want of a grantee; then, it must, of necessity, receive this construction: *i. e.*, that it was in fact a grant for the use of such ministry, or such religious purposes, as the town should choose, or the state appoint; at least, unless the Church of England should have been established by law. The general purpose was religious instruction. This duty the laws of the state throw on the towns, and it is a reasonable construction which gives this fund, even without any particular grant of the legislature, to the towns, for that purpose. This construction will answer the general object of the grant. In no other way can any of its objects be answered, in one case out of fifty. This puts it on the same ground as the grants for schools, and for the use of the ministry (a common grant in the charters in the eastern part of New Hampshire). The main purposes of the grants were education, and religious instruction; and, in the events which have happened, the most safe, and only practicable, construction is, to give the funds intended for the promotion of these purposes, to those on whom the law imposes the obligation of making adequate provision for these objects. I venture to say, such is the law of New Hampshire.

There is still another question, to which the plaintiff's counsel wishes to draw the attention of the court; and that is, has the court jurisdiction of the cause? Is this a case coming within that clause of the constitution which gives to this court jurisdiction over "controversies between citizens of the same state, claiming lands by grants of different states?" It is submitted, with some confidence, that this is not such a case. These two grants are not to be considered as the acts of different states, in the sense of the constitution. At the time of the first grant, both the present states of New Hampshire and Vermont formed but one state. They have become two, by subsequent subdivision. The first grant *was made by the state of [*320
Vermont, as much as by the state of New Hampshire. The power from which it emanated was the sovereign power of what is now Vermont, precisely as much as it was the sovereign power of what is now New Hampshire. The question is, between an act of the sovereign power of what is now Vermont, passed in 1761, and another act of the sovereign power of Vermont,

passed in 1805. If, on the division of territory, that part lying west of Connecticut river had been called New Hampshire, and the part lying east of that river Vermont, instead of the reverse, it seems to the plaintiff's counsel, that in that case, the whole ground on which the jurisdiction of the court over this case rests, would have been removed.

It is easy to perceive the class of cases, for which this provision was made; for example, when disputes about boundaries between two states arise. It is easy also to imagine many other cases, apparently within the letter, and yet not within the meaning, and so excluded by a just construction of the clause. These cases arise from the subdivision of states. One may imagine, for example, that in the state of Kentucky, ejectments must be often tried, in which grants of Virginia, before the division, and grants of Kentucky since, might be respectively relied on by the parties; and yet it would hardly be contended, that that circumstance should oust the courts of Kentucky of their jurisdiction, and give the cognisance of all such causes to the courts of the United States. It might be said, in such case, that the grants emanated from different states; and, nominally, they did so. Still, they both originated from a power having undoubted authority to grant the territory. The first grant was not so much the act of a different state, as of the parent of both states. Virginia, now, differs as much from Virginia, before the severance, as Kentucky now differs from Virginia, before the severance. Kentucky has the same power over her territory now, as Virginia had, over the same territory, formerly. She is, therefore, as to this, to be considered the same sovereign power, in other words, the same state. If integrity of territory, or retention of jurisdiction over the whole of the same soil is necessary to preserve the identity of political power, then Virginia herself is not what she was; a grant of hers before the severance, and a grant since, would be grants from different states.

*321] *Shepherd*, in reply, as to jurisdiction.—The counsel for the defendants, in answer to the objection made to the jurisdiction of the court, will only say, that this case is certainly within the literal provision of the constitution, and it is presumed, the court will not search with solicitude to find a far-fetched meaning, in repugnance to the letter, so long as it can produce no other object than to send the parties to a trial in the courts of Vermont, where, perhaps, there is not a judge to be found, but is interested for or against the plaintiff in this cause.

This is a case where the lands in dispute have been granted by different states; that is, by New Hampshire and Vermont. Now, although these states were all under one jurisdiction, yet, when the land was granted by the state of Vermont, they were two sovereign, independent states, and the same reason exists here, that can exist in any case of state controversy, for depriving the states respectively of the power to determine the dispute.

If this cause is to be tried in Vermont, the judges are to decide under the very strong impressions of a legislative construction, unequivocally made, of the grant; and to give us what we claim as right, they must decide against a positive statute of their legislature. So far, therefore, is this case from being taken from the letter of the constitution, by any equitable construction, with a view to set up the spirit against the letter, that it is within all the reasoning that governed the framers of the constitution, and most perfectly

within the meaning of that clause; and one of the evils, which must have been intended to be guarded against, exists, at full length, in the present case.

Why was the case of parties claiming land under the grants of different states made cognisable before the United States' courts? Undoubtedly, because where this state of things exists, it is reasonable to suppose, that the judges of the states, respectively, will feel strong prepossessions, and are, therefore, unfit to decide the strife in relation to the powers and rights of the conflicting states. *It is the same reason which induced the giving jurisdiction in several other cases, such as citizens of different [*322 states, and a state and citizens of another state. In these cases, the state courts may be deprived of their jurisdiction; and why? Most indubitably, because the judges of the courts of the United States have less interest, and fewer prejudices to overcome, and the parties will be more sure of an impartial decision. And can this reason exist stronger in any case than in the one now before the court?

March 10th, 1815. (Absent, Todd, J.) STORY, J., delivered the opinion of the court, as follows:—The first question presented in this case is, whether the court has jurisdiction. The plaintiffs claim under a grant from the state of Vermont, and the defendants claim under a grant from the state of New Hampshire, made at the time when the latter state comprehended the whole territory of the former state. The constitution of the United States, among other things, extends the judicial power of the United States to controversies "between citizens of the same state claiming lands under grants of different states." It is argued, that the grant under which the defendants claim is not a grant of a different state, within the meaning of the constitution, because Vermont, at the time of its emanation, was not a distinct government, but was included in the same sovereignty as New Hampshire.

But it seems to us, that there is nothing in this objection. The constitution intended to secure an impartial tribunal for the decision of causes arising from the grants of different states; and it supposed, that a state tribunal might not stand indifferent in a controversy where the claims of its own sovereign were in conflict with those of another sovereign. It had no reference whatsoever to the antecedent situation of the territory, whether included in one sovereignty or another. It simply regarded the fact, whether grants arose under the same or under different states. Now, it is very clear, that althought the territory of Vermont was once a part of New Hampshire, yet the state of Vermont, in its *sovereign capacity, is [*323 not, and never was the same as the state of New Hampshire. The grant of the plaintiffs emanated purely and exclusively from the sovereignty of Vermont; that of the defendants purely and exclusively from the sovereignty of New Hampshire. The sovereign power of New Hampshire remains the same, although it has lost a part of its territory; that of Vermont never existed, until its territory was separated from the jurisdiction of New Hampshire. The circumstance that a part of the territory or population was once under a common sovereign no more makes the states the same, than the circumstance that a part of the members of one corporation constitutes a component part of another corporation, makes the

corporation the same. Nor can it be affirmed, in any correct sense, that the grants are of the same state; for the grant of the defendants could not have been made by the state of Vermont, since that state had not, at that time, any legal existence; and the grant of the plaintiffs could not have been made by New Hampshire, since, at that time, New Hampshire had no jurisdiction or sovereign existence, by the name of Vermont. The case is, therefore, equally within the letter and spirit of the clause of the constitution. It would, indeed, have been a sufficient answer to the objection, that the constitution and laws of the United States, by the admission of Vermont into the Union as a distinct government, had decided that it was a different state from that of New Hampshire.

The other question which has been argued is not without difficulty. It is contended by the plaintiffs, that the original grant, in the charter of Pawlet, of "one share for a glebe, for the Church of England as by law established," is either void for want of a grantee, or if it could take effect at all, it was as a public reservation, which, upon the revolution, devolved upon the state of Vermont.

The material words of the royal charter of 1761 are, "do give and grant, in equal shares, unto our loving subjects, &c., their heirs and assigns for ever, whose names are entered on this grant, to be divided amongst them into sixty-eight equal shares, all that tract or parcel or land, &c., and that the same be and hereby is incorporated *into a township, by the name *324] of Pawlet; and the inhabitants that do or shall hereafter inhabit the said township, are hereby declared to be enfranchised with and entitled to all and every the privileges and immunities that other towns within our province, by law, exercise and enjoy. To have and to hold the tract of land, &c., to them and their respective heirs and assigns for ever, upon the following conditions," &c.

Upon the charter are indorsed the names of sixty-two persons, and then follows this additional clause: "His excellency, Benning Wentworth, a tract of land to contain 500 acres as marked in the plan B. W., which is to be accounted two shares; one share for the incorporated Society for the Propagation of the Gospel in foreign parts; one share for a glebe for the Church of England as by law established; one share for the first settled minister of the gospel; one share for the benefit of a school in said town." Thus making up, with the preceding sixty-two shares, the whole number of sixty-eight shares stated in the charter.

Before we proceed to the principal points in controversy, it will be proper to dispose of those which more immediately respect the legal construction of the language of the charter. And in our judgment, upon the true construction of that instrument, none of the grantees, saving Governor Wentworth, could legally take more than one single share, or a sixty-eighth part of the township. This construction is conformable to the letter and obvious intent of the grant, and, so far as we have any knowledge, has been uniformly adopted in New Hampshire. It is not for this court, upon light grounds or ingenious and artificial reasoning, to disturb a construction which has obtained so ancient a sanction, and has settled so many titles, even if it were at first somewhat doubtful. But it is not in itself doubtful; for it is the only construction which will give full effect to all the words of the charter. Upon any other, the words "in equal shares," and "to be divided

amongst them in sixty-eight equal shares," would be nugatory or senseless.

We are further of opinion, that the share for a glebe is not vested in the other grantees having a capacity to take, and so in the nature of a condition, *use or trust, attaching to the grant. It is nowhere stated to be a condition, binding upon such proprietors, although other conditions [*325 are expressly specified. Nor is it a trust or use growing out of the sixty-eighth part granted to the respective proprietors, for it is exclusive of these shares, by the very terms of the charter. The grant is in the same clause with that to the Society for the Propagation of the Gospel, and in the same language, and ought, therefore, to receive the same construction, unless repugnant to the context, or manifestly requiring a different one. It is very clear that the Society for the Propagation of the Gospel take a legal, and not a merely equitable estate; and there would be no repugnancy to the context, in considering the glebe, in whomsoever it may be held to vest, as a legal estate.

We are further of opinion, that the three shares in the charter "for a glebe," "for the first settled minister," and "for a school," are to be read in connection, so as to include, in each, the words "in the said town," *i. e.*, of Pawlet; so that the whole clause is to be coustrued, one share for a glebe, &c., in the town of Pawlet, one share for the first settled minister, in the town of Pawlet, and one share for a school, in the town of Pawlet.

We will now consider, what is the legal operation of such a grant, at the common law; and how far it is affected by the laws of New Hampshire or Vermont. At common law, the Church of England, in its aggregate description, is not deemed a corporation. It is, indeed, one of the great estates of the realm; but is no more, on that account, a corporation, than the nobility in their collective capacity. The phrase, "the Church of England," so familiar in our laws and judicial treatises, is nothing more than a compendious expression for the religious establishment of the realm, considered in the aggregate, under the superintendence of its spiritual head. In this sense, the Church of England is said to have peculiar rights and privileges, not as a corporation, but as an ecclesiastical institution, under the patronage of the state. In this sense, it is used in *Magna Charta*, ch. 1, where it is declared, "*quod ecclesia Anglicana libra sit, et habeat omnia jura sua integra, et libertates *suas illæsas;*" and Lord Coke, in his commentary [*326 on the text, obviously so understands it. 2 Inst. 2, 3. The argument, therefore, that supposes a donation to "the Church of England," in its collective capacity, to be good, cannot be supported, for no such corporate body exists, even in legal contemplation.

But it has been supposed, that the "Church of England of a particular parish," must be a corporation for certain purposes, although incapable of asserting its rights and powers, except by its parson regularly inducted. And in this respect, it might be likened to certain other aggregate corporations, acknowledged in law, whose component members are civilly dead, and whose rights may be effectually vindicated through their established head, though, during a vacancy of the headship, they remain inert; such are the common-law corporations of abbot and convent, and prior and monks of a priory. Nor is this supposition without the countenance of authority.

The expression, parish church, has various significations. It is applied

sometimes to a select body of Christians, forming a local spiritual association; and sometimes, to the building in which the public worship of the inhabitants of a parish is celebrated; but the true legal notion of a parochial church is a consecrated place, having attached to it the rights of burial and the administration of the sacraments. Com. Dig. *Esglise*, C; Seld. *de Decim.* 265; 2 Inst. 363; 1 Burn's Eccles. Law 217; 1 Wooddes. 314. Doctor Gibson, indeed, holds, that the church, in consideration of law, is properly the cure of souls, and the right of tithes. Gibs. 189; 1 Burn's Eccles. Law 232.

Every such church, of common right, ought to have a manse and glebe as a suitable endowment; and without such endowment it cannot be consecrated; and until consecration, it has no legal existence as a church. Com. Dig. *Dismes*, B. 2; 3 Inst. 203; Gibs. 190; 1 Burn's Eccl. Law 233; Com. Dig. *Esglise*, A; Dort, of Plural. 80. When a church has thus acquired all the ecclesiastical rights, it becomes, in the language of law, a rectory or parsonage, which consists of a glebe, tithes and oblations estab-
*327] lished for the maintenance of a parson *or rector to have cure of souls within the parish. Com. Dig. Ecclesiast. Persons, C. 6.

These capacities, attributes and rights, however, in order to possess a legal entity, and much more to be susceptible of a legal perpetuity, must be invested in some natural or corporate body; for in no other way can they be exercised or vindicated. And so is the opinion of Lord Coke in 3 Inst. 201, 202, where he says, "albeit they (*i. e.*, subjects) might build churches without the king's license, yet they could not erect a spiritual politic body, to continue in succession, and capable of endowment, without the king's license; but by the common law, before the statute of mortmain, they might have endowed the spiritual body, once incorporated, *perpetuis futuris temporibus*, without any license from the king or any other."

This passage points clearly to the necessity of a spiritual corporation to uphold the rectorial rights. We shall presently see, whether the parish church, after consecration, was deemed in legal intendment such a corporation. In his learned treatise on tenures, Lord Chief Baron Gilbert informs us, that anciently, according to the superstition of the age, abbots and prelates "were supposed to be married to the church, inasmuch as the right of property was vested in the church, the estate being appropriated, and the bishop and abbot, as husbands and representatives of the church, had the right of possession in them; and this the rather because they might maintain actions and recover, and hold courts within their manors and precincts as the entire owners; and that crowns and temporal states might have no reversions of interests in their feuds and donations. Therefore, since they had the possession in fee, they might alien in fee; but they could not alien more than the right of possession that was in them, for the right of propriety was in the church." But as to a parochial parson, "because the cure of souls was only committed to him, during life, he was not capable of a fee, and therefore, the fee was in abeyance." Gilb. Tenures 110, &c.

Conformable herewith, is the doctrine of Bracton, who observes, that an
*328] assize *juris utrum* would not lie, *in cases of a gift of lands to cathedral and conventual churches, though given in *liberam eleemosynam*, because they were not given to the church solely, but also to a parson to be held as a barony, *non solum dantur ecclesiis, sed et personis tenendæ in baro-*

nia; and therefore, they might have all the legal remedies applicable to a fee. But he says, it is otherwise to a person claiming land in right of his church, for in cases of parochial churches, gifts were not considered as made to the parson, but to the church, *quia ecclesiis parochialibus non fit donatio personæ, sed ecclesiæ, secundum perpendi poterit per modum donationis.* Bracton 286 *b;* 1 Reeves Hist. Law 369. And in another place, Bracton, speaking of the modes of acquiring property, declares that a donation may well be made to cathedrals, convents, parish churches and religious personages, *poterit etiam donatio fieri in liberam eleemosynam, sicut ecclesiis cathedralibus, conventualibus, parochialibus, vivis religiosis,* &c. Bracton 27 *b;* 1 Reeves Hist. Law 303.

The language of these passages would seem to consider cathedral, conventual, and parochial churches as corporations of themselves, capable of holding lands. But upon an attentive examination, it will be found to be no more than an abbreviated designation of the nature, quality and tenure of different ecclesiastical inheritances, and that the real spiritual corporations, which are tacitly referred to, are the spiritual heads of the particular church, viz., the bishop, the abbot, and, as more important to the present purpose, the parson, *qui gerit personam ecclesiæ.*

Upon this ground, it has been held in the Year Books, 11 Hen. IV. 84 *b,* and has been cited as good law by Fitzherbert and Brooke (Fitz. Feofft. pl. 42; Bro. Estate, pl. 49; s. c. Viner Abr. L. pl. 4), that if a grant be made to the church of such a place, it shall be a fee in the parson and his successors. *Si terre soit done per ceux parolz, dedit et concessit ecclesiæ de tiel lieu, le parson et ses successeurs serra inheriter.* And in like manner, if a gift be of chattels to parishioners, who are no corporation, it is good, and the church-wardens shall take them in succession, for the gift is to the use of the church. 37 Hen. VI. 30; 1 Kyd Corp. 29.

*In other cases, the law looks to the substance of the gift, and, in favor of religion, vests it in the party capable of taking it. And [*329 notwithstanding the doubts of a learned, but singular mind, Perk. § 55, in our judgment, the grant in the present charter, if there had been a church actually existing in Pawlet, at the time of the grant, must, upon the common law, have received the same construction. In the intendment of law, the parson and his successors would have been the representatives of the church, entitled to take the donation of the glebe. It would, in effect, have been a grant to the parson of the Church of England, in the town of Pawlet, and to his successors, of one share in the township, as an endowment, to be held *jure ecclesiæ;* for a glebe is emphatically the dowry of the church: *Gleba est terra qua consistit dos ecclesiæ.* Lind. 254.

Under such circumstances, by the common law, the existing parson would have immediately become seised of the freehold of the glebe, as a sole corporation, capable of transmitting the inheritance to his successors. Whether, during his life, the fee would be in abeyance, according to the ancient doctrine (Litt. § 646, 647; Co. Litt. 342; 5 Edw. IV. 105; Dyer 71, pl. 43; Hob. 338; Com. Dig. Abeyance, A.; Ibid. Ecclesiastical Persons, C. 9; Perk. § 709), or whether, according to learned opinions in modern times, the fee should be considered as *quodam modo* vested in the parson for the benefit of his church and his successors (Co. Litt. 341 *a;* Com. Dig. Ecclesiast. Persons, C. 9; Fearne Cont. Rem. 513, &c.; Christian's note to 2 Black.

Com. 107, note 3 ; Gilb. Tenures 113 ; 1 Wooddes. 312), is not very material to be settled ; for at all events, the whole fee would have passed out of the crown. Litt. § 648 ; Co. Litt. 341 *a ;* Christian's note, *ubi supra ;* Gilb. Tenures 113. Nor would it be in the power of the crown, after such a grant executed in the parson, to resume it at its pleasure. It would become a perpetual inheritance of the church, not liable, even during a vacancy, to be divested ; though by consent of all parties interested, viz., the patron and ordinary, and also the parson, if the church were full, it might be aliened or incumbered. Litt. § 648 ; Co. Litt. 343 ; Perk. § 35 ; 1 Burn's Ecclesiast. Law 585.

*330] *But inasmuch as there was not any church, duly consecrated and established, in Pawlet, at the time of the charter, it becomes necessary further to inquire, whether, at common law, a grant so made, is wholly void, for want of a corporation having a capacity to take.

In general, no grant can take effect, unless there be a sufficient grantee then in existence. This, in the case of corporations, seems pressed yet further ; for if there be an aggregate corporation, having a head, as a mayor and commonalty, a grant or devise made to the corporation, during the vacancy of the headship, is merely void ; although for some purposes, as for the choice of a head, the corporation is still considered as having a legal entity. 13 Edw. IV. 8 ; 18 Ibid. 8 ; Bro. Corporation, 58, 59 ; Dalison 31 ; 1 Kyd Corp. 106, 107 ; Perk. § 33, 50. Whether this doctrine has been applied to parochial churches, during an avoidance, has not appeared in any authorities that have fallen within our notice ; and perhaps, can be satisfactorily settled only by a recurrence to analogous principles, which have been applied to the original endowments of such churches.

We have already seen, that no parish church, as such, could have a legal existence, until consecration ; and consecration was expressly inhibited, unless upon a suitable endowment of land. The canon law, following the civil law, required such endowment to be made, or at least ascertained, before the building of the church was begun. Gibs. 189 ; 1 Burn's Eccles. Law 233. This endowment was, in ancient times, commonly made by an allotment of manse and glebe, by the lord of the manor, who, thereupon, became the patron of the church. Other persons also, at the time of consecration, often contributed small portions of ground, which is the reason, we are told, why, in England, in many parishes, the glebe is not only distant from the manor, but lies in remote divided parcels. Ken. Par. Aut. 222, 223, cited in 1 Burn's Eccles. Law 234. The manner of founding the church and making the allotment was, for the bishop or his commissioner to set up a cross, and set forth the ground where the church was to be built, and it then became the endowment of the church. Degge, p. 1, ch. 12, cited 1 Burn's Eccles. Law 233.

*331] *From this brief history of the foundation of parsonages and churches, it is apparent, that there could be no spiritual or other corporation, capable of receiving livery of seisin of the endowment of the church. There could be no parson, for he could be inducted into office only as a parson of an existing church, and the endowment must precede the establishment thereof. Nor is it even hinted, that the land was conveyed in trust, for at this early period, trusts were an unknown refinement. The land, therefore, must have passed out of the donors, if at all, without a

grantee, by way of public appropriation, or dedication to pious uses. In this respect, it would form an exception to the generality of the rule, that to make a grant valid, there must be a person *in esse* capable of taking it. And under such circumstances, until a parson should be legally inducted to such new church, the fee of its lands would remain in abeyance, or be like the *hæreditas jacens* of the Roman code, in expectation of an heir. This would conform exactly to the doctrine of the civil law, which, as to pious donations, Bracton has not scrupled to affirm to be the law of England. *Res vero sacræ, religiosæ, et sanctæ in nullius bonis sunt, quod enim divini juris est, id in nullius hominis bonis est, immo in bonis dei hominum censura, &c. Res quidam nullius dicuntur pluribus modis, &c. Item censura (ut dictum est) sicut res sacræ religiosæ et sanctæ. Item casu, sicut est hæreditas jacens ante additionem, sed fallit in hoc, quia sustinet vicem personæ defuncti, vel quia speratur futura hæreditas ejus, qui adibet.* Bracton, 8 *a*; Justin. Instit. lib. 2, tit. 1; Co. Litt. 342, on Litt. § 447.

Nor is this a novel doctrine in the common law. In the familiar case, where a man lays out a public street or highway, there is, strictly speaking, no grantee of the easement, but it takes effect by way of grant or dedication to public uses. *Lade* v. *Shepherd*, 2 Str. 1004; Hale, in Harg. 78. So, if the parson, or a stranger, purchase a bell with his own money and put it up, the property passes from the purchaser, because, when put up, it is consecrated to the church. 11 Hen. IV. 12; 1 Kyd Corp. 29, 30. These principles may seem to savor of the ancient law; but in a modern case, in which, in argument, the doctrine was asserted, Lord HARDWICKE did not deny it, but simply decided, that the circumstances of that case did not amount to a donation of the land, on which *a chapel had been built, to public and pious uses. *Attorney-General* v. *Foley*, 1 Dick. 363. [*332 And in an intermediate period, Lord Chief Justice DYER held, that if the crown, by a statute, renounced an estate, the title was gone from the crown, although not vested in any other person, but the fee remained in abeyance. It is true, that WESTON, J., was, in the same case, of a different opinion; but Lord Chief Baron COMYNS has quoted Dyer's opinion, without any mark of disapprobation. Com. Dig. Abeyance, A. 1.

For the reasons then that have been stated, a donation by the crown for the use of a non-existing parish church, may well take effect by the common law, as a dedication to pious uses, and the crown would thereupon be deemed the patron of the future benefice, when brought into life. And after such a donation, it would not be competent for the crown to resume it, as its own will, or alien the property, without the same consent which is necessary for the alienation of other church property, viz., the consent of the ordinary and parson, if the church be full, or in a vacancy, of the ordinary alone.

And the same principles would govern the case before the court, if it were to be decided upon the mere footing of the common law. If the charter had been of a township in England, the grant of the glebe would have taken effect as a dedication to the parochial church of England to be established therein. Before such church were duly erected and consecrated, the fee of the glebe would remain in abeyance, or, at least, be beyond the power of the crown to alien, without the ordinary's consent. Upon the erection and consecration of such a church, and the regular induction of a parson,

such parson and his successors would, by operation of law, and without further act, have taken the inheritance *jure ecclesiæ*.

Let us now see how far these principles were applicable to New Hampshire, at the time of issuing of the charter of Pawlet. New Hampshire was
*333] originally erected into a royal *province, in the 31st year of Charles II., and from thence until the revolution, continued a royal province, under the immediate control and direction of the crown. By the first royal commission, granted in 31 Charles II., among other things, judicial powers, in all actions, were granted to the provincial governor and council, "so always that the form of proceedings in such cases, and the judgment thereupon to be given, be as consonant and agreeable to the laws and statutes of this our realm of England, as the present state and condition of our subjects inhabiting within the limits aforesaid (*i. e.*, of the province) and the circumstances of the place will admit." Independently, however, of such a provision, we take it to be a clear principle, that the common law in force at the emigration of our ancestors, is deemed the birth-right of the colonies, unless so far as it is inapplicable to their situation, or repugnant to their other rights and privileges. *A fortiori*, the principle applies to a royal province.

By the same commission or charter, the crown granted to the subjects of the province, "that liberty of conscience shall be allowed to all Protestants, and that such especially as shall be conformable to the rights of the Church of England shall be particularly countenanced and encouraged." By a subsequent commission of 15 Geo. II., the governor of the province, among other things, is authorized "to collate any person or persons to any churches, chapels or other ecclesiastical benefices, within our said province, as often as any shall happen to be void," and this authority was continued and confirmed in the same terms by royal commissions, in 1 Geo. III. and 6 Geo. III. By the provincial statute of 13 Ann. ch. 43, the respective towns in the province were authorized to choose, settle and maintain their ministers, and to levy taxes for this purpose, so always that no person who constantly and conscientiously attended public worship, according to another pursuasion, should be excused from taxes. And the respective towns were further authorized to build and repair meeting-houses, minister's houses and school-houses, and to provide and pay schoolmasters. This is the whole of the provincial and royal legislation upon the subject of religion.

Inasmuch as liberty of conscience was allowed, and *the Church
*334] of England was not exclusively established, the ecclesiastical rights to tithes, oblations and other dues had no legal existence in the province. Neither, upon the establishment of churches, was a consecration by the bishop, or a presentation of a parson to the ordinary, indispensable; for no bishopric existed within the province.

But the common law, so far as it respected the erection of churches of the Episcopal persuasion of England, the right to present or collate to such churches, and the corporate capacity of the parsons thereof to take in succession, seems to have been fully recognised and adopted. It was applicable to the situation of the province, was avowed in the royal grants and commissions, and explicitly referred to, in the appropriation of glebes, in almost all the charters of townships in the province. And it seems to be also clear, that it belonged to the crown exclusively, at its own pleasure, to erect the

church, in each town, that should be entitled to take the glebe, and upon such erection, to collate, through the governor, a parson to the benefice. The respective towns, in their corporate capacity, had no control over the glebe; but inasmuch as they were bound, by the provincial statute, to maintain public worship, and had, therefore, an interest to be eased of the public burden, by analogy to the common law, in relation to the personal property of the parish church, the glebe could not, before the erection of a church, be aliened by the crown, without their consent; nor, after the erection of a church and induction of a parson, could the glebe be aliened, without the joint consent of the crown as patron, the parson as *persona ecclesiæ*, and the parishioners of the church, as having a temporal as well as spiritual interest, and thereby, in effect, representing the ordinary.

But a mere voluntary society of Episcopalians, within a town, unauthorized by the crown, could no more entitle themselves, on account of their religious tenets, to the glebe, than any other society worshipping therein. The church entitled, must be a church recognised in law for this particular purpose. Whenever, therefore, within the province, previous to the revolution, an Episcopal church was duly erected by the crown, in any town, *the parsons thereof, regularly inducted, had a right to the glebe in perpetual succession. [*335 Where no such church was duly erected by the crown, the glebe remained as an *hæreditas jacens*, and the state, which succeeded to the rights of the crown, might, with the assent of the town, alien or incumber it; or might erect an Episcopal church therein, and collate, either directly, or through the vote of the town, indirectly, its parson, who would thereby become seised of the glebe *jure ecclesiæ*, and be a corporation capable of transmitting the inheritance.

Such, in our judgment, are the rights and privileges of the Episcopal churches of New Hampshire, and the legal principles applicable to the glebes reserved in the various townships of that state, previous to the revolution. And without an adoption of some of the common law, in the manner which I have suggested, it seems very difficult to give full effect to the royal grants and commissions, or to uphold that ecclesiastical policy which the crown had a right to patronize, and to which it so explicitly avowed its attachment.

It seems to be tacitly, if not openly, conceded, that before the revolution, no regular Episcopal church was established in Pawlet. By the revolution, the state of Vermont succeeded to all the rights of the crown as to the unappropriated as well as appropriated glebes.

It now, therefore, becomes material to survey the statutes which the state of Vermont has, from time to time, passed on this subject. By the statute of 26th of October 1787, the selectmen of the respective towns were authorized, during the then septennary (which expired in 1792), to take the care and inspection of the glebes, and to lease the same, for and during the same term; and further, to recover possession of the same, where they had been taken possession of by persons without title; but an exception is made in favor of ordained Episcopal ministers, who during their ministry, within the same term, were allowed to take the profits of the glebes, within their respective towns. The statute of 30th October 1794, granted to their respective towns the entire property of the glebes, therein situate, for the sole use and support of religious worship; and *authorized [*336

the selectmen of the towns to lease and recover possession of such glebes. This act was repealed by the statute of the 5th of November 1779. But by the statute of the 5th of November 1805, the glebes were again granted to the respective towns, for the use of the schools of such towns; and power was given to the selectmen to sue for possession of, and to lease the same.

By the operation of these statutes, and especially, of that of 1794, which, so far as it granted the glebes to the towns, could not afterwards be repealed by the legislature, so as to divest the right of the towns under the grant, the towns became respectively entitled to all the glebes situate therein, which had not been previously appropriated by the regular and legal erection of an Episcopal church, within the particular town; for in such case, the towns would legally represent all the parties in interest, viz., the state, which might be deemed the patron, and the parish. Without the authority of the state, however, they could not apply the lands to other uses than public worship; and in this respect, the statute of 1805 conferred a new right, which the towns might or might not exercise at their own pleasure.

Upon these principles, the plaintiffs are entitled to recover, unless the defendants show, not merely that, before the year 1794, there was a society of Episcopalians in Pawlet, regularly established according to the rules of that sect, but that such society was erected by the crown, or the state, as an Episcopal church (*i. e.*, the Church of England), established in the town of Pawlet. For unless it have such a legal existence, its parson cannot be entitled to the glebe reserved in the present charter.

The statement of facts is not, in this particular, very exact; but it may be inferred from it, that the Episcopal society or church was not established in Pawlet, previous to the year 1802. In what manner and by what authority it was then established, does not distinctly appear. As the title of the plaintiffs is, however, *primâ facie* good, and the title of the defendants is not shown to be sufficient, upon the principles which have been stated, the plaintiffs would seem entitled to judgment.

*337] *There is another view of the subject which, if any doubt hung over that which has been already suggested, would decide the cause in favor of the plaintiffs. And it is entitled to the more weight, because it seems, in analogous cases, to have received the approbation and sanction of the state courts of New Hampshire. In the various royal charters of townships in which shares have been reserved for public purposes (and they are numerous), it has been held, that the shares for the first settled minister and for the benefit of a school, were vested in the town in its corporate capacity; in the latter case, as a fee-simple absolute, in the former case, as a base fee, determinable upon the settlement of the first minister by the town.

The foundation of this construction is supposed to be, that the town is, by law, obliged to maintain public worship and public schools; and that, therefore, the legal title ought to pass to the town, which is considered as the real *cestui que use*. By analogy to this reasoning, the share for a glebe might be deemed to be vested in the town, for the use of an Episcopal church; and then, before any such church should be established, and the use executed in its parson, by the joint assent of the legislature and the town, the land might, at any time, be appropriated to other purposes. We do not

profess to lay any particular stress on this last consideration, because we are entirely satisfied to rest the decision upon the principles which have been before asserted.

On the whole, the opinion of the majority of the court is, that upon the special statement of facts by the parties, judgment ought to pass for the plaintiffs.

JOHNSON, J.—The difficulties in this case appear to me to arise from refining too much upon the legal principles relative to ecclesiastical property under the laws of England. I find no difficulty in getting a sufficient trustee to sustain the fee, until the uses shall arise.

It is not material, whether the corporation of Pawlet *consist of the proprietors or inhabitants. The grant certainly vests the legal [*338 interest in the proprietors; and it is, in nothing, inconsistent with this idea to admit that the corporate powers of the town of Pawlet are vested in the inhabitants. The proprietors may still well be held trustees, but the application of the trust may be subject to the will of the whole combined population.

I, therefore, construe this grant thus, we vest in you so much territory, by metes and bounds, in trust to divide the same into sixty-eight shares; to assign one share in fee to each of you, the grantees, two to the governor, one to the Church of England as by law established, &c. This certainly would be a sufficient conveyance to support the fee, for the purposes prescribed.

But the difficulty arises on the meaning of the words "Church of England as by law established." This was, unquestionably, meant to set apart a share of the land granted, for the use of that class of Christians known by the description of Episcopalians. But was it competent for any man, or any number of men, to enter upon this land, without any legal designation or organization identifying them, to come within the description of persons for whose use this reservation was made? I think not. Some act of the town of Pawlet, or of the legislature of the state, or at least of Episcopal jurisdiction, became necessary, to give form and consistency to the *cestui que use*, until such person or body became constituted and recognised. I see nothing to prevent the legislature itself from making an appropriation of this property. Their controlling power over the corporate body, denominated the town of Pawlet, certainly sanctioned such an act; and before the act passed in this case, there does not appear to have been in existence a person, or body of men, in which the use could have vested. I, therefore, concur in the decision of the court.

*Otis *v.* Watkins. (*a*)

Issue.—Embargo law.—Justification of seizure.

If the facts stated in a special plea do not amount, in law, to a justification, yet, if issue be joined thereon, and the facts be proved, as stated, it is error in the judge, to instruct the jury, that the facts so proved do not in law maintain the issue on the part of the defendant.[1]

If a collector justify the detention of a vessel, under the 11th section of the embargo law, of the 25th of April 1808, he need not show that his opinion was correct, nor that he used reasonable care and diligence in ascertaining the facts upon which his opinion was formed. It is sufficient, that he honestly entertained the opinion upon which he acted.[2]

Quære? Whether, under that act, the collector was bound to transmit to the president a statement of the facts upon which he formed his opinion, that the vessel intended to violate the embargo laws; and whether he was bound in law to use reasonable care and diligence in ascertaining the facts thus to be laid before the president?

Whether the collector had a right, under that act, to remove a vessel from one harbor to another, as well as to detain her?

Watkins *v.* Otis, 2 Pick. 88, affirmed.

Error to the Supreme Judicial Court of the commonwealth of Massachusetts, under the 25th section of the judiciary law of the United States (1 U. S. Stat. 85), in an action of trespass, by Watkins against Otis, a deputy-collector for the district of Barnstable, for taking, carrying away and destroying the plaintiff's schooner Friendship, and her cargo of cod-fish.

The defendant pleaded, that he was a deputy-collector for the district of Barnstable; that by the 11th section of the act of congress of the 25th of April 1808 (2 U. S. Stat. 501), it is enacted, "that the collectors of the customs be and they are hereby respectively authorized to detain any vessel ostensibly bound with a cargo to some other port of the United States, whenever, in their opinions, the intention is to violate or evade any of the provisions of the acts laying an embargo, until the decision of the president of the United States be had thereupon." That the schooner Friendship, with her cargo, was lying in the harbor of Provincetown, in the district of Barnstable, ostensibly bound to some other port in the United States, in the opinion of the collector, with an intent to violate or evade the provisions of the acts aforesaid; whereupon, the collector, by the defendant, his deputy, caused the said vessel and her cargo to be detained, and removed from the port and harbor of Provincetown, to the port and harbor of Barnstable, that she might be securely kept; and there also caused her to be detained, as it was lawful for him to do, so that the decision of the president of the United States might be had thereupon; and that the president, afterwards, on the 3d of January 1809, upon the report and representation of the said collector, approved and confirmed the detention; all which is the same taking, &c.

To this plea, there was a general replication and issue; upon the trial of which, a bill of exceptions was taken, which stated, that the defendant, in order to show that the collector had reasonable ground to believe that this vessel intended to violate or evade the embargo laws, *offered in evi-
*340] dence the deposition of an inspector of the customs, who testified, that

(*a*) March 10th, 1815. Absent, Todd, Justice.

[1] In Moore *v.* Houston, 3 S. & R. 175, Chief Justice Tilghman says, that the plaintiff "having joined issue, cannot prevent that from going to the jury, which tends to prove the issue on the part of the defendant." And see Howell *v.* McCoy, 3 Rawle 268; Stanley *v.* Southwood, 4 Phila. 291, 305.

[2] Otis *v.* Walter, 2 Wheat. 18.

he went on board the schooner, at Provincetown, which was wholly laden with fish in bulk, and a barrel of beef and a number of packages of small stores, and three or four barrels of water. That he supposed she was bound to sea, and gave information thereof, and of his suspicions, to the collector. That she had also a number of kegs of pickled oysters on board; and that he judged that the groceries were sufficient for the crew of such a vessel for thirty days, and that he had no doubt of her being bound to sea; which was the reason of his giving the information. Upon cross-examination, he said, he had never lived in the county of Barnstable, and did not know the course and manner of their trade and navigation.

It further appeared in evidence, that on the 19th of December 1808, written orders were given, by the collector, to one Andrew Garrett, to detain the schooner, then lying in Provincetown harbor, and bring her to the port of Barnstable, and there secure her in the best manner possible. That the distance from Provincetown to Barnstable is about thirty miles by water. That on the voyage, she accidentally ran on a point of land, and could not be gotten off, until she was frozen up in the ice, and there remained until March following, when she was gotten off, and brought up to the wharf, and her cargo unladen and safely stored. That about seventy quintals of cod-fish were damaged, but the residue was in good order. That when she was so detained, she had nine barrels of water on board, but no bread. That her sails were on shore.

That on the 24th of December 1808, the collector wrote to the secretary of the treasury, that he had detained the schooner Friendship, loaded with dry cod-fish, and evidently intended for a foreign port, as she had an unusual quantity of small stores on board, sufficient for such a voyage, and fully watered, that their plea was, that she was intended for a store ship, and a neighboring market, both of which it was sufficiently evident were without foundation. That on the 3d of January, the secretary answered, that the detention of the schooner was approved and confirmed by the president. That the collector had used due care and diligence in the preservation of the vessel and cargo. That on the 30th of January 1809, the secretary of the treasury wrote to the collector, authorizing him to release all vessels detained by him under the *said 11th section of the act aforesaid, on bond being given, in the manner and to the amount provided by the 2d section of the act of January 9th, 1809. That on the 15th of February 1809, the collector sent the following written notice to the plaintiff, Watkins, dated at the custom-house: [*341

"Sir:—I hereby request of you, as the owner of the schooner Friendship, of Provincetown, detained by order under the 11th section of the embargo law of the 25th of April 1808, at Barnstable, to give bond here, within three days after giving this notification, agreeable to the second section or the act to enforce the embargo, passed on the 9th ultimo. I am, sir, your humble servant, JOSEPH OTIS, Collector."

But that Watkins wholly refused to give such bond. That on the 21st of March 1808, the collector wrote to the comptroller of the treasury, stating that on the 24th of December, he had detained the schooner Friendship, under the embargo law, for loading with cod-fish, without a permit, which detention was approved and confirmed by the president. That on the pas-

sage of the act of the 9th of January 1809, he notified the owner, that if he would give bond agreeable to the second section of the same, he would give her up to him, which he utterly refused to do, or to unload his vessel, for more than a fortnight. That he wished to know, whether she ought not to be libelled. To this letter, the comptroller replied, referring the collector to the attorney for the district. That the vessel was afterwards libelled in the district court, for having taken her cargo on board, in the night, without a license, and without the inspection of the proper inspecting officers of the port. Upon trial, she was acquitted.

The plaintiff also produced a laborer, who stowed the fish on board the schooner, who testified, that the vessel "was destined to Boston, for a market," and that the vessel and cargo were much injured, in consequence of the detention. He also produced testimony, that it was usual for vessels going from Provincetown to take water enough on board to last them to Bos-
*342] ton, and for two *or three weeks, because the people did not like the Boston water. That it was usual, to take eight or ten barrrels on such a voyage. Whereupon, the judge who tried the cause (Chief Justice Parsons) charged the jury, "that the several matters and things so given in evidence by the defendant, Otis, did not in law maintain the issue on his part; and also, that it was the duty of the collector, as collector, to have used reasonable care in ascertaining the facts on which to form an opinion; and to transmit to the president a statement of those facts for his decision." The verdict and judgment being against the defendant, he brought his writ of error.

The case was submitted to this court, by *J. Law*, for the plaintiff in error, and by *J. Read*, of Massachusetts, for the defendant, upon written notes of argument.

J. Law, for the plaintiff in error.—The question for consideration by this court, on this appeal, arises on the bill of exceptions taken to the opinion and instruction of the judge before whom the trial was held in the state court. It divides itself into two branches. 1. Whether the several matters, given in evidence by Otis, and spread on the record, maintain the issue on his part? 2. Whether it was his duty to have used reasonable care in ascertaining the facts on which to form an opinion; and to transmit a statement of those facts to the president for his decision?

1. On the first point, it will be observed, that the issue joined is, that at the time of the detention the vessel was ostensibly bound to some other port of the United States, in the opinion of the collector, with an intent to violate or evade the provisions of the act of April 25th, 1808; that the vessel was removed from Provincetown to Barnstable, that she might be securely kept, until the decision of the president thereon; and that the president approved and confirmed the said detention.

*343] *Is there any evidence to show that the collector did not entertain an opinion, that the said vessel was ostensibly bound to some other port, in violation of the embargo? The information he received came from an agent of the government, Isaac Cooper, who was inspector of customs. He stated to the collector, not merely his suspicions, but his belief. He also stated, as the grounds of his belief, that the vessel was fully watered, and contained a sufficient quantity of groceries, stores and provisions for a

foreign voyage—information which is satisfactorily proved to have been correct, and which was sufficient to excite a just suspicion of the intention of the owners of the vessel. At any rate, these circumstances of suspicion were sufficiently strong to repel any implication of *mala fides* in the collector, in forming his opinion.

It is, however, contended, on the part of Watkins, that information, coming from such a source, is not to respected, because Cooper was unacquainted with the course of trade from Provincetown to Boston; and the quantity of water on board the schooner was only such as is generally taken in such voyages. The fact whether Cooper was acquainted or not with the course of trade, is immaterial. The only question is, did Otis believe he was competent to give correct information on the point? He certainly did think so; at any rate, there is no evidence to the contrary; and the circumstance of Cooper's being an inspector of the customs, would be alone sufficient to accredit his information.

But even admitting the fact, that the quantity of water on board the schooner is accounted for, no explanation is given of the quantity of groceries, small stores and provisions on board. Although it may be contended, that the water at Provincetown is better than that at Boston, it will not, I presume, be contended, that the groceries and small stores would be better and cheaper at the former place than at the latter.

The circumstance of the sails belonging to the vessel not being on board, at the time of the detention, can have no weight against the collector, because it was not to be supposed, he was to wait, until the vessel was on the very point of sailing, before he acted on his opinion.

*That the collector was justified in removing the vessel to Provincetown, that she might be safely kept; and afterwards in unloading her, when the owner refused to give bond, is settled by the decision of this court in the case of *Crowell and Hawes* v. *McFadon* (8 Cr. 94). "The landing and storing the cargo, whether to preserve it from injury, or to secure it from rescue, was a necessary consequence of the detention." The removal, therefore, of the vessel from Provincetown, which is at the very extremity of Cape Cod, to Barnstable, where the collector resided and had his office and his agents, was a necessary consequence of the detention, to guard against a rescue, and to save the expense of engaging an adequate guard to take care of the vessel. There is, in fact, no evidence to prove that such was not his real motive for causing the removal, and for unloading the vessel. [*344

2. The second branch of the judge's instruction and opinion is exceptionable in many respects. It implies, that reasonable care had not been used by the collector in ascertaining the facts, on which to form an opinion. He had sufficient evidence on which to form an honest opinion, and he was not bound to go beyond that evidence, if it was satisfactory to him.

This instruction of the judge also implies, that the collector is answerable for the correctness, or incorrectness, of his opinion. Such a position cannot be admitted. If public officers were to be answerable for error of judgment, few would be venturous enough to engage in so perilous a service; and it would be in vain to submit the performance of any duty to the exercise of a sound discretion. Such a doctrine would establish a new criterion of innocence and guilt; and judges would be engaged in measuring

the mental capacities of men. Yet such would be the consequence of punishing an officer who had discretionary powers, if the examination was not into the purity of his intention, but into the correctness of the judgment which influenced his conduct.

But the principles of law and the obvious import of the embargo act, refute such a doctrine. It is not the injury done to an individual, or error of judgment, but malice alone, that is the *gist* of prosecutions against a *345] *public officer, at common law, for malfeasance in office. Gross and flagrant misconduct may justify a presumption of malice; but even such misconduct, if it is proved to be the result of mental imbecility or good-intentioned ignorance, is pardonable. In the present case, a collector, exercising the odious and unpopular duty imposed upon him by the act, ought surely to receive similar indulgence; and the words of the act, in authorizing him to detain vessels, according to his opinion of their destination, give him this indulgence. In acting over an extensive district, he is not to be questioned, whether he could have got better information, or ought to have acted on the information he received, if he acted honestly and conscientiously.

But this point is put at rest by the opinion of the court in the case of *Crowell and Hawes* v. *McFadon*, 8 Cr. 94. It was there decided, that the law placed a confidence in the opinion of the officer, and he is bound to act according to his opinion; and when he honestly acts, as he must do, in the execution of his duty, he cannot be punished for it. The instruction, therefore, of the judge was erroneous; as it was calculated to mislead the jury, and to establish another test of his conduct than the honesty of his opinion.

The last branch of the instruction excepted to is, that it was the duty of the collector, to transmit to the president, for his decision, a statement of the facts which had been thus ascertained with care. In this case, it is contended by Otis, that a sufficient statement was made to the president for his decision; although the instruction implies, that the judge was of a contrary opinion. In his letter to Mr. Gallatin, of the 24th December 1808, he states, as the ground of his opinion, that the schooner had an unusual quantity of small stores on board, sufficient for a foreign voyage, and was fully watered. This statement the president thought a sufficient foundation for his decision; and accordingly, approved of the detention.

It has already been shown, that the facts stated by the collector, as the foundation of his opinion, were true. Admitting, however, that the statement was incorrect, or the facts capable of explanation, was it not the duty *346] *of Watkins, to address the president concerning the detention of his vessel, to correct any mis-statements, and explain any dubious facts? Did he do so, and can he now, after such supine or sullen negligence on his part, complain of the conduct of the collector, who stated fairly what he heard, or of the conduct of the president, who decided upon it? It is his fault only, if he made no defence, and took no steps to recover his vessel. The same sullenness of conduct induced him to refuse to give bond for the release of his vessel, when such a proposition was made to him. The case of *Bacon* v. *Otis* has nothing to do with this case.

J. Read, of Massachusetts, for the defendant in error.—It is understood,

that the supreme court of the United States has no authority, under the law which authorizes this appeal, to notice any errors except such as appear on the face of the record, and immediately respect the the questions of validity of construction of the constitution, treaties, statutes, commissions or authorities in dispute. This being the case, it is presumed, the principal question for the decision of the court, in the cause now under consideration, is, was the charge given by Chief Justice PARSONS, in the supreme court of Massachusetts, on the final trial of the cause now under consideration, in conformity with a correct and valid construction of the laws of the United States?

He charged the jury, "that it was the duty of the collector, as collector, to have used reasonable care in ascertaining the facts on which to form an opinion, and to transmit to the president a statement of those facts, for his decision."

Collectors of customs were authorized by the 11th section of the statute of April 1808, to detain any vessel, ostensibly bound, with a cargo, to some other port of the United States, whenever, in their opinion, the intention is to violate or evade any of the provisions of the acts laying an embargo, until the decision of the president of the United States be had thereupon.

*The collector of customs was bound to have some rational ground for his opinion, otherwise, he might seize all vessels, under any circumstances, and it would always be a complete justification, on his part, merely to say that, in his opinion, the vessels seized were ostensibly bound, with a cargo, to some other port of the United States, and were about to violate or evade some of the provisions of the embargo laws. Such a defence, it is apprehended, would not amount, in all cases, to a justification. The power and authority of a collector is confined to a vessel ostensibly bound, &c. The collector should have had rational ground to induce him to believe that the vessel was ostensibly bound, &c.; that there was an intention of violating the embargo laws. In the case of *Otis* v. *Bacon*, 7 Cranch 589, this court determined, that Otis detained the vessel of Bacon unlawfully, because, in their opinion, there was no rational ground of suspicion of an intended violation of the embargo laws; and the court, in that case, went into an examination of the facts, in order to determine whether Otis had rational ground of suspicion. The result of their investigation was, in their own words, "all rational grounds of suspicion of an intended violation of the embargo laws is then done away, &c." [*347

If it then be admitted, that a collector was bound, when acting under the authority of the embargo laws, and especially of the 11th section of the law of 25th April 1808, to have rational ground for his opinions and suspicions; it is confidently believed, it was the duty of such collector to have used those means to ascertain facts, without which there can be no rational grounds of belief. "It was the duty of the collector, as collector, to have used reasonable care in ascertaining the facts on which to form an opinion," as directed by the judge in the court of Massachussets. It was his duty, as an honest man; as an officer in whom the government had placed the highest confidence; on whose suspicions depended the property of hundreds.

It is also believed, that it was the duty of the collector, not only to have used reasonable care in ascertaining the facts on which to form an

opinion, but to transmit to the president a statement of those facts, for his decision.

*348] *Collectors were intrusted with great and unprecedented power, under the embargo laws. They were under the highest obligations to execute the trust reposed in them honestly and faithfully. The power of collectors consisted principally in the influence their statement or representation must necessarily have on the mind of the president. Collectors were authorized, in certain events, to seize and detain; but could detain only until the will of the president could be known. His approbation was requisite to a continuation of the detention. The president was, by law, constituted the sole judge whether a vessel seized and detained by a collector should be restored or not. On what evidence was the opinion of the president in such cases to be founded? The opinion of the president must, from the necessity of the case, be founded almost universally on the statement or representation of the collector. The collector, under the embargo law, after he had seized a vessel, became a witness—and sole witness in the case; and a witness not in a situation to be cross-examined. On the statement or representation of the collector, the president founded his opinion. Then, it follows, irresistibly, that it was the bounden duty of a collector, so situated, to have transmitted to the president a statement of facts in the case, on which the opinion of the president was asked. If the collector was bound to represent the facts in the case to the president, he must have been bound to have used reasonable care in ascertaining those facts, not only as the foundation of his own opinions or suspicions, but also as the foundation upon which the ultimate decision of the president must rest.

If the opinions of the judge, in the court below, were considered unsound, and were not established, it is apprehended, the greatest injustice might be practised; and as no case can readily be imagined, where the conduct of a collector could have been more reprehensible, than in the case now under consideration, we beg the court again to advert to some facts in the case now under consideration. From the decision of the district court, when the schooner Friendship, &c., was libelled and tried before that court (here, perhaps, I ought again to note, that after Otis seized Watkins's vessel, &c., and was directed, on certain conditions, to deliver her up, and Watkins refused to accept her, Otis libelled her and pretended that

*349] *he had seized her for loading without a permit), the judge of that court certified, that at the time Otis first seized the vessel (December 24th, 1808), Watkins was loading his vessel in bulk, in the day-time, with dried cod-fish, avowedly for the Boston market. It also appears, that some water and small stores were carried on board, not, however, so much as was usually put on board to go to Boston. Otis, it seems, obtained the information he possessed, from a stranger to the place and to their course of business. If he knew not what quantity of water and small stores were usual, he could not know what was unusual. He immediately sent a number of men to seize and detain the vessel, and had he done no more, the injury would probably have been trifling. But he ordered them not only to seize and detain, but to bring away and remove the schooner from Provincetown, one of the safest and best harbors in the world, to Barnstable, a distance of more than thirty miles. In attempting to obey his commands, the vessel was run aground and much injured, and the cargo nearly ruined. He after-

wards got the vessel to the wharf and unloaded it. What statement did he make to the president? What information did he give? Did he say, he had removed the vessel thirty miles? Did he say, he had run the vessel aground and ruined the cargo? No! He studiously avoided saying one word on the subject. He stated to the president, that the vessel was evidently intended for a foreign port, for, said he, she had an unusual quantity of small stores on board; sufficient for such a voyage; and was fully watered. He also stated, that the plea of Watkins, that his vessel was intended for a store ship, and a neighboring market, was without foundation; did he represent things truly?

Afterwards, on the 30th day of January 1809, Otis was directed by the secretary of the treasury to give up the vessel and cargo to Watkins. Here the affair would have ended, but the vessel and cargo had been ruined, by running aground, and Watkins refused, under all the circumstances, to accept her; Otis then wrote to the comptroller of the treasury, on the 21st of March, a few days after he had unladen the vessel, and stated, that he had detained the vessel on the 24th day of December (being the same day on which he originally seized and removed the said vessel), because she was loading, without a *permit. He wrote to the president, that [*350 he had seized and detained her, because, in his opinion, she was intended for a foreign port. Thus, it is evident, that Otis made one statement to the president, and a very different statement to the comptroller. Both statements could not be true; and he carefully avoided stating to either, the removal of the vessel and the consequent ruin of the property.

Our attention is called to a case decided at the last term of this court, *Crowell* v. *McFadon*, 8 Cranch 94. The court observed, "the law places a confidence in the opinion of the officer, and he is bound to act according to his opinion, and when he honestly exercises it, as he must do, in the execution of his duty, he cannot be punished for it." It is believed, the above opinion does not change the principle laid down in the case of *Bacon* v. *Otis* nor is it believed to be against the charge of the judge, in the court below, in the present cause.

It is not contended, that an officer is bound to be right and correct in his opinions and suspicions; but is not an officer bound to examine? Is he not bound to inquire? Is he not bound to have rational ground for his opinions? Was not a collector, in the execution of the embargo laws, bound to use reasonable care in ascertaining the facts on which his own opinion and that of the president must depend? If, in the discharge of so important a trust, he does not use reasonable care in ascertaining facts, can he be said honestly to exercise his opinion? We think not.

The original action against the collector is for taking, carrying away and destroying the vessel and cargo, &c., of Watkins. If the collector should be able to justify himself, under the 11th section of the embargo act of April 25th, in seizing and detaining; still, he has no justification in removing her, with her cargo, from a safe and secure port to a distant one, running her on shore and destroying the cargo, and unlading her. It is not believed, that the president himself had, under that act, any authority to remove the vessel and cargo, as it was removed, much less, had the collector any such authority. But the president gave no order for such removal, nor [*351 *did he approve or confirm such removal, for he was kept ignorant

of it. The question then rests on the power of the collector, and is too plain to justify the detention of the court, in attempting to elucidate it. An authority to detain is not an authority to remove or unload, especially, if there be no necessity so to do, for security and preservation. Congress thought proper, in this section, to vest collectors with power to detain vessels, under certain circumstances, until the decision of the president could be had, but they gave them no power to remove or unload; and the court will not, by construction, give them power which congress have withheld.

While acting fairly and with good faith within the limits of the power thus delegated to them, the collectors are to be protected, but when they transcend those limits, they must be answerable for the consequences. The collector, in the present case, must, of course, be answerable for all the damages sustained by Watkins, in consequence of the removal and unlading and destroying his vessel and cargo; by which he has been deprived of the earnings of many years devoted to industry and economy, and it is believed, he has been so deprived wantonly, and unjustly, by the gross misconduct of Otis, under color of authority vested in him as deputy-collector of customs: the charge and direction of the judge, therefore, to the jury, in the court below, on the facts disclosed, was correct.

It is urged, on the part of Otis, that admitting that Otis's statement to the president was incorrect, it was the duty of Watkins to have addressed the president on the subject, to correct any mis-statement of facts, &c.; and because he neglected it, he is accused of sullen silence. 1. It is probable, the patient acquiescence (not sullen silence) of Watkins was owing to his ignorance of the provisions and details of the embargo laws. 2. If he had knowledge of the subject, ought he to presume that Otis would neglect to state all the facts to the president? And besides, he had no opportunity; Otis wrote to the president on the 24th of December, and the president approved the detention on the 3d of January; ten days after. It is urged,
*352] Otis lived in Barnstable, and it was, *therefore, proper to remove the vessel, to save expense, that he might have her under his own eye, &c. If it were necessary to rebut the statement, it is a fact, that the town of Barnstable is twelve miles long, and Otis did not live or keep his office within four miles of the harbor.

It is also contended, that the case of *Crowell and Hawes* v. *McFadon*, does not support the point contended for in favor of Otis in the present case. In the case of McFadon, the agent of McFadon consented to the landing and storing the cargo; but on the supposition that no such consent had been given, "the court, in that case, observe, that the landing and storing the cargo, whether to preserve it from injury or secure it from rescue, was a necessary consequence of the detention. Has Otis, in the present case, produced any evidence to show that it was necessary to remove the vessel of Watkins, to preserve or secure the property? In the case above-mentioned of *Crowell and Hawes* v. *McFadon*, the vessel of McFadon was not removed from the harbor of Hyannis, where she was first detained; but was merely brought to a landing-place or wharf, about one-half mile from the place where first detained.

In the case now before the court, the vessel of Watkins was removed from Provincetown to Barnstable, a distance more than thirty miles. The harbor of Provincetown is one of the safest in the world; that of Barn-

stable less secure. By the removal and running aground, the vessel and cargo of Watkins were principally lost. If necessary to unlade and store the cargo, it might have been better and easier done at Provincetown than at Barnstable.

It is confidently believed, this court, will not, by construction, extend the authority of collectors under the embargo laws, to distant removals. No removal will be permitted, unless absolutely necessary to preserve or secure the property. Otis has not produced a tittle of evidence to show that any such necessity existed. On the other hand, it has been abundantly proved to have been unnecessary and ruinous.

*March 10th, 1815. (Absent, Todd, J.) LIVINGSTON, J., delivered the opinion of the court, as follows :—This is an action of trespass, [*353 brought in the supreme judicial court of the commonwealth of Massachusetts, for taking, carrying away and destroying a certain schooner called the Friendship, with her cargo, belonging to the plaintiff below.

The declaration is in common form. The defendant pleaded, that as deputy-collector for the district of Barnstable, he detained and removed from the port and harbor of Provincetown, to the port and harbor of Barnstable, the said vessel and cargo, that they might be securely kept ; the said schooner and cargo, at the time of such detention, lying in the said harbor of Provincetown, within the district aforesaid, ostensibly bound to some other port of the United States, with an intent, in the opinion of the defendant, to violate or evade the provisions of the embargo laws. He further pleaded, that he caused the said vessel to be detained, so that the decision of the president of the United States might be had thereon, who, afterwards, upon his report and representation, did approve and confirm the said detention. The plaintiff replies, that the defendant committed the trespass of his own wrong, and without any such cause, &c. Issue being joined thereon.

On a bill of exceptions taken to the charge of the court, the following facts appear to have been given in evidence : That the schooner in question, in the month of December 1808, was lying at Provincetown, wholly loaded with cod-fish. She had also a barrel of beef, a number of small stores and groceries, with three or four barrels of water, and a number of kegs of pickled lobsters. That an inspector of the customs, seeing the Friendship in this situation, and judging that the groceries were sufficient for the crew of such a vessel for thirty days, and having no doubt of her being bound to sea, gave information of such his suspicions, to the collector, who gave a written order to one Ganett, to detain *and to bring her into the port [*354 of Barnstable, and there secure her in the best manner possible. That Ganett proceeded to Provincetown, with about thirty men, and removed the said vessel to Barnstable, about ten leagues, by water ; but when attempting to come up to a wharf, she accidentally ran on to a point of land which projected into the water, and there stuck fast. That she could not be gotten off, during that tide, which soon left her ; and the weather was very cold, and the harbor was frozen up for a long time, so that the schooner could not be removed. That the defendant gave notice, by letter, to the secretary of the treasury of the United States, of the detention of said vessel, stating, at the same time, his reasons for believing that " she was evidently intended

for a foreign port;" which detention was approved of and confirmed by the president. That, as soon as the weather would permit, which was in the month of March following, the defendant caused the said schooner to be brought to a wharf and unloaded, and secured the cargo. That about 60 or 70 quintals of fish were damaged, and the rest in good order. There was, also, evidence, on the part of the plaintiff, to prove that the Friendship was actually bound to Boston, and the extent of the injury which his property had sustained.

The court charged the jury that the several matters and things so given in evidence by the defendant, "did not, in law, maintain the issue aforesaid on his part; and also, that it was the duty of the collector, as collector, to have used reasonable care in ascertaining the facts on which to form an opinion, and to transmit to the president a statement of those facts, for his decision." On an exception to the charge, the cause now comes before us, it having been removed into this court under the 25th section of the judiciary act; and whether it were correct or not, is the question which is now to be decided.

This seizure was made under the 11th section of the act of the 25th of April 1808 (2 U. S. Stat. 501), which provides, "that the collectors of the customs be and they are hereby respectively authorized to detain any vessel, ostensibly bound, with a cargo, to some other port of the United States, *355] whenever, in their opinions, the *intention is to violate or evade any of the provisions of the acts laying an embargo, until the decision of the president of the United States be had thereupon."

The issue tendered by the defendant, and on which the parties went to trial, was, whether the vessel and cargo were detained, because, in the opinion of the defendant, she intended, although ostensibly bound to a port in the United States, to violate or evade the provisions of the embargo laws? and whether the vessel was removed to Barnstable, that she might be securely kept until the decision of the president was known?

If there were any evidence to prove this issue, it should have been left to the jury to draw their own conclusions. If the defendant had taken upon himself to say, that the vessel did intend to violate the embargo laws, and that such removal was absolutely necessary for her secure detention, such charge would have been less exceptionable; but that it was the opinion of the collector, that such violation was in contemplation, and that such removal was for the purpose of securing the vessel, which were the facts in issue, might very well have been inferred by the jury, from the evidence before them. Indeed, it would have been difficult for them to have come to a different conclusion; for the collector, from the information which he received, could scarcely fail to form the opinion he did; and there was no evidence whatever, to induce them to believe, that she could have been removed to Barnstable, considering the care which was taken of her, during her removal, and after her arrival there, for any other purpose but for that alleged in the plea. In this particular, then, it is the opinion of a majority of the court, that the charge was erroneous.

The charge is deemed incorrect in another respect. The jury are told, that it was the collector's duty to have used reasonable care in ascertaining the facts on which to form an opinion. This instruction implies that the collector is liable, if he form an incorrect opinion, or if, in the opinion of

the jury, it shall have been made unadvisedly, or without reasonable care and diligence. But the law exposes *his conduct to no such scrutiny. If it did, no public officer would be hardy enough to act under it. [*356 If the jury believed, that he honestly entertained the opinion under which he acted, although they might think it incorrect, and formed hastily or without sufficient grounds, he would be entitled to their protection. Such was the opinion of this court in the case of *Crowell and Hawes* v. *McFadon*, decided at the last term. This does not preclude proof, on the part of the plaintiffs, showing malice or other circumstances which may impeach the integrity of the transaction. The jury, then, were misled, when their attention was drawn from the fact, whether the defendant really entertained such opinion, and were directed to inquire into the reasonable care with which it was formed, which left them at liberty to find a verdict against the defendant, however honestly and fairly he may have acted.

It is the opinion of the court, that the judgment of the supreme judicial court of Massachusetts must, for the reasons assigned, be reversed, and the cause be remanded for further proceedings.

Marshall, Ch. J., after stating the facts of the case, delivered his separate opinion, as follows :—As this court can notice no other error than such as may be founded on a misconstruction of the act of congress under which the defendant justified the taking and carrying away, charged in the declaration, the charge of the judge can be considered so far only as it respects that act.

The section to which the plea refers is in these words : "Be it enacted," &c. In construing this law, it has already been decided in this court, that the collector is not liable for the detention of a vessel "ostensibly bound, with a cargo, to some other port of the United States, whenever, in his opinion, the intention is to violate or evade any of the provisions of the acts laying an embargo, until the decision of the president of the United States be had thereon." For the correctness of this opinion, he is not responsible. If, in truth, he has formed it, his duty *obliges him to act upon it ; and when the law affords him no other guide than his [*357 own judgment, and declares that judgment to be conclusive in the case, it must constitute his protection, although it be erroneous. The legislature did not intend to expose the collector to the hazard of being obliged to show that he had probable cause for the opinion he had formed. If, in reality, he had formed it, the law justifies him for acting upon it. If it can be proved, either from the gross oppression of the case, or from other proper testimony, that the collector did not, in fact, entertain the opinion under which he professed to act, some doubt may be entertained of his being justified by the law ; but if the opinion avowed was real, though mistaken, a detention, under that opinion, is lawful.

But the act of congress authorizes only a detention of the vessel, not its removal. The collector did remove the vessel from one harbor into another, a distance of about thirty miles by water, and in this removal, the injury was sustained. As an independent act, this proceeding is not justified by the law. It was the duty of the collector, to detain the vessel ; and all acts which were necessary, as means to the end, were lawful ; but unless this

removal was necessary for the purpose of detention, it is not protected by the law.

The charge of the judge will now be examined. He instructed the jury, "that the several matters and things so given in evidence by the said William Otis, did not in law maintain the issue on his part." If this instruction could be understood as conveying to the jury an opinion, that Otis had not justified the detention of the vessel, the court would feel no hesitation in pronouncing it erroneous. But it was necessary for Otis to justify the removal, as well as the detention, and he could only justify the removal, by showing that it was necessary to a secure detention. Had he offered any testimony whatever to this point, it might have been incumbent on the judge to submit that testimony to the jury; but he has offered no testimony whatever to it. This court, therefore, cannot say, that the judge of the state court has erred, in saying that the matters and things *given in *358] evidence by the said William Otis, did not, in law, support his plea. Certainly, they did not make out a justification, under the act of congress.

The judge further instructed the jury, "that it was the duty of the collector, as collector, to have used reasonable care in ascertaining the facts on which to form an opinion, and to transmit to the president a statement of those facts, for his decision." The act authorizes the collector to detain a vessel, on his own mere suspicion, "until the decision of the president of the United States be had thereupon."

On what is the decision of the president to be had? Clearly, on the further detention of the vessel, and on the future proceedings of the collector respecting her. Whenever the president acts, he is expected to act upon information; and from whom, in this instance, is his information to be derived? Unquestionably, from the collector. The law does not, indeed, say, in terms, that the collector "shall take reasonable care in ascertaining the facts," or that he shall afterwards communicate those facts correctly to the president; and if this be not a fair and necessary construction of the act, the judge has misconstrued the law, and his judgment ought to be reversed. But it seems to be an inference which must be drawn from the words of the law. It follows, necessarily, from the duties of forming an opinion and of communicating that opinion to the president for his decision in the case, that reasonable care ought to be used in collecting the facts to be stated to the president, and that the statement ought to be made.

I cannot say that the court of Massachusetts has erred, in its construction of the act of congress under which the defendant justifies the trespass alleged in the declaration.

Judgment reversed.

*The Brig Alerta and Cargo, Bosquet, Claimant, *v.* Blas Moran, Libellant. (*a*)

Restoration of neutral property.

The district courts of the United States (being neutral) have jurisdiction to restore to the original Spanish owner (in amity with the United States), his property captured by a French vessel, whose force has been increased in the United States, if the prize be brought *infra præsidia.*[1]

This was an appeal from the sentence of the District Court for the district of New Orleans (which has the jurisdiction also of a circuit court). The facts of the case were stated by Washington, J., in delivering the opinion of the court, as follows :

This is the case of a libel filed in the district court of New Orleans, by Blas Moran, a subject of the king of Spain, and a native and resident of the island of Cuba, setting forth, that he is the owner of the brig Alerta and cargo, consisting of 170 slaves, which, on a voyage from the coast of Africa to the Havana, was, some time in the month of June 1810, when within a few leagues of Havana, captured on the high seas by the L'Epine, bearing French colors ; that a prize-master was put on board the Alerta, and seventeen of the slaves taken out, after which, the prize was ordered to steer for the Balize, and was finally brought to the port of New Orleans, with the remainder of her cargo, consisting of 153 slaves. The libel alleges that the L'Epine was not duly commissioned to capture the property of Spanish subjects, or, if so commissioned, that she was armed and equipped for war in the port of New Orleans, and manned by sundry American citizens and inhabitants of the territory of New Orleans, contrary to the law of nations. The prayer of the libel is for restitution and damages.

The claim of the prize-master admits the capture of the Alerta, as lawful prize of war ; and asserts, that the L'Epine, at the time of the capture, was and still is legally authorized to capture all vessels and their cargoes belonging to the subjects of Spain, as enemies of France. He further states, that after the capture, he was compelled to enter the port of New Orleans, by stress of weather, *want of provisions, and the inability [*360
of the Alerta to keep the sea, and prays to be dismissed.

The evidence in the cause establishes the following facts : That some time in April 1810, this privateer, commanded by Captain Batigne, and bearing a commission from the French government, to make prizes on the high seas, entered the port of New Orleans. The captain had with him a letter of instructions from his owner, directing him to deposit what money he might take as prize, in the Bank of New Orleans ; to put into one of the ports, as being in distress, and in case he should hear of the capture of Guadaloupe, he was to renew his crew, for the purpose of conveying his prizes to France. Some time in the course of the succeeding month, Batigne presented two petitions to the collector of the port of New Orleans, stating that the L'Epine had been compelled by stress of weather to put into that port, and that he had necessarily incurred expenses for refitting

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(*a*) March 10th, 1815. Absent, Todd, Justice.

[1] See La Armistad de Rues, 5 Wheat. 385 ; The Santissima Trinidad, 7 Id. 284 ; The Gran Para, Id. 471 ; The Santa Maria, Id. 490 ; Stoughton *v.* Taylor, 2 Paine 653 ; The Nancy, Bee 73.

and victualling the privateer, and for defending himself against a criminal prosecution for piracy, to an amount exceeding $5000, and praying for permission to enter and sell such part of his cargo, as would enable him to discharge that sum. He also applied to the collector, about the same time, for permission to purchase provisions for his crew, amounting to thirty persons, on his intended voyage to France, and intimated, that he should take with him about ten passengers, if permitted to do so; but this permission being refused, he professed to relinquish his intention of taking passengers on board.

Having obtained permission to purchase provisions, and to dispose of a part of his cargo, it appears, that he paid off his crew, and sailed from New Orleans, soon afterwards, with a crew of from fifty to sixty men, composed partly of persons obtained at New Orleans, and partly of those who had entered that port with him. With this force on board, he went to sea, and soon afterwards fell in with the Alerta, bound from Africa to the Havana, which, together with her cargo, consisting of 170 slaves, he captured as prize of war, put a prize-master on board, and ordered her to steer towards the Balize. On her passage, the Alerta suffered very considerably in a gale; and her crew, together with the slaves on board, were
*361] much distressed for want of provisions, when she was, *at the request of Captain Batigne, visited and relieved by Captain Allen, and conducted safely to New Orleans, where he libelled the vessel and cargo for salvage.

The court below, upon the libel of the Spanish owners, decreed restitution to the libellant of the ship and the 154 slaves left on board of her by the privateer, subject to all expenses for the support of the negroes, and such salvage as should be decreed by the court, together with costs of suit, and such damages as the court should thereafter decree.

J. Woodward, for the appellant, contended for the following points:— 1. That the authority to capture is complete, and the capture in all respects legal and operative. 2. That it does not appear that the equipment of the L'Epine was in violation of any law of the United States, or in such manner as to affect the prize in question. 3. That there is error in the decree of the court below, in decreeing restoration to the libellant, Blas Moran. 4. That should it be the opinion of this court, that the Alerta and cargo are not prize of war, the restoration should be subject to a salvage to the captors; and submitted the case to the court, upon the following written argument.

In this case, the appellant will not controvert the jurisdiction of the court to inquire as to the commission or authority under which the privateer acted, but will content himself with showing that, for all the purposes of this case, the commission is regular. There are no appearances which justify a presumption of fraud, on the face of the commission. The court will inspect it. The district court agrees, that if the case stood on this point alone,
*362] it would be left to the foreign tribunal. The official signatures are proven. The commission being *thus established, this court will not go into a question of regularity, which may or may not be material, according to the local usage in the French ports, as to issuing or using those commissions.

It appears, by the captain's petition to the collector, which is sworn to, that he, the captain of the L'Epine, was tried at New Orleans, on this transaction, as a pirate, and I think, the presumption must be, that he was acquitted. The validity of his commission must have been passed upon, on this trial, for if he acted without commission, he was a pirate. He cannot be looked upon as a pirate, because he has acted openly, under the authority of, at least, a regularly-executed commission, and in full communion with the consul of his own nation, at New Orleans. If not a pirate, he was a legal captor so far as respects the commission.

But it is said, that the equipment of the L'Epine, by force of which she made the capture in question, was contrary to the laws of the United States, and that, therefore, our courts have a right to restore the prize. The inference of law may be true, but the fact is not established. Indeed, it might not be indecorous to suppose, from a comparison of the testimony with the result in the court below, that, by possibility, clamor or prejudice, which too often insensibly intervene in such cases, had not been without their effect. The acting consul at New Orleans swears, that the additional number of men went on board as passengers, that no money was paid to them, and that, if they were to have formed an augmentation of the crew, he must have co-operated. The circumstances corroborate this fact: they were foreigners; they were emigrants. It does not appear, in any instance, that a person was taken on board as an addition to the crew. There might have been a difference between the number reported, and the number on board, but it is also true, that there were some secreted on board, unknown to the captain, until he got to sea. This is not an unusual case, with respect to such vessels. But the testimony shows the conduct of the captain to have been honorable on this point. If, after leaving the jurisdiction of the United States, any of those Frenchmen had entered into the service, as foreigners, this is a crime personal to themselves, and which cannot affect the privateer or her prize, unless by the captain's original procurement, he knowing them to be American citizens. Would the evidence *which [*363 the court will, of course, read, be sufficient to establish the penalties under the act of congress? If not, it will not be sufficient to establish the forfeiture of vessel and cargo, as against the captors, whose possession I consider firm under the capture. The whole conduct of the captain has been in open day, and under the express view of the collector. It must be presumed fair.

But it is said, that the last entrance into the port of New Orleans was not in good faith. It is said, that by the letter of instructions, &c., the L'Epine had an original intent to go into New Orleans, to deposit cash in the bank there. This intent was contingent and remote, and it does not appear, that the contingency of getting cash had happened. But the original intent is immaterial, provided the distress were the true and immediate cause. I need not refer the court to authorities, under the navigation laws of England, to decide this point, but if desired, they can be produced. This intent might have been effected, without a violation of our laws, as the money might have been sent in, without the vessel. But this charge of original intent is contradicted by the fact, as the L'Epine passed, frequently, with a fair wind, when she might have entered, and did not, but kept at broad

capturing distance, 80 miles from the Balize, although there were no enemy ships to prevent her entering the port.

If the court should be of opinion, contrary to the crude reasoning now submitted, that the Alerta and cargo ought of right to be restored, then it appears to me, that the captors are entitled to salvage, and not Mr. Allen, the pilot, as a condition precedent to the restoration. The deposition of Allen himself will show, that when he, for the first time, boarded the Alerta, she was within a day of Barrataria, had weathered the storm of the 26th, was riding in a calm sea, at anchor, twelve feet water, and the crew amusing themselves in catching sea birds, and supplying themselves by salting them, of which they had several barrels. She had plenty of provisions at that time, to carry her to Barrataria, and Allen states, that she could have gotten there, but had a storm happened, he should not have liked to have risked himself in her. But as to the L'Epine, she overtook the Alerta, in actual distress, after she had been recently cast on shore and greatly injured, with
*364] but half a barrel of bread, half a barrel of pork, *for 150 slaves, and twelve other persons, and indeed, the L'Epine, was visited by Mr. Martinez, from the Alerta, on account of this distress. The testimony shows that she could not have reached a harbor, but for the aid from the L'Epine. Then, unless the act of bringing in the Alerta were piratical, the L'Epine acted as humanely and as beneficially to the owners, in bringing in the Alerta, as in any other case of salvage.

There was no argument on the part of the appelleee.

March 10th, 1815. (Absent, Todd, J.) Washington, J., delivered the opinion of the court, as follows :—The only question for the consideration of this court is, whether the court below had jurisdiction of this cause, for the purpose of restoring the property to the libellant? The jurisdiction is asserted upon two grounds. 1. That the force of the privateer, by means whereof this capture was made, had been increased at New Orleans, contrary to the laws and in violation of the neutrality of the United States. 2. That the commission of this privateer had expired, before the capture was made.

As this court is satisfied with the sentence of the court below, upon the first ground of jurisdiction, the opinion will be confined to that point. The general rule is undeniable, that the trial of captures, made on the high seas, *jure belli*, by a duly-commissioned vessel of war, whether from an enemy or a neutral, belongs exclusively to the courts of that nation to which the captor belongs. To this rule there are exceptions, which are as firmly established as the rule itself. If the capture be made within the territorial limits of a neutral country, into which the prize is brought, or by a privateer which had been illegally equipped in such neutral country, the prize courts of such neutral country not only possess the power, but it is their duty to restore the property, so illegally captured, to the owner. This is necessary to the vindication of their own neutrality.

*365] *A neutral nation may, if so disposed, without a breach of her neutral character, grant permission to both belligerents, to equip their vessels of war within her territory. But without such permission, the subjects of such belligerent powers have no right to equip vessels of war, or to increase or augment their force, either with arms or with men, within the

territory of such neutral nation. Such unauthorized acts violate her sovereignty, and her rights as a neutral. All captures made by means of such equipments are illegal, in relation to such nation, and it is competent to her courts to punish the offenders, and in case the prizes taken by her are brought *infra præsidia*, to order them to be restored.

These principles are believed to be fully warranted by the general law of nations, by the decisions of the courts of this country, and by the laws of the United States. By the act of June 1794, the enlisting, within the territory of the United States, persons to serve as soldiers and marines on board of any vessel of war or privateer, in the service of any foreign state, with the exception of the subjects of such foreign state, transiently within the United States; the fitting out and arming any vessel in the service of a foreign prince or state, at war with any other nation, which is at peace with the United States; and the increasing or augmenting the force of any armed vessel of war, in such foreign service, by adding to the number of her guns, and the like; are declared to be offenses against the United States, and are punishable by fine and imprisonment; and the 7th section of the law provides for the detention of all such vessels as have been so fitted out, or as have so increased or augmented their force, together with such prizes as they may have made, in order to the execution of the prohibitions and penalties prescribed by that act, and to the restoring of such prizes, in cases where restoration has been adjudged.

Thus, if there were any doubt as to the rule of the law of nations upon this subject, the illegality of equipping a foreign vessel of war within the territory of the United States, is declared by the above law; and the power and duty of the proper courts of the United States, to restore the prizes made in violation of that law, is clearly recognised.

*But it is insisted for the claimant, in this case, that the persons persons taken on board at New Orleans, by the captain of the privateer, formed no part of the crew, at the time the privateer left that port, but that they were received merely as passengers; that they were emigrants from other nations, and not citizens of the United States; and that their subsequent change of character from passengers to crew, cannot attach any crime to the captain of the privateer, under the laws of the United States, or affect his right to the prizes which he might afterwards make on the high seas. [*366

This argument is unsupported by the facts proved in the cause. It appears, that Captain Batigne proposed, in the first instance, to the collector of the port of New Orleans, to take on board ten passengers for France, provided he should be permitted to do so, and that he afterwards stated to the collector, that as there was some difficulty in obtaining such permission, he should decline taking them. But what places this subject beyond all doubt is, that it appears from some of the ship's papers of the privateer, that advances were made to these alleged passengers, with a deduction of three per cent. for the marine invalids, agreeable to the ordinances of France, and the *role d'equipage* contains the number of prize-shares opposite to their names. These facts, being unexplained by any testimony in the cause, which deserves to be respected, leave no doubt, that the persons taken on board at New Orleans were engaged originally as an addition to the crew of the privateer. Some of the persons so enlisted are proved to be native citizens;

others were residents domiciled in New Orleans, some with and others without families; and others again were slaves belonging to the citizens of that place, who appear to have been seduced from the service of their masters. It is quite immaterial, whether the persons so enlisted were native American citizens, or foreigners domiciled within the United States; since neither the law of nations, nor the act of congress, recognise any distinction, except in respect to subjects of the state in whose service they are so enlisted, transiently within the United States; and it may well be doubted, whether this exception in the act of congress was not virtually repealed by the non-intercourse law. But it appears, that some of these persons *were emi- *367]
grants from Cuba, and were, at that time, residing and domiciled in New Orleans.

It is next contended on behalf of the claimant, that in case the court should affirm the decree directing restitution, it ought to be done, upon the condition of the libellant paying salvage, not to the captain of the gunboat who furnished the Alerta with provisions, and conducted her to New Orleans, but to the privateer.

This claim is entirely inadmissible. Salvage is allowed as a reward for the meritorious conduct of the salvor, and in consideration of a benefit conferred on the person whose property he has saved. What are the pretensions of Captain Batigne to the reward he claims? He fits out his vessel at New Orleans, in contravention of the law of nations, and of the United States; and finding on the high seas a vessel and cargo, belonging to the subjects of a nation at peace with the United States, within a short distance of the Havana, her port of destination, he employs the force thus illegally taken on board, to make prize of both vessel and cargo, and taking her out of her course, he conducts her towards the Balize, near to which she is found by Captain Allen in distress, in consequence of a severe gale, to which she had been exposed, and of the want of provisions. Her wants being relieved by that officer, he conducted her in safety to New Orleans. Nothing could be more remote from the intentions of the captain of the privateer, than to render a service to this ship and her cargo. So far from it, he committed an unwarrantable spoliation of the cargo, by selling fourteen of the slaves, part thereof, to an American whom he met at sea; and he most certainly intended to have smuggled the residue of the slaves into Grand Terre, or some other part of the coast, and there to have disposed of them. It would ill become any court of justice, and much less an American court, to bestow a reward on a person who had thus violated the laws of the United States, in one instance, and meditated a violation of them in another: and it would be still worse, to give such reward, at the expense of the injured Spaniard.

Upon the whole, it is the opinion of this court, that the sentence appealed from ought to be affirmed, with costs.

Sentence affirmed.

*The Grotius, Sheafe, Master. (*a*)

Capture.

In order to constitute a capture, some act should be done, indicative of an intention to seize and to retain as prize; it is sufficient, if such intention is fairly to be inferred from the conduct of the captor.[1]

This case was continued from last term, for further proof (see 8 Cr. 456), and was now submitted, upon the further proof produced, without argument.

Washington, J., delivered the opinion of the court, as follows :—This case comes before the court upon an order for further proof, made at the last session, in relation to the validity of the alleged capture of this vessel. The master, the mate and two of the seamen of the Grotius, in answer to some of the standing interrogatories, swore, that they did not consider the ship to have been seized as prize, and that the young man who was put on board by Odiorne, the captain of the privateer, was received and considered as a passenger, during the residue of the voyage. The deposition of Very, the alleged prize-master, was taken and read in the court below, in which he swore, that he was present at the capture; that Sheafe, the master of the Grotius, was ordered to go on board the privateer, with his papers, and that he, Very, was directed by Captain Odiorne, in the presence of Sheafe, to go with the prize, as prize-master, and to permit the master of the Grotius to keep possession of the ship's papers and to navigate her into port. That he accordingly went on board as prize-master, taking with him a copy of the privateer's commission, and also written instructions from Captain Odiorne for his own conduct.

The deposition of Very, though irregularly taken in that stage of the cause, was nevertheless calculated to weaken the preparatory evidence in relation to this contested fact, and to point out the propriety of a further investigation. The evidence of this witness lost much of its weight, from the circumstance that his letter of instructions was not annexed to his deposition, or made an exhibit in the cause. It was proper, that this omission should be supplied by the captors, if it could be done, and that they should have an opportunity to fortify the *evidence of Very, if in [*369
their power to do so. For these reasons, the order for further proof was extended as well to the captors as to the claimants. Under this order, the captors have exhibited an attested copy of the written instructions to Very, bearing date the 29th of July 1813. They inform him, that he is put on board the Grotius, and direct him to proceed to the ship, and on his arrival, to report himself to the agent of the privateer, who would take such measures as he might deem necessary; that he is not to take charge of the vessel, but is to allow the master to take her into any port in the United States he might see fit. The authenticity of this paper is ascertained by the affidavit of the prize-agent of the privateer, in which he swears that the original was delivered to him, by Very, on his arrival, as containing his orders, and that it has remained ever since in his possession. The deposition

(*a*) March 10th, 1815. Absent, Todd, Justice.

[1] See The Alexander, 1 Gallis. 532.

of Very has not been taken, under the order for further proof, but the omission is accounted for by the prize-agent, who, in his affidavit, swears that Very was captured on a subsequent voyage, and had not since returned to the United States. Under these circumstances, the court feels no difficulty in receiving his deposition, originally taken in the court below. In addition to the letter of instructions to Very, the collector of the port of Portsmouth has furnished an extract from the journal of the privateer, kept on that cruize, which states "that on the 30th of July 1813, the Grotius was boarded, and after an examination of her papers, a prize-master was put on board of her, and she was ordered to the first port in the United States."

This documentary evidence is further supported by the deposition of Mr. Wardwell, the surgeon of the privateer, who swears that Captain Odiorne informed the master of the Grotius, after he had come on board, that he should make out a copy of his commission, and should put a prize-master on board, to whom he should give orders to suffer Captain Sheafe to conduct his ship into any port of the United States he should think fit; that he would be further instructed to report to the custom-house on his arrival, and to inform the agent of the privateer of his arrival. That a prize-master, named Very, was accordingly placed on board, with instructions and a copy of the commission. This witness being examined *as touching his interest in this cause, swears that he has none, having for a valuable consideration assigned all his interest in the prize, to the owners of the privateer. The only evidence given by the claimants, under the order for further proof, is the deposition of John de Forest, and the affidavit of Captain Sheafe, which corresponds with his answers to the standing interrogatories; and in addition thereto, he contradicts the material parts of Wardwell's testimony. De Forest was a passenger on board of the Grotius, and he swears that Very exercised no authority whatsoever on board that ship, but was considered and treated as a passenger.

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Upon this evidence, and the answers to the standing interrogatories, the cause is now to be decided; and the only question is, whether the Grotius was, in fact, seized as prize of war. When the facts are ascertained, there can be very little doubt, what constitutes in law a valid seizure as prize. It is clear, that some act should be done, indicative of an intention to seize and to retain as prize; and it is always sufficient, if such intention is fairly to be inferred from the conduct of the captor. Now, in this case, the evidence of Very and of Wardwell, proving that Captain Sheafe was distinctly informed that his ship would be sent in as prize, is corroborated by the written instructions to the former, which he delivered, on his arrival, to the prize-agent, and by the journal of the privateer, both of which documents correspond with the evidence of those witnesses. The former of these documents, written at the time when Very was appointed the prize-master, as he states, imports a clear declaration of the intention of Captain Odiorne, and having been deposited, with the prize-agent, immediately on the arrival of the Grotius, it cannot be presumed to have been fabricated, to serve the purpose for which it is now used.

Although the instructions do not call Very prize-master, by name, yet they contain other equivalent expressions; for if he was put on board merely as a passenger, what had he to do with reporting the vessel, on her arrival, to the collector, and particularly, to the prize-agent?

The Grotius.

*The evidence, then, on the part of the captor, would be quite sufficient to establish the fact of a valid capture, if it stood uncontradicted. The only positive evidence against it, is the deposition of Sheafe, which is in direct opposition to that of Wardwell and Very. He swears, that Odiorne represented himself, in the first instance, as the commander of a British privateer, and as such, threatened to put a prize-master on board, and send him into Halifax. That he afterwards avowed his real character, after which, he never spoke of putting a prize-master on board, but merely requested him to receive Very as a passenger. He says, that the first conversation when Odiorne spoke of putting a prize-master on board, took place in the cabin, when Wardwell was present; that the latter conversation was on deck, when he was not present.

Wardwell is equally positive. He swears, that after Captain Odiorne had disclosed his real character, he told Sheafe that he should put a prize-master on board, and send him into any port in the United States he might choose, adding, that he might as well be prize to the privateer, as be seized by the government of the United States on his arrival; to which Captain Sheafe assented. He further swears, that Captain Odiorne informed the master of the Grotius, that he should direct the prize-master to report himself to the custom-house, and to the prize-agent. In point of credit, these witnesses appear to be equal, neither of them having any personal interest in the dispute. But Wardwell is fully supported by Very, and their united testimony receives considerable aid from the instructions, and from the journal of the privateer. They are also supported, in some degree, by the answer of Chambers, one of the crew of Grotius, to one of the standing interrogatories, in which he states that Very, the day after his coming on board of that ship, declared that he was put on board as prize-master.

The evidence of the mate, of de Forest, and of Prince, is entitled to very little weight, because the two former did not go on board of the privateer, and the latter, although he did accompany Captaid Sheafe to the privateer, does not pretend that he heard any conversation between him and Captain Odiorne; and being a common seaman, it is unlikely that he should have been admitted into their company. The evidence of these persons as *to the unassuming conduct of Very, whilst on board the Grotius, from which they inferred that he was there merely as a passenger, is entirely consistent with the arrangement proved to have been made on board of the privateer, that he was not to interfere in the navigation of the vessel. [*372

Upon the whole, it is the opinion of a majority of the court, that the validity of the capture of the Grotius, as prize of war, is sufficiently established by the evidence, and the master having acquiesced in the subsequent arrangement as to the mode of sending in the vessel, she ought to have been condemned to the use of the captors.

The decree of the circuit court condemning the ship Grotius, &c., to the the United States is reversed; and the court proceeding to give such decree as the said circuit court ought to have given, it is further decreed and ordered, that the said ship be condemned as lawful prize to the captors.

Gettings *v.* Burch's Administratrix. (*a*)

Effect of answer.

It is error in the orphans' court for the county of Washington, in the district of Columbia, to decide a cause against the answer of a defendant, if the answer had not been denied by a replication; and if there be no evidence in the record contradicting that answer.

This was an appeal from the sentence of the Circuit Court for the district of Columbia, affirming that of the Orphans' Court for the county of Washington.

On the 13th of February 1813, the appellee, Jane Burch, filed in the orphans' court, a petition or libel, setting forth, that by an order of that court, on the 11th of June 1805, the property of the deceased, in her hands, was delivered to the appellant, who had become one of her sureties in the administration-bond, in the year 1803, and who obtained an order of that court to sell the same. That he had made no return of sales, nor rendered any account of his proceedings, but still had the property in his possession, consisting of a negro woman and her four children; and praying that the property might be re-delivered to her, she having been appointed guardian
*373] of the infant children of the deceased, and being *ready to give good security to idemnify the appellant against his responsibility on her administration-bond, and to pay him any moneys he might have paid on her account, as administratix.

A citation having been issued, the appellant appeared and filed his answer, in which he said, that in pursuance of the order of the court, he duly sold the property, and was ready to account for the proceeds.

It did not appear by the record, that any formal replication in writing was filed to this answer; and that circumstance seemed to have passed unnoticed in the courts below; and the cause was tried, without any objection having been made on that ground.

Upon the trial of the cause in the orphans' court, the judge ordered and decreed, that the appellant should deliver up the property to the appellee, upon her paying him certain sums of money which he had paid for her, as administratrix. The record did not show what evidence was before the orphans' court respecting the sale of the property by Gettings. Upon the appeal to the circuit court, the sentence of the orphans' court was affirmed.

The case was argued by *Jones*, for the appellant, and by *F. S. Key*, for the appellee, in the absence of the reporter.

February 23d, 1815. (Absent, Todd, J.) Marshall, Ch. J., ordered the following decree to be enrolled:—This cause came on to be heard, on the transcript of the record of the proceedings of the orphans' court for the county of Washington, and of the circuit court for the said county, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the decree of the orphans' court for the county of Washington, ordering the said Kenzy Gettings to deliver to the said Jane Burch, as administratrix of Jesse Burch, deceased, the slaves in the said decree men-
*374] tioned, *when the petitioner had not, by replication, denied the answer of the defendant, in which he stated a sale of the said slaves,

(*a*) February 22d, 1815. Absent, Todd, Justice.

in pursuance of an order of the said orphans' court, and without receiving any evidence that the said slaves were not sold, or that they remain still in possession of the said defendant, is erroneous, and that the decree of the circuit court, affirming the same, is also erroneous ; and that the said decree of affirmance ought to be reversed and annulled, and the cause remanded to the said circuit court, with directions to reverse the said decree of the said orphans' court, and to remand the cause to the said court, that further proceedings may be had therein, according to law. All which is ordered and decreed accordingly.

UNITED STATES *v.* BRYAN and WOODCOCK, Garnishees of HENDRICKSON. (*a*)

Priority of the United States.

The 5th section of the act of the 3d of March 1797, giving a priority of payment to the United States out of the effects of their debtors, did not apply to a debt due before the passing of that act, although the balance was not adjusted at the treasury, until after the act was passed.

ERROR to the Circuit Court for the district of Delaware. This was an attachment of the effects of Hendrickson, a bankrupt, in the hands of his assignees, Bryan and Woodcock. Hendrickson was surety for George Bush, late collector of the customs, at Wilmington, in an official bond, dated in 1791. Bush died on the 2d of February 1797. By an adjustment of his accounts at the treasury, in 1801, it appeared, that the balance against him was $3453.06.

In the court below, it was agreed, that the case should depend on the question, "Whether, under the 5th section of the act of congress of March the 3d, 1797, the United States are entitled to satisfaction of their demand *out of the effects of the bankrupt Hendrickson, in the hands of the garnishees, as assignees of the bankrupt, prior to the claims, or any part of them, of other creditors of the said bankrupt being satisfied?" The judgment in the court below was against the United States, and they brought their writ of error. [*375

Wells, for the defendants in error. — In respect to the priority supposed to be established by this act, if it be considered as applying to this case, it will be a priority set up, if not by an "*ex post facto* law," by a retrospective law.

Two questions here present themselves for consideration : 1. Was congress competent to enact such a retrospective law? 2. Has such a law been enacted? is the act of the 3d of March 1797, retrospective?

I. Was congress competent to enact such a retrospective law? It has never yet been contended, that these priorities rest, for support, upon any ancient and royal ground of prerogative. Our constitution is a government of definite, delegated authority : and the powers not given, belong to the people, not only by clear and unavoidable inference, but by positive and express reservation. No attempt has yet been made in any of the courts of the United States, to set up this claim, upon the ground of prerogative. Congress have considered it as not resting upon that ground ; or they would have deemed it unnecessary to make statutory provisions upon the subject.

(*a*) March 10th, 1815. Absent, TODD, Justice.

It has been decided, that they have the power to establish a fair priority, in behalf of the government. They have the power to impose and collect taxes; and it is certainly their duty to provide for their faithful collection and payment into the public treasury. A fair priority has been considered, if not absolutely "necessary," at least, "conducive" to this end; and the power
*376] *to establish it, consequently, given expressly, by the clause in the constitution, emphatically termed the "sweeping clause."

Had the constitution omitted this clause, still, it would seem, for the fair and legitimate execution of the powers expressly delegated, that there would be, from necessity, conferred the right to exercise any means, for that purpose, that were "proper and necessary." To give body and substance to this abstract right; to bring this latent power into light, and to demonstrate its existence, as well as its proper form and proportion; to show it, in the constitution, to the eye, what it is in perfect reason, it is declared, that congress shall have power "to make all laws," not that they, in their good pleasure, with a discretion that acknowledges neither guide nor restraint, not to make any and every sort of law they may choose, in furtherance of any special power, but only those "which shall be *necessary* and *proper* for carrying into execution the foregoing powers, vested, by this constitution, in the government of the United States, or in any department, or officer thereof."

An act which cannot be traced up to any original, nor yet to this secondary power, in the constitution, proceeds not from it, and of course, partakes not of the character of law. An act declaring itself to have proceeded from the secondary power, which shall be manifestly improper and unnecessary, or either, cannot have emanated from that power; and is both a stranger and an enemy to the constitution.

The limitation upon the secondary power was, originally, of a more striking and imposing character than it now appears, since the adoption of the amendments to the constitution. Most, if not all, of the high and important privileges, fenced about by those amendments, owed their security and protection, previous to the adoption of these amendments, to these two talismanic words, if I may use the term. Without some restraint imposed upon this secondary power, most probably, the means to effect a lawful purpose would have been what congress pleased to make them. An unlimited power over the means of accomplishing a proper end, would have been as
*377] terribly pernicious in politics as in morals. *It would have been not even a new mode of despotism. Nothing in the constitution could have stayed its monstrous course. It might, and probably would, have crushed beneath it, in its destructive progress, every atom of civil and religious liberty.

And further, it cannot escape our observation, that the people, in their provident care of themselves, have established certain criterions, by which the *propriety* and *necessity* of measures shall be tested. I refer to the preamble of the constitution, where the moving causes—the great motives of establishing this government, are set out; and placed, as it were, for guards and sentinels, at its very threshold.

As there was, originally, no express provision in the constitution, destined to protect the privileges which are now so sedulously guarded by the amendments, so is there still none to be found to forbid the enactment, by con-

gress, of laws impairing the obligation of contracts, or those that are retrospective. To pass the former, would not be "proper," because it would be to travel a path of error, which the people have positively forbidden their own state governments to use. It would not be "proper," because it would overturn, instead of "establishing justice:" it would be to frustrate, in place of promoting, one of the first great objects of the people in forming this government.

As to retrospective laws, we learn, in our reports, from an authority which has always been, and I trust will long continue to be, respected in this court and in this country, that an earnest, but unsuccessful attempt was made in the convention to prohibit, expressly, to congress, the exercise of the power to pass retrospective laws, as well as *ex post facto* laws. We are not, however, to conclude, from the failure of the attempt to expressly inhibit the exercise of this power, that it was delegated to congress by letter or implication. The convention evidently departed, with reluctance, from the great and noble theory of government which they kept so steadily before them. The whole stock of power, they knew, was in the hands of the people; it all belonged to them. Their business was not to specify what they kept for themselves, but to particularize what *they surrender, in trust, for their benefit, to the government. It is true, they sometimes departed [*378 from this rule; as they did, when they prohibited the enactment, by congress, of *ex post facto* laws. They stepped out of the course which, with such wisdom, they prescribed to themselves, not so much to guard against the exercise of a power which they then expressly (as they would without it, have almost as clearly) withheld, as to obviate, upon a point of the highest interest and feeling, the misconceptions of ignorance; and to quiet the apprehensions and suspicions of fear and jealousy.

The power to pass retrospective laws, then, is neither expressly given, nor expressly withheld. When such acts are, therefore, passed by congress, they must derive their authority from being "proper and necessary" means to the exercise of some other power expressly given. Some such laws, in given cases, it is not denied, may be comprised by this definition; and be fairly regarded as entirely constitutional. It is, notwithstanding, contended, that these must always be considered as cases of exception, proving the general rule, that retrospective acts are not "necessary and proper" means to give due effect to the powers vested "in the government, or in any department or officer thereof." If congress, thus clothed with every power that ought to be desired, with abundant means for a wise and provident government, should fall into the mistakes of short-sighted man, they must, like him, pay the forfeit of error, and the price of experience. It cannot be "necessary and proper," nor will it "establish justice," to transfer to others the consequences of their own improvidence.

Such, the defendants in this case contend, would virtually be the effect of retrospective liens and priorities, in favor of the government, and at the expense of the citizen. The exercise of such a power would overturn all the rules by which men are governed, in calculating the chances of safety, and in estimating the risks of danger, when they give credit to each other. To set up such liens and priorities, would not be "proper," because it would impair the obligation of contracts between citizen and citizen, by rendering unavailing the means of insuring their execution. It would not be "proper,"

because it would be lessening the security for private "property," if not taking it away by undue "process" of law. It is true, that the creditor, who does
*379] not obtain security for the *payment of his debt, cannot escape the lawful consequence of a subsequent act of his debtor. His dependence for safety, in this respect, is placed upon his knowledge of the character of his debtor, and upon his own vigilance. But, most assuredly, he ought to have full reason to rely that the character of any concern in which his debtor has been already engaged, will not be changed by matter of subsequent enactment, so as to enhance his risk of danger beyond what it was when the debt was contracted. Such a mode of legislation, I repeat, would violate and not "establish justice:" by enfeebling confidence between man and man, it would retard instead of "promoting the general welfare:" it would "impair the obligation of contracts:" it would be virtually taking away private "property," without "due process of law." An act, then, producing any of these effects could not have been "necessary and proper;" and is not warranted by the constitution: and of course, the plaintiffs in this case are not "entitled" (to use the expression in the stated case) to the satisfaction they claim under it.

II. The defendants are next to inquire, whether such a law has been passed? whether the 5th section of the act of the 3d of March 1797, is retrospective? If there be any doubt, whether it was the intention of congress to give to this act a retrospective effect, every objection which can be fairly urged against its constitutionality, will incline the court to such a construction as will rescue it from that imputation. The defendants insist, that it was not intended to have this effect.

Until this law was passed, there was no other in force, securing to the United States priority of payment, except in cases of custom-house bonds for duties. The first act giving this priority was passed on the 31st of July 1789 (1 U. S. Stat. 42), and is confined to the case of custom-house bonds. The 21st section of that act provides, that, "in all cases of insolvency, or where any estate in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased, the debt due to the United States *on any such bond* (*i. e.*, for the payment of duties) shall be
*380] first satisfied." *The next law, giving priority to the United States, is that of the 4th of August 1790 (1 U. S. Stat. 169). The 45th section is in these words: "That where any bond for the payment of duties shall not be satisfied, on the day it became due, the collector shall forthwith cause a prosecution to be commenced for the recovery of the money thereon, by action or suit at law, in the proper court having cognisance thereof; and in all cases of insolvency, or where any estate in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased, the debt due to the United States, *on any such bond*" (*i. e.*, for the payment of duties), "shall be first satisfied."

Nor does the act of the 2d of May 1792 (1 U. S. Stat. 263) create this priority. The 18th section refers to bonds given "for duties on goods, wares and merchandise imported." It transfers the priority of the United States to the surety, or his representatives, upon payment of the debt on such bond. The extension, by this section, of the cases of insolvency mentioned in the 45th section of the act of 4th of August 1790, applies only to the subject-matter of that section, which were bonds for duties. The same

was the subject-matter of this section. If, upon any other bonds than custom-house bonds, a priority had been secured to the United States, why was not a transfer of that priority provided for, in behalf of the surety, or his representatives, who paid the bond, as well as in the case of bonds for duties?

After the law of 3d of March 1797, establishing a general priority in cases of subsequently-contracted debts, the provisions on this head, in subsequent acts, assume a corresponding character. Thus, in the act of the 2d of March 1799, § 65 (1 U. S. Stat. 676), the provisions are co-extensive with the then established priority. The first member of this section continues the priority in respect to bonds for duties. It re-enacts, in the same words, the 45th section of the act of 1790 (Ibid. 169) giving that priority. The next member of this section is general, and declares the liability of the representatives of a debtor, if they pay any debt, in preference "to the debt or debts due to the United States." *Here are no words like those used [*381
in the acts of 1789 and 1790, above referred to, to limit and restrain the meaning to any particular "bond" or debts. Their liability commences upon the payment of *any* debt, in preference "to the debt or debts due to the United States." The first proviso of this section respects bail. The second proviso makes a general regulation in behalf of sureties, or their representatives, who pay the debt due to the United States upon any bond "for duties on goods, wares or merchandise imported, or other penalty;" and the cases of insolvency, in this act mentioned, are declared to extend to the cases of assignment, attachment and bankruptcy. That there was not given to the United States the priority, except in cases of custom-house bonds, until the act of 1797 was passed, was conceded by their counsel in the case of *Fisher* v. *Blight* (2 Cranch 362).

The 5th section of the act of the 3d of March 1797, referred to by the agreement of the parties in this suit, as before mentioned, is in the following words: "That where any revenue-officer, or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed."

The defendants insist, that there is error in the punctuation of this section; and that it ought to be read with a comma at the end of the second line (of the printed section) between the words "person" and "hereafter." It would then read "that when any revenue-officer or other person, hereafter becoming indebted," &c. The section thus pointed will establish for the United States a priority in case of subsequently-created debts, where: [*382
1. The debtor is insolvent: 2. Where he makes *a voluntary assignment of his effects, not having sufficient to pay all his debts: 3. Where an attachment shall issue against the effects of an absent, absconding or concealed debtor: 4. Where the debtor shall commit an act of legal bankruptcy: 5. Where his effects, in the hands of executors or administrators,

shall not be sufficient for the payment of all his debts. Without this latter provision, it has always been apprehended, that the declared priority in cases of insolvency would not bind executors and administrators : and it has uniformly been introduced, to create, in that case, not a greater, but only an equal priority. There can be no reason for supposing (notwithstanding the general words of this member of the section, respecting executors and administrators), that it was intended to extend the priority in this case to debts previously, as well as subsequently, created. The subject-matter of the section, with the punctuation we contend for, must be considered a provision for debts subsequently contracted. To understand its subject-matter, other than is here insisted upon, is to suppose the establishment of different priorities, without any reasonable motive or inducement for discrimination. In such case, the general (retrospective, as well as prospective) priority would apply to the case of a revenue-officer, to the case of a deceased debtor, and to the cases of voluntary assignment, attachment and bankruptcy. The limited (or prospective) priority would extend only to cases of persons (other than revenue-officers) becoming insolvent. Why this distinction between the insolvent and the other debtors? And in this view of the subject, what meaning is to be attached to these words, "and the priority hereby established, shall be deemed to extend," &c. ? According to the construction which we oppose, the priority established by the previous part of the section was general, as it respects revenue-officers, and executors and administrators ; and limited as it respects other persons. If it had been the intention of the legislature, to establish different priorities, they would have negatived, by their expressions, the individuality of the priority : most probably, they would have said, in place of the words they have used, "and the priorities hereby respectively established." Then, if a "revenue-officer" assigned, if his effects were attached as those of "an absent, concealed or absconding debtor," or if he committed "a legal act of bankruptcy," *383] *general priority would attach. If any "other person" came within this description, a limited priority would attach.

But there is a still greater obstacle to remove, before the construction of the plaintiffs can prevail. It would make a distinction, without reason, between "revenue-officers" and custom-house officers ; and indeed, between "revenue-officers" and all other nominal agents of the governments, whether accountable by bond or otherwise. A general priority would attach in case of a "revenue-officer" only ; and a limited priority in case of other receivers of the public money. It cannot be said, that "revenue-officers" comprise custom-house officers. It is very true, that money arising from customs constitutes part of the public revenue. Nor is it intended to be denied, that, in strict propriety, the collectors of those customs might be termed "revenue-officers." But it is insisted that the terms used were not intended to have that meaning, but a limited, appropriate and technical meaning. It is believed, that in no other sense, have they ever been used in any act of congress. Had it been the design of the legislature to use this definition in its enlarged, and not its accustomed, sense, they would have taken care to have marked their departure from former observances, in a manner that would have admitted of no doubt ; in a way too, that would have denoted, with precision, as occasion might require, the generic and specific signification of the terms. And besides, the legislature, after passing this law, have,

themselves, clearly disaffirmed the construction to which we object, by resorting again to these expressions, and undeviatingly using them in their former, limited and specific sense.

If the defendants' interpretation of the words "revenue-officer" is correct, then the fifth section will not, whatever may be its proper punctuation, establish a retrospective priority, in the case of custom-house officers. For if the court adheres to the existing punctuation of the statute, then, custom-house officers will be embraced by that part of the section which refers to persons becoming indebted to the United States, after the passing of this law; and the extension of the priority, in the *cases mentioned in the latter part of the section, will adapt itself, necessarily, [*384 and even in the absence of the usual technical words of discrimination, to that which, as occasion serves, will become its proper subject-matter. Thus, if the extension is to apply to a revenue-officer, the priority will be general—retrospective, as well as prospective; but if the extension is to apply to "any other person" (and of course, including custom-house officers), the priority will only be prospective.

If either of the general views here taken of this subject be correct, the United States, in this case, are not "entitled, under the 5th section of the act of congress, passed the 3d of March 1797, to satisfaction of their demands, out of the effects of Isaac Hendrickson, the bankrupt, in the hands of the garnishees, as assignees of the bankrupt, prior to the claims, or any part of them, of other creditors of said bankrupt being satisfied;" because the debt due to the United States was created prior to the enactment of that law.

Rush, Attorney-General, for the United States.—The reasons in support of the claim of the United States do not rest upon the rights of prerogative, but upon the terms of the legislative grant. It must be admitted, that the legislature had power to grant the priority which is claimed in the case of public officers; and the judgment of this court, in opposition to all objections, however well stated, has recognised and established the legitimacy of the grant, in every case of a public debtor, whatever might be the origin or nature of the debt. The existence of the power is, therefore, no longer open to dispute, whatever speculative doubts may be cherished as to its propriety; or whatever controversy may arise upon the cases proper for its application.

But the legislative power is limited in its exercise by the positive provisions of the constitution, and it is provided, among other things, that congress shall not pass an *ex post facto* law. The act of the 3d of March 1797, having been passed subsequent to the death of the collector; and of course, subsequent to the period of the debt's being contracted, the question is made, whether the act would not assume the character of an *ex post *facto* law, if it were to be applied to the present case. The answer [*385 in the negative is maintained by the following general reasons.

1. In ascertaining the true import of the terms, *ex post facto*, this court has decided, that they only apply to criminal cases. The present is a case of debt.

2. Laws having a retrospective effect in civil cases, both as to rights and remedies, have never been, on that account alone, deemed unconstitutional.

Theoretically, retrospective laws may sometimes be condemned; but practically, they are common to every system of jurisprudence. A member of the convention who framed the constitution of the United States, "had an ardent desire to have extended the provision respecting *ex post facto* laws to retrospective laws in general;" but having failed in accomplishing that desire in the convention, when he became one of the ornaments of the bench of the supreme court of the United States, he concurred in the judgment, that congress possessed the power to pass retrospective acts, in relation to civil, though not *ex post facto* laws, in relation to criminal, cases. (See 3 Dall. 397.)

If, therefore, congress has passed an act which must have a retrospective effect, the court will not, merely for that cause, declare it unconstitutional and inoperative. Before the act of the 3d of March 1797, was passed, congress had provided, in favor of the United States, for a priority as to the payment of debts upon bonds for duties. But no similar priority was made applicable to the cases of revenue-officers; of accountable agents; of debts on bonds, other than bonds for duties; or on contracts. These presumed defects in the law produced the act of the 3d of March 1797, and it must be expounded most liberally, to remove the defects, and advance the remedy in contemplation. With respect to revenue-officers, it was the policy, and must be taken to be the meaning of the law, that when they prove insolvent, the priority shall attach in favor of the United States, with a full retrospective effect. But when a debtor, not a revenue-officer, proves insolvent, he must have become indebted to the United States, after the passing of the act, in order to establish the claim of priority. *Such I have been informed, (*a*) has been the construction in the supreme court of Pennsylvania, in a case of the *Commonwealth, for the use of the United States*, v. *Lewis*, the surety of the administrators of Delany, who was collector for the port of Philadelphia, and died indebted to the United States, before the act of the 3d of March 1797 was passed.[1] The provision of the 5th section of the act respecting the priority of payment, and of the estate of a deceased debtor in the hands of executors or administrators, was considered, in the same case, as a substantive provision, analogous to the provisions, in most codes, by which, upon the decease of a debtor, the law undertakes to class his debts, and prescribe the order of payment; as, for instance, specialties before simple-contract debts, and debts due to the state, before those due to individuals.

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It has been suggested, however, that a collector of the customs is not a revenue-officer, within the meaning of the act of the 3d of March 1797. But the fact is, that the collector has, peculiarly, been deemed such an officer, as well by practical experience, as under the terms of the act itself. If the court should decide otherwise, it is to be feared, that the security given would be far short of the intention and policy of the act of 1797. The government had, obviously, more at risk upon the fidelity of the collectors of the customs, than upon any other class of revenue-officers. That they are embraced under the designation of revenue-officers in the act, it is believed, has been

(*a*) Mr. Dallas, who argued the case, has been kind enough to favor me with the information.

[1] Since reported in 6 Binn. 266.

taken for granted, in the different district and circuit courts of the United States.

March 11th, 1815. (Absent, Todd, J.) Livingston, J., delivered the opinion of the court, as follows :—The United States claim a priority in payment out of the estate of Hendrickson, in the hands of the defendants Hendrickson, it appears, was one of the sureties of George Bush, late collector at Wilmington, who died on the 2d of February 1797, in debt to the United *States, as appears by a subsequent adjustment of his accounts [*387
at the treasury, in the sum of $3453.06. By the 5th section of the act of the 3d of March 1797, under which this priority is claimed, it is declared, that where any revenue-officer, or other person, hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, &c., the debt due to the United States shall be first satisfied.

The court is of opinion, that Hendrickson was indebted to the United States, before this act passed, that is, at the time of the death of the collector, although the accounts of the latter were not settled, until after its passage ; and that, therefore, the law which secures a priority against the estates of persons who shall thereafter become indebted, does not apply to this case. The judgment of the circuit court is affirmed.

Judgment affirmed.

The Brig Concord, Taylor, Master. (*a*)

Duties on captured goods.

If captured goods, claimed by a neutral owner, be, by consent, sold, under an order of the court, and afterwards, by the final sentence of the court, the proceeds are ordered to be restored to such owner, the amount of the duties due to the United States upon the importation of the goods, must be paid.

This was an appeal from the sentence of the Circuit Court, affirming that of the district court, which restored to the claimants, neutral Spanish merchants, at Teneriffe, twenty pipes of wine, part of the cargo of the British brig Concord, captured by the American privateer Marengo, in August 1812, without payment of duties ; although the same had been, by consent of the proctors for the parties, sold, under an order of the court. The cause being submitted, without argument—

Story, J., delivered the opinion of the court, as follows :—This is the case of a shipment made by a neutral house, on board of a British ship, which was captured, on a voyage from Teneriffe to London, by the private armed ship Marengo, and brought into the port of New *York for [*388
adjudication. Pending the prize proceedings, the goods were sold by an interlocutory order of the district court, and the proceeds brought into the registry. Upon the hearing, the property was decreed to be restored to the claimants, without payment of duties ; and this decree was afterwards affirmed in the circuit court. The cause has been brought, by appeal, to this court, for a final decision.

We are all of opinion, that the proprietary interest of the claimants is

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(*a*) March 11th, 1815. Absent, Todd, Justice.

completely proved; and therefore, the decree of restoration must be affirmed.

With respect to the duties, we are all of opinion, that the decree of the courts below was erroneous. Where goods are brought by superior force, or by inevitable necessity, into the United States, they are not deemed to be so imported, in the sense of the law, as necessarily to attach the right to duties. If, however, such goods are afterwards sold, or consumed, in the country, or incorporated into the general mass of its property, they become retroactively liable to the payment of duties. In the present case, if the goods had been specifically restored, and afterwards withdrawn from the United States by the claimants, they would have been exempt from duties. But having been sold, by order of the court, for the general benefit, the duties indissolubly attached, and ought to have been deducted from the proceeds, by the courts below. The decree in this respect must be reversed.

Decree reversed.

The Nereide, Bennett, Master. (*a*)

Neutral property.

The stipulation in a treaty, "that free ships shall make free goods," does not imply the converse proposition, that "enemy ships shall make enemy goods."[1]

The treaty with Spain does not contain, either expressly or by implication, a stipulation that enemy ships shall make enemy goods.

The principle of retaliation or reciprocity, is no rule of decision in the judicial tribunals of the United States.

A neutral may lawfully employ an armed belligerent vessel, to transport his goods; and such goods do not lose their neutral character, by the armament, nor by the resistance made by such vessel, provided the neutral do not aid in such armament or resistance, although he charter the whole vessel, and be on board at the time of the resistance.[2]

This was an appeal by Manuel Pinto, from the sentence of the Circuit Court for the district of New York, affirming *pro formâ* the sentence of the district court, which condemned that part of the cargo which was claimed by him. The facts of the case are thus stated by the Chief Justice, in delivering the opinion of the court:

*389] *Manuel Pinto, a native of Buenos Ayres, being in London, on the 26th of August 1813, entered into a contract with John Drinkald, owner of the ship Nereide, whereof William Bennett was master, whereby the said Drinkald let to the said Pinto, the said vessel to freight, for a voyage to Buenos Ayres and back again to London, on the conditions mentioned in the charter-party. The owner covenanted that the said vessel, being in all respects seaworthy, well manned, victualled, equipped, provided, and furnished with all things needful for such a vessel, should take on board a cargo to be provided for her, that the master should sign the customary bills of lading, and that the said ship, being laden and dispatched, should join and sail with the first convoy that should depart from Great Britain for Buenos Ayres: that on his arrival, the master should give notice thereof to the agents or assigns of the said freighter, and make delivery of the cargo, according to bills of lading; and that the said ship, being in all respects

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(*a*) March 6th, 1815. Absent, Todd, Justice.

[1] The Cygnet, 2 Dods. 299.

[2] The Atalanta, 3 Wheat. 409; 5 Id. 433.

seaworthy, manned, &c., as before mentioned, should take and receive on board, at Buenos Ayres, all such lawful cargo as they should tender for that purpose, for which the master should sign the customary bills of lading: and the ship, being laden and dispatched, should sail and make the best of her way back to London, and on her arrival, deliver her cargo according to the bills of lading. For unloading the outward and taking in the homeward cargo, the owner agreed to allow ninety running days, and for unloading the return-cargo, fifteen running days. The owner also agreed, that the freighter, and one other person whom he might appoint, should have their passage, without being chargeable therefor. In consideration of the premises, the freighter agreed to send, or cause to be sent, alongside of the ship, such lawful goods as he might have to ship, or could procure from others, and dispatch her therewith, in time to join and sail with the first convoy, and on her arrival at Buenos Ayres, to receive the cargo according to bills of lading, and afterwards to send alongside of the ship a return-cargo, and dispatch her to London, and on her arrival, receive the cargo according to bills of lading, and to pay freight as follows, viz: for the outward cargo 700*l.*, together with five per cent. primage, to be paid on signing the bills of lading, and for the homeward or return-cargo, at the rate mentioned in the charter-party. He was also to advance the master, at *Buenos Ayres, [*390
such money as might be necessary for disbursements on the ship. It was provided, that all the freight of the outward cargo, except on the goods belonging to the freighter, which should not exceed 400*l.*, should be received by the owner, on the bills of lading being signed; and in case of the loss of the ship, such freight should be his property; but if she arrived safe back, with a full cargo, then the freighter should be credited for the excess of the said freight, over and above the sum of 700*l.* A delay of ten running days, over and above the time stipulated, is allowed the freighter, he paying for such demurrage at the rate of 10*l.* 10*s.* per day.

Under this contract, a cargo, belonging in part to the freighter, in part to other inhabitants of Buenos Ayres, and in part to British subjects, was taken on board the Nereide, and she sailed, under convoy, some time in November 1813. Her license, or passport, dated the 16th of November, states her to mount ten guns, and to be manned by sixteen men. The letter of instructions from the owner to the master is dated on the 24th of November, and contains this passage: "Mr. Pinto is to advance you what money you want for ship's use, at River Plate, and you will consider yourself as under his directions, so far as the charter-party requires."

On the voyage, the Nereide was separated from her convoy, and on the 19th of December 1813, when in sight of Madeira, fell in with, and after an action of about fifteen minutes, was captured by the American privateer The Governor Tompkins. She was brought into the port of New York, where vessel and cargo were libelled; and the vessel and that part of the cargo which belonged to British subjects were condemned, without a claim. That part of the cargo which belonged to Spaniards was claimed by Manuel Pinto, partly for himself and partners, residing in Buenos Ayres, and partly for the other owners, residing in the same place. On the hearing, this part of the cargo was also condemned. An appeal was taken to the circuit court, where the sentence *of the district court was affirmed *pro formâ*, and [*391
and from that sentence, an appeal has been prayed to this court.

Hoffman, of New York, for the appellee.—It is true, this vessel was armed, but Pinto had no agency in arming her. She was an armed vessel, as early at least as May 1811, before the war between the United States and Great Britain. It is true, she sailed with convoy, but this she was obliged by law to do. It is true also, that she resisted the capturing vessel; but neither Pinto, who was a passenger on board, nor any other neutral passenger, gave any aid in the engagement.

The claim of Pinto, in behalf of himself, his father and sister, who were jointly interested with him in the business which he carried on, in his own name, was of three descriptions of goods. 1st. Of goods of which they were the sole owners. 2d. Of goods of which they owned one undivided moiety, the other being owned by British merchants. 3d. Of goods in which they claimed an interest of one-fourth, the residue being British property.

As to this last claim, he is charged with *mala fides*, because, in his examination *in præparatorio*, he stated, without qualification, that he was the owner of one-fourth part of those goods, whereas, in his claim and test-affidavit he states the fact to be, that he had agreed with certain British merchants, that if they would give him ten per cent. upon the sales, he would select for them such goods as would sell, at Buenos Ayres, at an advance of 150 per cent. upon their cost and charges; that he selected these goods, under that contract; that his commissions would have amounted to one-fourth of the original cost, and to that extent, he believed himself interested therein. There was no attempt to impose upon the court, he voluntarily explained the nature of his interest; if he was mistaken as to the legal effect of such a contract, yet no improper motive can be attributed to him.

*392] *Neither Pinto, nor any person connected with him, joined in the battle. If he had done so, he might have been considered as taking part in the war, and thereby excluding himself from the protection to which he is now entitled by the law of nations. He remained in the cabin, during the whole engagement, and had no concern whatever in the defence of the ship. It is true, that he states upon his examination *in præparatorio*, "that he belonged to the ship at the time of her capture, and had control of said ship and cargo." But his answers were written by the commissioner, and he, being a foreigner, probably did not observe the force of the expression. The nature of his control is explained by all the other circumstances of the case, to be a control within the limits of the charter-party. It is evident, he could have no lawful control over the management of the ship, from the time of her sailing from London, until her arrival at Buenos Ayres. The letter of instructions from the owner of the ship to the master, shows that the master was under the direction of Pinto, so far only as the charter-party required.

It has been heretofore said, that Pinto had acquired a hostile character arising from domicil. There is, however, no ground for such a pretence. It is true, that in the charter-party, he is said to be "of Buenos Ayres, but now residing in the city of London;" and in his examination *in præparatorio*, he states "that for seven years last past, he has lived and resided in England and Buenos Ayres." But he, at the same time, states, that he is a native of Buenos Ayres, that he now lives there, and has generally lived

there for 35 years, and has been admitted a freeman under the new government of Buenos Ayres. Even if he had acquired a domicil in England, which is not true, yet he had turned his back on that country and was on his voyage home. *Somerville* v. *Somerville*, 5 Ves. jr. 787. Pinto's test-affidavit shows particularly, that his birth, residence and commercial establishment had always been at Buenos Ayres, except during his occasional temporary absences in his commercial pursuits. The test-affidavit is always good evidence in prize causes. The party is obliged to put in his claim, upon oath, and it is to be taken as true, until contradicted by better evidence.

*The court is now for the first time called upon to decide the question, whether neutral property forfeits its character of neutrality, by being put on board an armed ship of the enemy? The general rule is, that the property of a friend, in a hostile vessel, is not liable to condemnation. There are but two exceptions to the neutral right to trade. 1. He shall not carry contraband of war. 2. He shall not violate a blockade. If the sailing in an armed vessel of the enemy had been also an exception, it would unquestionably have been noticed by some writer upon the law of nations. But no such exception is to be found in the books. If such be the doctrine, what degree of force will be sufficient to forfeit the neutral character of the goods? If she carried a single musket, the principle must be the same as if she mounted fifty cannon. And sailing under convoy, would be still more clearly within the rule. [*393

Vattel, lib. 3, c. 5, § 75, lays down the general principle thus: "Since it is not the place where a thing is, which determines the nature of that thing, but the quality of the person to whom it belongs; things, belonging to neutral persons, which happen to be in an enemy's country, or the enemy's ships, are to be distinguished from those belonging to the enemy." No hint is given, that a distinction is to be taken between the armed and unarmed ships of the enemy. Again, in lib. 3, c. 7, § 116, he says, "the effects of neutrals, found in an enemy's ship, are to be restored to the owners, against whom there is no right of confiscation." See also Duponceau's Bynkershoek 102, 108; 2 Azuni 194; Chitty 111; Ward 21; Mr. Jefferson's letter to M. Genet, 24th January 1793, among our own state papers, in the department of state.

This court will not, in contradiction to all these authorities, *make a new exception to the rights of neutral commerce. The policy of this country is to extend, not to impair them. A neutral aids the belligerent much more, by carrying belligerent property, than by employing a belligerent vessel to carry neutral goods; yet the neutral vessel, carrying the belligerent goods, is always restored, and with freight, unless she forfeit her neutral character by her hostile conduct. The neutral character may be forfeited by fraudulent conduct of the master; by violation of blockade; by carrying contraband goods; by false destination, and by resisting search. These are the only exceptions to the general rule that the property of a friend must be restored. But there must be an actual or an implied connivance between the master of the vessel, and the neutral owner of the goods, in order to subject the neutral cargo to condemnation for the acts of the master. *The Mercurius*, 1 Rob. 67 (Am. ed.); *The Columbia*, Ibid. 130; *The Jonge Tobias*, Ibid. 277; *The Shepherdess*, 5 Ibid. 234. In the case of [*394

The Maria (the Swedish convoy), the merchant vessels had received orders from the convoy, to resist search.

The unneutral character of a master shall not forfeit neutral property on board a neutral vessel. Can you then punish the innocent neutral for the legal exercise, by the hostile master of a belligerent vessel, of his rights of war? If this property is to be condemned, it must be on the ground of resistance; for it is understood, that it has been decided by this court, that shipping neutral property on board an armed neutral vessel even, will not subject it to condemnation. If resistance be not the ground on which condemnation is claimed, then, in a case where no resistance is made, if neutral property be found on board an enemy's ship, armed merely for resisting the piratical boats of South America, it is liable to condemnation.

It is true, that a neutral cannot lawfully rescue his ship, captured by a belligerent, because he has redress by the law of nations, if he has been improperly captured. *The Dispatch*, 3 Rob. 227 (Am. ed.); *The Maria*, 1 Ibid. 287. But here, the force was not used by a neutral. The ship-owner and the master were open and avowed enemies, and as such had a perfect
*395] right to defend their *ship by force. It was a lawful force. *The Catharina Elizabeth*, 5 Rob. 206.

But it will be said, that the right to search is impaired. The right of search is applicable only to a neutral ship. In case of a belligerent ship, the right of search is superseded by the right of capture. The privateer had a right to capture the Nereide, but, strictly speaking, had no right to search her. Pinto, by placing his goods on board a hostile ship, made them certainly liable to capture, although not to condemnation. He gave us the right of capture, in lieu of the right of search. The putting of neutral goods on board an armed vessel of the enemy, is analogous to the placing them in a fortified town. If they are placed there, before investment, they are not liable to condemnation, if captured; but if placed there, after investment, they are liable.

But it will be contended, that the 15th article of the treaty of 1795, between Spain and the United States (8 U. S. Stat. 146), has altered the rule of the law of nations on this subject, and that neutral Spanish goods, found on board an enemy's ship, are liable to condemnation as enemy's goods. The words of the article are, "And it is hereby stipulated, that free ships shall also give freedom to goods; and that everything shall be deemed free and exempt, which shall be found on board the ships belonging to the subjects of either of the contracting parties, although the whole lading, or any part thereof, should appertain to the enemies of either; contraband goods being always excepted."

It, will be contended, that if free ships make free goods, enemy's ships must make enemy's goods. But we contend, that although, by the treaty, free ships make free goods, yet the rule of the law of nations still remains in full force, that free goods, found in an enemy's ship, are also free. Nothing but an express stipulation in a treaty can deprive the Spanish subject of his rights under the law of nations; the treaty contains no such express
*396] stipulation. The article stipulated does *not necessarily imply its converse; the two rules are not inconsistent with each other. The neutral nation is entitled to the benefit of both. Ward 145.

In some of our treaties, will be found express stipulations as to both

points ; in others, as to one of the points only ; which fact shows that the two propositions are not considered as inseparable. The treaty of 1782, with Holland, adopts both rules—free ships are to make free goods, and hostile ships, hostile goods. So also does the convention of 1809 with France. (8 U. S. Stat. 184.)

As to the Spanish ordinance of Spain, cited in 2 Azuni 139, which declares even the goods of Spanish subjects to be good prize, if found on board an enemy's ship, it is a mere municipal regulation, and does not appear to have been adopted in practice against the citizens of the United States, even if it were in its terms applicable to them. It is said, that Spain would condemn our goods, found on board her enemy's ships, and therefore, upon the principle of reciprocity, we ought to condemn her goods, found on board the ships of our enemy. But the principle of reciprocity applies only to the case of salvage. It is not a rule of the law of nations, as to prize of war.

The proprietary interest of Pinto, his father and sister, and of the other merchants of Buenos Ayres in whose behalf he has interposed a claim, cannot be disputed. Their national character is clearly made out. The goods are not liable to forfeiture, either on account of his residence in London, or the character of the ship, or the opposition which she made, or by the treaty of Spain, or the principle of reciprocity. They ought, therefore, to be restored ; and without payment of the duties, inasmuch as it was not a voluntary importation.

Dallas, contrà, for the captors, contended, that there was evidence tending to show that Pinto had caused the ship to be armed, and had caused sundry British passengers to be taken on board, some of whom fought in the battle. That he had acquired *a British character by domicil ; [*397 and that he had not renounced that character, by turning his back on England, inasmuch as he meant to return. That Pinto must be considered as the owner of the vessel for the voyage, and as having a control over her in regard to her resistance.

He admitted, that neutrals have a right to carry on their accustomed trade, in the usual manner, and to employ the merchant vessels of the enemy for that purpose ; but not to arm a hostile vessel, nor to hire a hostile vessel already armed.

He divided his argument into three points : 1. That the property cannot be restored, without further proof, both on the subject of domicil, and on that of proprietary interest. And that, under the circumstances of this case, Pinto is not entitled to time for further proof. 2. That by force of the treaty between Spain and the United States, taken in connection with the existing law of Spain, the property is liable to condemnation. 3. That a neutral cannot lawfully hire an armed vessel of our enemy, and in the course of that trade, engage in battle with the United States.

I. As to further proof respecting his domicil. In his examination *in præparatorio*, he states, that for the last seven years, he resided in England and Buenos Ayres. This fact stood unexplained upon the record, for nearly a month. He then states in his test-affidavit, that he was then a resident of Buenos Ayres, where he had generally resided for 35 years ; but says nothing in explanation of his former assertion, that he had resided the last

seven years in England and Buenos Ayres. Why did he not state how long he had resided in each place? This leaves a doubt, which the court would permit him to explain, if he stood fair in court. The charter-party also states him to be then a resident in England.

*398] *Then, as to his proprietary interest, he first swears that he is the sole owner; but afterwards contradicts himself, and says he made a mistake, and that his father and sister are jointly interested with him in the property. Again, he first states the printing apparatus to be his property, and afterwards admits that it belonged to British subjects. With regard to the one-fourth which he claimed of sundry parcels of goods, he first swears that it belongs to him absolutely, and afterwards states that he was only entitled to a commission upon the sales of them. So also, with regard to an invoice of buttons; he first claimed them as his own, and afterwards disclaimed them as British property. Again, his testimony is contradicted by Puzey, his confidential clerk, who testifies that part of the property claimed by Pinto, belonged to the government of Buenos Ayres. It is certain, then, that the evidence is not clear in his favor, as to his domicil, and as to his proprietary interest.

Is he entitled to further proof? He has hired an armed vessel of the enemy, which has fought an American vessel, and would have captured her, if she had been able. There is no case in which restitution has been awarded, under such circumstances. Suppose, an American frigate had captured a British frigate, laden with specie belonging to the Spanish government, would it have been restored? How was it in the case of the Peacock and the Epervier?

Pinto chartered the whole ship. He permitted everything to be put on board; the hostile property as well as the neutral. He was to receive freight for the hostile property, and a higher freight, on account of the armament. He knew, that if this armament was employed to protect the neutral property, it would protect the hostile also. He impliedly undertook that the enemy's property should be protected. He was, therefore, interested in so doing, and identified his interest with that of the belligerent. The armament was clearly intended to be used against the Americans, as

*399] all the cruizers of France *had been driven from the ocean, and never appeared in those southern latitudes.

He says in his examination, that he was interested in the vessel and cargo and freight; and in a subsequent answer, he states that he had the control of the ship and cargo. It is clear, therefore, that he participated in the belligerent character, and is not entitled to further proof. See *The Atalanta*, 6 Rob. 460.

II. As to the effect of the Spanish treaty, in connection with the existing law of Spain. The treaty says that "free ships shall make free goods." This implies the converse proposition, that hostile ships shall make hostile goods. This treaty followed the memorable discussion which took place between this government and Genet, in 1793. At that time, we had a treaty with Prussia (8 U. S. Stat. 90, art. 12), which contains the same stipulation that free ships shall make free goods; but is silent as to the converse proposition. The two treaties are to be construed alike. Genet complained, that we permitted the British to take French goods out of our vessels. Mr. Jefferson was one of the negotiators of that treaty, and it is clear, that he understood it as implying that enemy ships should make enemy goods. See

his letters, as secretary of state, to Mr. Genet, of the 24th July 1793, and to Mr. Morris of the 16th of August 1793. The administration of our government constituted, at that time, perhaps, as wise a cabinet as ever existed. This treaty was their act. The proper construction must be, that the converse rule is implied. Ward 144, 145.

But when the treaty is taken in connection with the existing law of Spain, at the time of making the treaty, there can be no doubt. By that law, enemy ships make enemy goods. 2 Azuni 139. The Mr. Debron there mentioned was a Spaniard. There were two ordinances, one in 1704, the other in 1718. They are referred to in 2 Valin 252, lib. 3, tit. 9, art. 7. As to these ordinances, it is singular, that they do not say that the goods of a friend, in an enemy's ship, shall be liable to confiscation; but that the goods of a Spanish subject, in an enemy's ship, *shall be so liable. This, however, implies the other proposition; for if the goods of their own [*400 subjects were so liable, the goods of a friend would, *à fortiori*, be liable. It is said, that these ordinances have not been enforced against us. But we are not bound to show that fact. It is sufficient for us, that the law exists. Reciprocity is the permanent basis of the law of nations.

III. If a neutral hire an armed vessel of our enemy, and with armed force resist our belligerent rights, he forfeits his neutral character. A neutral may pursue his accustomed trade, in his usual manner; but the law of nations allows nothing further. It has been said, that the only test of neutrality is impartiality to the belligerents. This is true only in a national point of view. But when individuals are concerned, a very different test applies. (See the case of *The Tulip*.) A neutral cannot justify furnishing one belligerent with transports, by furnishing them to the other also. (See Vattel, lib. 3, ch. 7, § 109, 110, where will be found the whole doctrine of the law of nations on this subject.)

The general rule is, that nothing shall be done by a neutral to invigorate the belligerent. A right of peaceful commerce is not a right to set forth a warlike expedition. On that principle, a government might be neutral, and all its subjects belligerent. The words of the elementary writers are to be construed according to the subject upon which they treat. They all speak of a peaceable merchant vessel, not an armed vessel. Neutrals, says Sir W. Scott, may trade in the same manner as before the war, provided they take no direct part in the contest. It is not necessary to show, that the party actually put a match to the guns. This vessel was forced into action by Pinto; at all events, she *was brought into action by means of Pinto. [*401 He had a direct part in the contest.

The authority cited from Bynkershoek is in our favor, if we interpret the words according to the subject-matter. He says, a neutral may let as well as hire a vessel, but it must be a lawful letting and hiring. He did not mean to say, that a neutral may carry on a peaceful trade, in hostile manner. In the next sentence, he says, you may employ the vessel and the labor of the belligerent. It is clear, that he means an unarmed vessel.

What are the rights of the belligerent in regard to the neutral? He may search the vessel, the cargo and the papers. We have reason to complain of a neutral who puts a cargo like this (a great part being belligerent), on board a belligerent armed vessel, whereby our right of search is eluded, without a battle. A neutral may, indeed, if he can, elude the right of

search, by superior sailing, but he cannot lawfully prevent it by force. In the case cited from 5 Rob. 206, there is not evidence that the vessel was armed. If the fact had been so, it would undoubtedly have been mentioned by the reporter or the judge. Their silence shows that it was not armed.

The slightest recourse to belligerent force, in support of neutral rights, is fatal. A neutral vessel may arm, but she cannot resist belligerent rights. A neutral must not, directly or indirectly, contribute to the force of an enemy. In *The Maria*, 1 Rob. 287, it is decided, that resistance of the convoy ship, is the resistance of the whole convoy ; and that the resistance of the ship affects the cargo.

In the case of *The Elsebe*, 5 Rob. 174 (Eng. ed.), one of the questions was, whether the cargoes, belonging to subjects of the Hans Towns, laden on board Swedish vessels, and sailing under Swedish convoy, were liable to condemnation ? the convoying ships having resisted search by the British fleet. It was contended on their behalf, that they were not involved *402] in the penalties of Swedish resistance, *which was an act of the Swedish government, and did not bind the subjects of other powers ; that the proprietors of these cargoes were not privy to this fact ; and that the masters of the vessels were not the agents of the cargoes, so as to bind them. Sir William Scott, after stating that there was in the charter-party, an express stipulation that the ship should sail with convoy, says, "But I will take the case, on the supposition that there was no such engagement. The master associates himself with a convoy, the instructions of which he must be supposed to know ; he puts the goods under unlawful protection, and it must be presumed, that this is done with due authority from the owners, and for their benefit. It is not the case of an unforeseen emergency, happening to the ship at sea, where the fact itself proves the owners to be ignorant and innocent ; and where the court has held, that being proved innocent by the very circumstances of the case, they shall not be bound by the mere principle of law, which imposes on the employer a responsibility for the acts of his agent. On the contrary, it is a matter done antecedently to the voyage, and must, therefore, be presumed to be done, on communication with the owners, and with their consent ; and the effect of this presumption is such, that it cannot be permitted to be averred against ; inasmuch as all the evidence must come from the suspected parties themselves, without affording a possibility of meeting it, however prepared. The court has, therefore, thought it not unreasonable, to apply the strict principle of law, in a case not entitled to any favor, and holds, as it does in blockade cases of that description, that the master must be taken to be the authorized agent of the cargo, that he has acted under powers from his employer, and that, if he has exceeded his authority, it is barratry, for which he is personally answerable, and for which the owner must look to him for idemnification. I pass over many considerations which have been properly pressed in argument ; but I cannot omit to observe, that this is not merely a question arising on a single fact of limited consequence ; it is a pretension of infinite importance, and of great extent, being nothing less than an opposition to the general law of search, by which, if it could, in one instance, be admitted, the whole provisions of the law of nations on that head might be effec- *403] tually defied ; *for if this principle could be maintained, by an interchange of convoys, the whole unlawful business might be carried on with

security. To put the goods of one country on board the ships of another, would be a complete *recipe* for the safety of the goods, with a trifling alteration, easily understood, and easily practised, while the mischief itself would exist in full force."

The same principle was afterwards advanced by the Danish government, in relation to American ships, sailing under British convoy, and acquiesced in by the American government. See the letter from our minister, Mr. Irvin, to the secretary of state, of June 23d, 1811, and the letter from the Swedish minister, Rosencrantz, to Mr. Irvin, of the 28th of June 1811. State Papers, p. 224, 235.

A neutral cannot employ the force of his own government, nor that of another neutral, much less than that of a belligerent, to protect himself from search. If you cannot make use of the convoy, you cannot take the guns of that convoy and protect yourself. It is not the modification of the force, but the force itself, that is unlawful. If a neutral, insured as such, range himself under convoy, the policy is vacated.

This case is not like that of neutral goods put into a fortified town, before investment: it is more like that of goods placed there, after investment. They were put on board, with a full knowledge that the vessel would be invested (if a land term may be permitted in speaking of a naval transaction), that is, that she would be liable to search.

Pinkney, on the same side, contended, that this property ought to be condemned upon three grounds: 1. The treaty with Spain; 2. The principle of reciprocity; and 3. The conduct of Pinto in hiring an armed vessel of the enemy, which made resistance.

*I. As to the Spanish treaty. It contains the stipulation that "free ships shall make free goods," and it does not negative the converse [*404 proposition, that enemy ships shall make enemy goods. Hence, we are at liberty to give the stipulation its full extent and scope. This principle was first attempted to be established by Holland, immediately after the treaty of Munster. They sought to establish by treaty, that the flag should communicate its character to the cargo. This was the original form of the proposition. It necessarily involved the principle, that hostile ships should make hostile goods. How preposterous would it be, to say, that neutral ships should make neutral goods, but enemy's ships should not make enemy's goods.

It is the universal understanding among nations, that the two propositions are mutually connected, and the one implies the other. It might have been necessary, in the outset, to express both, but when the principle was generally understood, that necessity ceased. The United States had no interest in extending the range of the principle; and in all her treaties, except those with Spain and Prussia, she has stipulated for both parts of the rule. There is no reason, either in the commercial or belligerent policy of the United States, which should induce her to stop short with the proposition, that free ships should make free goods, and not go on to adopt the converse.

Spain had no motive to adopt the principle, with the limitation under consideration. In her treaties with France, Holland and England, she adopts the principle in its whole extent. She took it with the qualification that neutrals should not put their goods on board a belligerent vessel. In her

treaty with England, she expresses only the converse, viz., that "enemy ships shall make enemy goods." It has been said, that she limited the principle, by acceding to the armed neutrality; but that was a mere ephemeral act, and its validity depended upon an event which never happened—the accession of England.

*405] II. As to the law of Spain and the principle of reciprocity. *In the ordinance of 1702, it appears to be her favorite principle, that "enemy ships shall make enemy goods." In the ordinance of 1718, the same principle is adopted, and ordered to be carried into execution. These ordinances were re-enacted in 1739, 1756, 1779, 1794 and 1796. The treaty now under consideration was wedged in between two of these ordinances; those of 1794 and 1796. Is it impossible, that Spain, the declared enemy of neutral rights, meant to recognise a principle like this, which had never before been taken under the protection of any nation? Are we to suppose, that Spain, by this treaty, meant to abandon her own local law? Spain has had this principle in abhorrence. By her ordinance of 1718, she says, that if any part of the cargo is hostile, it shall communicate its character to the ship and all the residue of the cargo. This principle cannot be understood but in the manner for which we contend. By the law of Spain, therefore, this property would be liable to condemnation. By the rule of reciprocity, it ought to be condemned here.

But it is objected, that the Spanish law has never been enforced against us. It is sufficient for us to show that it exists. In the absence of contrary proof, the presumption is, that it has been executed. It is said also, that the rule of reciprocity applies only to the case of re-capture and salvage. But Sir W. Scott, in *The Santa Cruz* (1 Rob. 53, Am. ed.), says, that "this principle of reciprocity is by no means peculiar to cases of re-capture: it is found also to operate in other cases of maritime law: at the breaking out of a war, it is the constant practice of this country to condemn property seized before the war, if the enemy condemns, and to restore, if the enemy restores. It is a principle sanctioned by the great foundation of the law of England, *Magna Charta* itself; which prescribes, that at the commencement of a war, the enemy's merchants shall be kept and treated as our own merchants are treated in their country."

*406] *The principle of reciprocity has been distinctly recognised and adopted by the law of Spain. Holland remonstrated, but Spain answered, that Holland had not resisted the maritime principles of England. The same answer was received from France, when we complained of the Berlin and Milan decrees. The British orders in council also were founded upon the same principle. Great Britain attempted to justify them, by the assertion that we acquiesced in the Berlin and Milan decrees. The assertion was not true; but it shows that Great Britain acknowledged the rule of reciprocity, as a rule of the law of nations.

III. As to the armament and resistance. The undisputed facts are, that Pinto hired the whole vessel, and took in goods on freight, for his own benefit. That the vessel was armed, sailed, resisted and was captured.

It is contended, that he could lawfully do all this. If he could, he was a "chartered libertine." Can a neutral surround himself "with all the pomp and circumstance of war?" The idea of our opponents exhibits a *discordia rerum*—an incongruous mixture of discordant attributes; a centaur-like

figure—half man, half ship ; a phantastic form, bearing in one hand the spear of Achilles, in the other, the olive branch of Minerva ; the frown of defiance on her brow, and the smile of conciliation on her lip, entwining the olive branch of peace around the thunderbolt of Jupiter, and hurling it, thus disguised, indiscriminately, at friends and foes.

From the authorities cited on the other side, an inference is attempted to be drawn, that a neutral may lawfully employ an armed merchant vessel of the enemy, to transport his goods. But none of those authorities speak of an armed vessel. Such a vessel, unquestionably, has power to make captures. If she has a commission, the captures are for her own benefit ; if she has no commission, she captures for the crown. Her prizes are *droits* of admiralty. It is true, that if she sail without a pass, or some document to show her national character, she would be considered as a pirate ; but this vessel had a British pass. If all neutrals may *lawfully hire such [*407
vessels, the ocean may be covered with them, and they might more effectually aid the enemy than his own navy.

Bynkershoek says, the neutral must do nothing to the prejudice of the belligerent. It is incumbent, therefore, upon Pinto, to show that he did us no prejudice, by chartering such an armed vessel. We say, he thereby infringed our right of search. It is said, that the right of search is a right to search the ship only. But why search the ship ? To see what sort of a cargo she has. The cargo, therefore, must be searched as well as the ship. A neutral cannot carry contraband goods, nor violate blockade, nor carry his own property, if it be the produce of his estate in the enemy's country. To prevent this, the belligerent has a right to stop and search his cargo. In this case, it is the hostile character of the vessel, which constitutes the offence, inasmuch as it prevented our right of search.

In the case of *The Elsebe*, the cargo was forfeited, by sailing under convoy, which resisted search. Pinto falls by the fate of war. He identified himself with a hostile armament ; he knew the necessary consequence of his act ; he knew it would be the duty of the ship to resist ; and that resistance would be made, if there should be any chance of escape thereby. He must be either at peace or war. He cannot claim the advantages of both conditions, at the same time.

Emmet, in reply, after removing the objections which had been raised as to the British domicil of Pinto, and as to some variations between his testimony *in præparatorio* and his test-affidavit, &c., observed—

As to the treaty with Spain, that the maxim "free ships shall make free goods," does not imply the converse, that hostile ships shall make hostile goods. There is certainly no necessary connection between the two maxims, nor have they ever been supposed to be necessarily connected. The one is the claim of a neutral, the other of a belligerent. What is the rule of justice ? That free ships should make free goods, and that free *goods, [*408
in belligerent ships, should be free also. Whenever the two maxims have been connected in a treaty, it has been where one of the maxims was important to one of the parties, as a neutral nation, and the other, to the other party, as a belligerent nation.

In the treaty of the armed neutrality, in 1780, the interest of the Dutch was to have the benefit of both maxims. The Dutch idea, however, was

discarded by the northern confederacy, and the two maxims completely separated. The Empress of Russia, in her manifesto of the 26th of February 1780, declaring the principles which she intended to follow, states this principle in the following words, "That the effects belonging to the subjects of the said warring powers shall be free, in all neutral vessels, except contraband merchandise." But she says nothing respecting neutral goods found on board belligerent vessels. It cannot be supposed, that she meant to surrender her neutral rights, by mere implication. The principle is expressed in nearly the same words, in the treaty of armed neutrality of 1780; nothing is there said respecting neutral goods in belligerent vessels. The King of Prussia, however, in his answer to the Russian manifesto, explicitly claims the freedom of neutral goods, on board belligerent ships, as well as of belligerent goods, on board of neutral ships. These facts show that, in the general understanding of all Europe, the two maxims were entirely distinct and independent. See also Marten's Law of Nations, translated by Cobbett, 318. The United States did not exist as a nation, until after the two maxims were thus completely separated.

Only three of the treaties by the United States have been produced on the other side. There are, in fact, eight in which the principle is mentioned. 1. The treaty with France of the 6th of February 1778 (8 U. S. Stat. 24), which expressly adopts both maxims; the United States having, in that instance, yielded to the belligerent claim of France. 2. The treaty with Holland of the 8th of October 1782 (Ibid. 40). 3. The treaty with Sweden of 3d April 1783 (Ibid. 64), adopts only the maxim that free ships shall make free goods. 4. The treaty with Prussia of 1785 (Ibid. 90), which adopts the principle free ships, &c., only. 5. The treaty *with Morocco, 1787 (Ibid. 101), which stipulates that free ships shall make free goods, and that neutral goods on board of belligerent vessels shall also be free. This latter stipulation was necessary, inasmuch as the Barbary powers pay little respect, in practice, to the law of nations. 6. The treaty of 1795, with the Dey of Algiers (Ibid. 132), which adopts the maxim, free ships, free goods. 7. The treaty with Spain of 1795 (Ibid. 146), adopts the same maxim. 8. The treaty with Tripoli, of 1796 (Ibid. 154), adopts the same maxim, and further stipulates that neutral goods shall be free, in belligerent vessels. It was not necessary that such a stipulation should be inserted in the treaty with Spain, because Spain knew the law of nations and professed to respect it.

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If there be no doubt, then, as to the construction to be given to the Spanish treaty, there is no necessity to discuss the ordinance which is supposed to be connected with it. The principle which they call the rule of reciprocity, ought more properly to be called the rule of retaliation. But there is no such ordinance of Spain as is pretended. The ordinance applies only to Spanish goods, found on board the vessels of the enemy, and was a mere temporary provision, to continue only during the war. It appears by the extract from D'Habreu, found in 2 Azuni 139, that the liability of the goods of neutrals, found on board the vessels of the enemy, depended upon treaties and not upon that ordinance.

The rule of retaliation is not a rule of the law of nations. The violation of the law of nations by one nation, does not make it lawful for the offended nation to violate the law in the same way. It is true, that states may resort

to retaliation, as a means of coercing justice from the other party. But this is always done as an act of state, and not as the mere result of a judicial execution of the law of nations. It is the effect of policy, not of law. Such were the measures adopted by the orders in council of Great Britain, and the offensive decrees of France, and of other nations under the control of France, which have been mentioned on the other side. The government of a state always undertakes to punish the violation *of its rights, and it chooses its own means. But the tribunals of justice must decide according to law. [*410

The cases alluded to by Sir W. Scott, in *The Santa Cruz*, are cases in which the government could lawfully exercise its discretion in receding from its acknowledged rights. Thus, in the case of property seized at the breaking out of a war, the government would have an unquestioned right to condemn or to release it. It was not the right to condemn, which depended upon the rule of reciprocity, but the inexpediency. It was not a question of law, but of policy.

As to the armament, and the resistance. It is difficult to say, in what fact the opposite party consider the criminality to exist. Is it that Pinto took unarmed passengers on board? This was lawful. Was it the taking on board enemy goods? This was innocent. Was it in chartering an armed vessel? There is no rule of the law of nations against it. Was it in arming the vessel? The fact is not proved. Was it in joining in the combat? It is fully proved, that he took no part in the contest.

But it is said, that chartering the vessel makes him owner for the voyage. This is not the rule, in a court of admiralty. Even if an enemy charter a neutral vessel, he is not owner for the voyage: the vessel is always restored. Bynkershoek says, it is not unlawful for a neutral to hire a vessel from the enemy, for commercial purposes. But it is said, that he means an unarmed vessel: there is nothing to support that idea; the natural presumption is, that an enemy's ship would be armed.

It is said also, that a neutral may deposit his goods in an armed belligerent vessel, under a bill of lading, but not under a charter-party. That is, that several neutral merchants may severally occupy the whole ship, but that one cannot. A distinction founded upon no difference of principle, cannot alter the case. How does he call the belligerent faculties of the ship into action, more in one case than in the other? Does the neutral add to her belligerent faculty, by lading her deeply and giving her a destination from which she dare not depart in quest of her enemy?

This is not a commissioned vessel: that case might be different. The Epervier was a commissioned vessel, and it is said, was coming from Bermuda, with bullion for the British troops in Canada; otherwise, probably, a claim for the bullion would have been interposed. In the case of the British packets, captured during the present war, was the property of the neutral passengers confiscated? These vessels were armed and commissioned. But there is no distinction taken in the books between commisioned and uncommissioned vessels, except that the latter cannot make captures, under the penalty of being treated as pirates. 2 Azuni 233. [*411

If the doctrine be true, in regard to an armed vessel, it must be equally true, with regard to convoy; yet they do not pretend, that this vessel is liable to condemnation, because she sailed with convoy. The law of England

is, now, that no vessel shall sail without convoy. Such a doctrine would go to prevent neutral property from being laden on board an English merchantman. Did England suppose, when she was passing the law requiring all vessels to sail with convoy, that she was cutting herself off from all neutral freight?

When writers on the law of nations speak of a belligerent vessel, what do they mean? They speak of it as of a wolf, which you can only hold by the ears—*lupum auribus tenere.* They mean a vessel carrying on war. But can a vessel carry on war, without arms? What degree of armament is sufficient to make it unlawful for a neutral to employ her? One musket, or two, or twenty?

The *Consolato del Mare* was written long before the knowledge of firearms, and does not speak of the distinction between armed and unarmed. In all the battles in which England has been engaged, and in all her commercial transactions, has such a case never occurred before? If it has, why are the books silent upon the subject? Why has not a single writer in the world mentioned the difference between neutral goods, found in an armed, and in an unarmed, vessel of the enemy? See 2 Azuni 194, 195, 196, 197, and the authorities there cited.

The owner of the ship was an enemy: he had a perfect right to arm and defend his ship: the master, for *this purpose, was his exclusive agent. His act in defending the ship cannot be attributed to the innocent owner of the cargo, who also had a perfect right to put his goods on board such a ship; and who did not interfere in the combat. But it is said, that a neutral has only a right to carry on his accustomed trade, in his accustomed manner. Where is it said, that it must be carried on in his accustomed manner? There is no authority for such a restriction, nor any principle to justify it. But this trade from London to Buenos Ayres was always carried on in British ships, and often, if not generally, armed. This was a voyage carried on in the accustomed way.

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It is said also, that by putting these neutral goods on board an armed vessel, our right of search, as belligerent nation, was impaired. But how is the right of search applicable to this case? This is a secondary right, auxiliary to the belligerent right of capturing the enemy's goods on board a neutral vessel. It is applicable only to a vessel bearing a neutral flag. The belligerent has a right to know whether the cargo be really neutral, and for that purpose must examine it at sea. But if the vessel bears the flag of an enemy, there is no necessity to search the nature of the cargo at sea. You have the right to capture at once, and bring her in, when the cargo may be examined; the neutral must make out his claim, and is never entitled to damages for the delay or the detention.

Why does neutral resistance of search forfeit the cargo as well as the vessel, although the owner of the cargo had no concern in the vessel nor in the resistance? It is, because the act of resistance was wholly unlawful; and the owner of the cargo can recover damages from the owner of the vessel or the master. But here, the resistance was lawful; Pinto could never recover damages against the master for defending his ship.

March 11th, 1815. (Absent, Todd, J.) MARSHALL, Ch. J., after stating the facts of the case, delivered the opinion of the court, as follows:—

*In support of the sentence of condemnation in this case, the captors contend, 1. That the claimant, Manuel Pinto, has neither made sufficient proof of his neutral character, nor of his property in the goods he claims. 2. That by the treaty between Spain and the United States, the property of a Spanish subject, in an enemy's vessel, is prize of war. 3. That on the principles of reciprocity, this property should be condemned. 4. That the conduct of Manuel Pinto and of the vessel has impressed a hostile character on his property, and on that of other Spaniards laden on board of the Nereide.

I. Manuel Pinto is admitted to be a native of Buenos Ayres, and to carry on trade at that place, in connection with his father and sister, who are his partners, and who also reside at Buenos Ayres ; but it is contended, that he has acquired a domicil in England, and with that domicil, the English commercial character. Is the evidence in any degree doubtful on this point ? Baltaza Ximenes, Antonio Lynch and Felix Lynch, three Spaniards, returning with Pinto, in the Nereide, all depose, that Buenos Ayres is the place of his nativity and of his permanent residence, and that he carries on trade at that place. In his test-affidavit, Manuel Pinto swears, in the most explicit terms, to the fact that Buenos Ayres is, and always has been, the place of his permanent residence ; that he carries on business there, on account of himself, his father and sister, and that he has been absent for temporary purposes only. His voyage to London, where he arrived in June 1813, was for the purpose of purchasing a cargo for his trade at Buenos Ayres, and of establishing connections in London for the purposes of his future trade at Buenos Ayres.

This plain and direct testimony is opposed, *1. By his examination *in præparatorio*. In his answer to the first interrogatory, he says, [*414 that he was born at Buenos Ayres, that for seven years last past, he has lived and resided in England and Buenos Ayres, that he now lives at Buenos Ayres, that he has generally lived there for thirty-five years last past, and has been admitted a freeman of the new government. Whatever facility may be given to the acquisition of a commercial domicil, it has never heretofore been contended, that a merchant, having a fixed residence, and carrying on business, at the place of his birth, acquires a foreign commercial character, by occasional visits to a foreign country. Had the introduction of the words "seven years last past," even not been fully accounted for by reference to the interrogatory, those words could not have implied such a residence as would give a domicil. But they are fully accounted for. In his answer to the 12th interrogatory, he repeats, that he is a Spanish American ; now lives and carries on trade at Buenos Ayres, and has generally resided there.

2. The second piece of testimony relied on by the counsel for the captors is the charter-party. That instrument states Manuel Pinto to be of Buenos Ayres, now residing in London. The charter-party does not state him to have been formerly of Buenos Ayres, but to be, at its date, of Buenos Ayres. Nothing can be more obvious, than that the expression, now residing in London, could be intended to convey no other idea than that he was then personally in London. As little importance is attached to the covenant to receive the return-cargo, at the wharf in London. The performance of this duty by the consignee of the cargo, as the agent of Pinto, would be a complete execution of it. Had the English character been friendly, and

the Spanish hostile, it would have been a hardy attempt, indeed, in *Mr. Pinto, to found, on these circumstances, a claim to a domicil in England.

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The question respecting ownership of the goods is not so perfectly clear. The evidence of actual ownership, so far as the claim asserts property existing, at the time, in himself and partners, is involved in no uncertainty. The test-affidavit annexed to the claim, is full, explicit and direct. It goes as far as a test-affidavit can go, in establishing the right which the claim asserts. All the documentary evidence, relating to this subject, corroborates this affidavit. The charter-party shows an expectation that, of a freight of 700*l.*, the goods of Mr. Pinto would pay 400*l.* The very circumstance that he chartered the whole vessel furnishes strong inducements to the opinion, that a great part of her cargo would be his own.

The witnesses examined *in præparatorio*, so far as they know anything on the subject, all depose to his interest. William Puzey was clerk to Pinto, and he deposes to the interest of his employer, on the knowledge acquired in making out invoices and other papers belonging to the cargo. His belief too, is, in some degree, founded on the character of Pinto, in London, where he was spoken of as a man of great respectability and property; and from the anxiety he discovered for the safety of the property, after the Nereide was separated from her convoy. The bills of lading for that part of the cargo which is claimed by Pinto, are filled up, many of them, with his name, some to order, and the marginal letters in the manifest would also denote the property to be his. Where he claims a part of a parcel of goods, the invoice is sometimes to order, and the marginal letters would indicate the goods to be the property of Pinto and some other person.

This testimony proves, very satisfactorily, the interest of Pinto's house in the property he claims. There is no counter-testimony in the cause, except the belief expressed by Mr. Puzey, that for a part of the goods, Pinto was agent for the government of Buenos Ayres. This *belief of Mr. Puzey is supposed to derive much weight from his character as the clerk of Mr. Pinto. The importance of that circumstance, however, is much diminished, by the fact, that he had seen Pinto only a week before the sailing of the Nereide, and that he does not declare his belief to be founded on any papers he had copied or seen; or on any communication made to him by his employer. There are other and obvious grounds for his suspicion. A part of the cargo consisted of arms and military accoutrements; and it was not very surprising, that Puzey should conjecture that they were purchased for a government about to sustain itself by the sword. But this suspicion is opposed by considerations of decisive influence, which have been stated at the bar. The demand for these articles in Buenos Ayres, by the government, would furnish sufficient motives to a merchant for making them a part of his cargo. In a considerable part of this warlike apparatus, British subjects were jointly concerned. It is extremely improbable, that, if acting for his government, he would have associated its interests with those of British merchants. Nor can a motive be assigned for claiming those goods for himself, instead of claiming them for his government. They would not, by such claim, become his, if restored; he would still remain accountable to his government, and the truth would have protected the property as effectually as a falsehood, should it remain undetected. By claiming these goods

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for himself, instead of his government, he would commit a perjury from which he could derive no possible advantage, and which would expose to imminent hazard, not only those goods, but his whole interest in the cargo. The court, therefore, must consider this belief of Mr. Puzey, as a suspicion, which a full knowledge of the facts ought entirely to dissipate.

If there was nothing in the cause but this suspicion, or this belief of Mr. Puzey, the court would not attach any importance to it. But Mr. Pinto himself has, in his examination *in præparatorio*, been, at least, indiscreet, in asserting claims not to be sustained; and in terms which do not exhibit the real fact in its true shape. In his answer to the 12th interrogatory, he says, "And this deponent also has one-fourth interest, as owner of the following goods, &c., viz., 15 bales of merchandise," &c. In his claim, he thus states the transaction under which his title to the one-fourth of these goods accrued. *He had agreed with certain persons in England to select for them a parcel of goods for the market of Buenos Ayres, of which he was to [*417 be the consignee, and which he would sell on a commission of ten per cent. on the amount of sales at Buenos Ayres.. These goods were selected, purchased and consigned to Manuel Pinto. The bills of lading were in his possession, and he considered his interest under this contract as equal to one-fourth of the value of the goods, "wherefore," he says, "he did suppose that he was interested in the said goods and merchandise for himself, his father and sister, and well entitled, as the owner thereof, or otherwise, to an equal fourth part of the said goods, inasmuch as his commissions as aforesaid, would have been equal to such fourth."

It is impossible to justify this representation of the fact. The reasoning might convince the witness, but the language he used was undoubtedly calculated to mislead the court, and to extricate property to which the captors were clearly entitled, although the witness might think otherwise. Such misrepresentations must be frowned on in a prize court, and must involve a claim, otherwise unexceptionable, in doubt and danger. A witness ought never to swear to inferences, without stating the train of reasoning by which his mind has been conducted to them. Prize courts are necessarily watchful over subjects of this kind, and demand the utmost fairness in the conduct of claimants. Yet, prize courts must distinguish between misrepresentations which may be ascribed to error of judgment, and which are, as soon as possible, corrected by the party who has made them, and wilful falsehoods which are detected by the testimony of others, or confessed by the party, when detection becomes inevitable. In the first case, there may be cause for a critical, and perhaps, suspicious examination of the claim, and of the testimony by which it is supported; but it would be harsh indeed, to condemn neutral property, in a case in which it was clearly proved to be neutral, for one false step, in some degree equivocal in its character, which was so soon corrected by the party making it.

The case of Mr. Paul's printing-press is still less dubious in its appearance. It would require a very critical *investigation of the evidence, [*418 to decide whether this press is stated, in his answer to the 12th interrogatory, to be his property or not. Four presses are said in that answer to belong to him; but he also says, in his answer to another interrogatory, perhaps the 26th, that Mr. Paul had one printing-press on board. Whether there were five presses in the cargo, or only four, has not been

decided, because the declaration made in his examination *in præparatorio*, that one of the presses belonged to Mr. Paul, proves unequivocally that the mistake, if he made one, was not fraudulent.

That he should state as his, the property which belonged to a house in Buenos Ayres, whose members all resided at the same place, and of which he was the acting and managing partner, was a circumstance which could not appear important to himself, and which was of no importance in the cause. These trivial and accidental inaccuracies are corrected in his claim, and in his test-affidavit. The court does not think them of sufficient importance, to work a confiscation of goods, of the real neutrality of which no serious doubt is entertained.

II. Does the treaty between Spain and the United States subject the goods of either party, being neutral, to condemnation as enemy property, if found by the other, in the vessel of an enemy? That treaty stipulates that neutral bottoms shall make neutral goods, but contains no stipulation that enemy bottoms shall communicate the hostile character to the cargo. It is contended by the captors, that the two principles are so completely identified, that the stipulation of the one necessarily includes the other. Let this proposition be examined.

The rule that the goods of an enemy, found in the vessel of a friend, are prize of war, and that the goods of a friend, found in the vessel of an enemy, are to be restored, is believed to be a part of the original law of nations, as generally, perhaps universally, acknowledged. Certainly, it has been fully and unequivocally recognised by the United States. This rule is founded on the simple and intelligible principle, that war gives a full right to capture the goods of an enemy, but gives no right to *capture the goods of a friend. In the practical application of this principle, so as to form the rule, the propositions that the neutral flag constitutes no protection to enemy property, and that the belligerent flag communicates no hostile character to neutral property, are necessarily admitted. The character of the property, taken distinctly and separately from all other considerations, depends in no degree upon the character of the vehicle in which it is found.

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Many nations have believed it to be their interest to vary this simple and natural principle of public law. They have changed it, by convention between themselves, as far as they have believed it to be for their advantage to change it. But unless there be something in the nature of the rule, which renders its parts unsusceptible of division, nations must be capable of dividing it, by express compact, and if they stipulate either that the neutral flag shall cover enemy goods, or that the enemy flag shall infect friendly goods, there would, in reason, seem to be no necessity for implying a distinct stipulation not expressed by the parties. Treaties are formed upon deliberate reflection. Diplomatic men read the public treaties made by other nations, and cannot be supposed either to omit or insert an article, common in public treaties, without being aware of the effect of such omission or insertion. Neither the one nor the other is to be ascribed to inattention. And if an omitted article be not necessarily implied in one which is inserted, the subject to which that article would apply, remains under the ancient rule. That the stipulation of immunity to enemy goods, in the bottoms of one of the parties, being neutral, does not imply a surrender of the goods of that party, being neutral, if found in the vessel of an enemy, is the proposition of the

counsel for the claimant, and he powerfully sustains that proposition, by arguments arising from the nature of the two stipulations. The agreement that neutral bottoms shall make neutral goods is, he very justly remarks, a concession made by the belligerent to the neutral. It enlarges the sphere of neutral commerce, and gives to the neutral flag a capacity not given to it by the law of nations.

The stipulation which subjects neutral property, found in the bottom of an enemy, to condemnation as prize of *war, is a concession made by the neutral to the belligerent. It narrows the sphere of neutral commerce, and takes from the neutral a privilege he possessed under the law of nations. The one may be, and often is, exchanged for the other. But it may be the interest and the will of both parties, to stipulate the one, without the other; and if it be their interest, or their will, what shall prevent its accomplishment? A neutral may give some other compensation for the privilege of transporting enemy goods in safety, or both parties may find an interest in stipulating for this privilege, and neither may be disposed to make to, or require from, the other, the surrender of any right, as its consideration. What shall restrain independent nations from making such a compact? And how is their intention to be communicated to each other, or to the world, so properly, as by the compact itself? [*420

If reason can furnish no evidence of the indissolubility of the two maxims, the supporters of that proposition will certainly derive no aid from the history of their progress, from the first attempts at their introduction to the present moment. For a considerable length of time, they were the companions of each other—not as one maxim, consisting of a single indivisible principle, but as two stipulations, the one, in the view of the parties, forming a natural and obvious consideration for the other. The celebrated compact, termed the armed neutrality, attempted to effect by force a great revolution in the law of nations. The attempt failed, but it made a deep and lasting impression on public sentiment. The character of this effort has been accurately stated by the counsel for the claimants. Its object was, to enlarge, and not in anything to diminish, the rights of neutrals. The great powers, parties to this agreement, contended for the principle, that free ships should make free goods; but not for the converse maxim; so far were they from supposing the one to follow as a corollary from the other, that the contrary opinion was openly and distinctly avowed. The king of Prussia declared his expectation, that in future, neutral bottoms would protect the goods of an enemy, and that neutral goods would be safe in an enemy bottom. There is no reason to believe, that this opinion *was not common to those powers who acceded to the principles of the armed neutrality. [*421

From that epoch to the present, in the various treaties which have been formed, some contain no article on the subject, and consequently, leave the ancient rule in full force. Some stipulate that the character of the cargo shall depend upon the flag, some that the neutral flag shall protect the goods of an enemy, some that the goods of a neutral, in the vessel of a friend, shall be prize of war, and some that the goods of an enemy in a neutral bottom shall be safe, and that friendly goods in the bottom of an enemy shall also be safe. This review, which was taken with minute accuracy at the bar, certainly demonstrates that, in public opinion, no two principles are

more distinct and independent of each other, than the two which have been contended to be inseparable.

Do the United States understand this subject differently from other nations? It is certainly not from our treaties that this opinion can be sustained. The United States have, in some treaties, stipulated for both principles, in some for one of them only, in some that neutral bottoms shall make neutral goods, and that friendly goods shall be safe in the bottom of an enemy. It is, therefore, clearly understood in the United States, so far as an opinion can be formed on their treaties, that the one principle is totally independent of the other. They have stipulated expressly for their separation, and they have sometimes stipulated for the one without the other.

But in a correspondence between the secretary of state of the United States and the minister of the French republic, in 1793, Prussia is enumerated among those nations with whom the United States had made a treaty adopting the entire principle that the character of the cargo should be determined by the character of the flag. Not being in possession of this correspondence, the court is unable to examine the construction it has received. It has not deferred this opinion on that account, because the point in controversy, at that time, was the obligation imposed on the United States to
*422] protect belligerent *property in their vessels, not the liability of their property to capture, if found in the vessel of a belligerent. To this point, the whole attention of the writer was directed, and it is not wonderful, that in mentioning, incidentally, the treaty with Prussia which contains the principle that free bottoms make free goods, it should have escaped his recollection, that it did not contain the converse of the maxim. On the talents and virtues which adorned the cabinet of that day, on the patient fortitude with which it resisted the intemperate violence with which it was assailed, on the firmness with which it maintained those principles which its sense of duty prescribed, on the wisdom of the rules it adopted, no panegyric has been pronounced at the bar, in which the best judgment of this court does not concur. But this respectful difference may well comport with the opinion, that an argument incidentally brought forward, by way of illustration, is not such full authority as a decision directly on the point might have been.

III. The third point made by the captors is, that whatever construction might be put on our treaty with Spain, considered as an independent measure, the ordinances of that government would subject American property, under similar circumstances, to confiscation, and therefore, the property, claimed by Spanish subjects in this case, ought to be condemned as prize of war.

The ordinances themselves have not been produced, nor has the court received such information respecting them, as would enable it to decide certainly, either on their permanent existence, or on their application to the United States. But be this as it may, the court is decidedly of opinion, that reciprocating to the subjects of a nation, or retaliating on them, its unjust proceedings towards our citizens, is a political, not a legal measure. It is for the consideration of the government, not of its courts. The degree and the kind of retaliation depend entirely on considerations foreign to this tribunal. It may be the policy of the nation to avenge its wrongs, in a manner having no affinity to the injury sustained, or it may be its policy to recede from its

full rights, and not to avenge them at all. It is not for its courts to interfere with the proceedings of the nation, and to thwart its views. It is not for us to depart from the beaten track *prescribed for us, and to tread the devious and intricate path of politics. Even in the case of [*423 salvage, a case peculiarly within the discretion of courts, because no fixed rule is prescribed by the law of nations, congress has not left it to this department, to say whether the rule of foreign nations shall be applied to them, but has by law applied that rule. If it be the will of the government, to apply to Spain any rule respecting captures, which Spain is supposed to apply to us, the government will manifest that will by passing an act for the purpose. Until such an act be passed, the court is bound by the law of nations, which is a part of the law of the land.

Thus far the opinion of the court has been formed, without much difficulty. Although the principles, asserted by the counsel, have been sustained on both sides, with great strength of argument, they have been found, on examination, to be simple and clear in themselves. Stripped of the imposing garb in which they have been presented to the court, they have no intrinsic intricacy which should perplex the understanding.

The remaining point is of a different character. Belligerent rights and neutral privileges are set in array against each other. Their respective pretensions, if not actually intermixed, come into close contact, and the line of partition is not so distinctly marked as to be clearly discernible. It is impossible to declare in favor of either, without hearing, from the other, objections which it is difficult to answer, and arguments which it is not easy to refute. The court has given to this subject a patient investigation, and has endeavored to avail itself of all the aid which has been furnished by the bar. The result, if not completely satisfactory even to ourselves, is one from which it is believed we should not depart, were further time allowed for deliberation.

IV. Has the conduct of Manuel Pinto and of the Nereide been such, as to impress the hostile character on that part of the cargo which was in fact neutral? In considering this question, the court has examined separately the parts which compose it. The vessel was armed; was the property of an enemy; *and made resistance. How do these facts [*424 affect the claim?

Had the vessel been armed by Pinto, that fact would certainly have canstituted an important feature in the case. But the court can perceive no reason for believing she was armed by him. He chartered, it is true, the whole vessel, and that he might as rightfully do, as contract for her partially; but there is no reason to believe, that he was instrumental in arming her. The owner stipulates that the Nereide, "well-manned, victualled, equipped, provided and furnished with all things needful for such a vessel," shall be ready to take on board a cargo to be provided for her. The Nereide, then, was to be put, by the owner, in the condition in which she was to sail. In equipping her, whether with or without arms, Mr. Pinto was not concerned. It appears to have been entirely and exclusively the act of the belligerent owner.

Whether the resistance, which was actually made, is in any degree imputable to Mr. Pinto, is a question of still more importance. It has been argued, that he had the whole ship, and that, therefore, the resistance was

his resistance. The whole evidence upon this point is to be found in the charter-party, in a letter of instructions to the master, and in the answer of Pinto to one of the interrogatories *in præparatorio*. The charter-party evinces throughout, that the ship remained under the entire direction of the owner, and that Pinto in no degree participated in the command of her. The owner appoints the master, and stipulates for every act to be performed by the ship, from the date of the charter-party to the termination of the voyage. In no one respect, except in lading the vessel, was Pinto to have any direction of her. The letter of instructions to the master contains full directions for the regulation of his conduct, without any other reference to Mr. Pinto than has been already stated. That reference shows a positive limitation *of his power, by the terms of the charter-party. Consequently, he had no share in the government of the ship.

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But Pinto says, in his answer to the 6th interrogatory, that "he had control of the said ship and cargo." Nothing can be more obvious, than that Pinto could understand himself as saying no more than that he had the control of the ship and cargo, so far as respected her lading. A part of the cargo did not belong to him, and was not consigned to him. His control over the ship began and ended, with putting the cargo on board. He does not appear ever to have exercised any authority in the management of the ship. So far from exercising any, during the battle, he went into the cabin, where he remained until the conflict was over. It is, then, most apparent, that when Pinto said, he had the control of the ship and cargo, he used those terms in a limited sense. He used them in reference to the power of lading her, given him by the charter-party. If, in this, the court be correct, this cause is to be governed by the principles which would apply to it had the Nereide been a general ship.

The next point to be considered is the right of a neutral to place his goods on board an armed belligerent merchantman. That a neutral may lawfully put his goods on board a belligerent ship, for conveyance on the ocean, is universally recognised as the original rule of the law of nations. It is, as has already been stated, founded on the plain and simple principle, that the property of a friend remains his property, wherever it may be found. "Since it is not," says Vattel, "the place where a thing is, which determines the nature of that thing, but the character of the person to whom it belongs, things belonging to neutral persons, which happen to be in an enemy's country, or on board an enemy's ships, are to be distinguished from those which belong to the enemy." Bynkershoek lays down the same principles, in terms equally explicit ; and in terms entitled to the more consideration, because he enters into the inquiry whether a *knowledge of the hostile character of the vessel, can affect the owner of the goods. The same principle is laid down by other writers on the same subject, and is believed to be contradicted by none. It is true, there were some old ordinances of France, declaring that a hostile vessel or cargo should expose both to condemnation ; but these ordinances have never constituted a rule of public law.

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It is deemed of much importance, that the rule is universally laid down in terms which compehend an armed as well as an unarmed vessel ; and that armed vessels have never been excepted from it. Bynkershoek, in discussing a question, suggesting an exception, with his mind directed to hostilities,

does not hint that this privilege is confined to unarmed merchantmen. In point of fact, it is believed, that a belligerent merchant vessel rarely sails unarmed, so that this exception from the rule would be greater than the rule itself. At all events, the number of those who are armed, and who sail under convoy, is too great, not to have attracted the attention of writers on public law; and this exception to their broad general rule, if it existed, would certainly be found in some of their works. It would be strange, if a rule laid down, with a view to war, in such broad terms as to have universal application, should be so construed, as to exclude from its operation almost every case for which it purports to provide, and yet that not a *dictum* should be found in the books, pointing to such construction. The antiquity of the rule is certainly not unworthy of consideration. It is to be traced back to the time when almost every merchantman was in a condition for self-defence, and the implements of war were so light and so cheap, that scarcely any would sail without them.

A belligerent has a perfect right to arm in his own defence; and a neutral has a perfect right to transport his goods in a belligerent vessel. These rights do not interfere with each other. The neutral has no control over the belligerent right to arm—ought he to be accountable for the exercise of it? *By placing neutral property in a belligerent ship, that property, according to the positive rules of law, does not cease to be neutral. [*427 Why should it be changed, by the exercise of a belligerent right, universally acknowledged, and in common use when the rule was laid down, and over which the neutral had no control?

The belligerent answers, that by arming, his rights are impaired. By placing his goods under the guns of an enemy, the neutral has taken part with the enemy, and assumed the hostile character. Previous to that examination which the court has been able to make of the reasoning by which this proposition is sustained, one remark will be made, which applies to a great part of it. The argument which, taken in its fair sense, would prove that it is unlawful to deposit goods for transportation in the vessel of an enemy, generally, however imposing its form, must be unsound, because it is in contradiction to acknowledged law.

It is said, that by depositing goods on board an armed belligerent, the right of search may be impaired; perhaps, defeated. What is this right of search? Is it a substantive and independent right, wantonly, and in the pride of power, to vex and harass neutral commerce, because there is a capacity to do so? or to indulge the idle and mischievous curiosity of looking into neutral trade? or the assumption of a right to control it? If it be such a substantive and independent right, it would be better that cargoes should be inspected in port, before the sailing of the vessel, or that belligerent licenses should be procured. But this is not its character. Belligerents have a full and perfect right to capture enemy goods, and articles going to their enemy which are contraband of war. To the exercise of that right, the right of search is essential. It is a mean justified by the end. It has been truly denominated a right growing out of, and ancillary to the greater right of capture. Where this greater right may be legally exercised, *without search, the right of search can never arise or come into [*428 question.

But it is said, that the exercise of this right may be prevented by the

inability of the party claiming it, to capture the belligerent carrier of neutral property. And what injury results from this circumstance? If the property be neutral, what mischief is done, by its escaping a search? In so doing, there is no sin, even as against the belligerent, if it can be effected by lawful means. The neutral cannot justify the use of force or fraud, but if, by means, lawful in themselves, he can escape this vexatious procedure, he may certainly employ them.

To the argument, that by placing his goods in the vessel of an armed enemy, he connects himself with that enemy, and assumes the hostile character; it is answered, that no such connection exists. The object of the neutral is the transportation of his goods. His connection with the vessel which transports them is the same, whether that vessel be armed or unarmed. The act of arming is not his—it is the act of a party who has a right so to do. He meddles not with the armament, nor with the war. Whether his goods were on board or not, the vessel would be armed and would sail. His goods do not contribute to the armament, further than the freight he pays, and freight he would pay, were the vessel unarmed. It is difficult to perceive in this argument anything which does not also apply to an unarmed vessel. In both instances, it is the right and the duty of the carrier to avoid capture, and to prevent a search. There is no difference, except in the degree of capacity to carry this duty into effect. The argument would operate against the rule which permits the neutral merchant to employ a belligerent vessel, without imparting to his goods the belligerent character.

The argument respecting resistance stands on the same ground with that which respects arming. Both are lawful. Neither of them is chargeable to
*429] the goods *or their owner, where he has taken no part in it. They are incidents to the character of the vessel; and may always occur where the carrier is belligerent.

It is remarkable, that no express authority on either side of this question, can be found in the books. A few scanty materials, made up of inferences from cases depending on other principles, have been gleaned from the books and employed by both parties. They are certainly not decisive for or against either. The celebrated case of the *Swedish convoy* has been pressed into the service. But that case decided no more than this, that a neutral may arm, but cannot, by force, resist a search. The reasoning of the judge, on that occasion, would seem to indicate, that the resistance condemned the cargo, because it was unlawful. It has been inferred on the one side, that the goods would be infected by the resistance of the ship, and on the other, that a resistance which is lawful, and is not produced by the goods, will not change their character.

The case of *The Catharine Elizabeth* approaches more nearly to that of the Nereide, because, in that case, as in this, they were neutral goods and a belligerent vessel. It was certainly a case, not of resistance, but of an attempt by a part of the crew to seize the capturing vessel. Between such an attempt, and an attempt to take the same vessel, previous to capture, there does not seem to be a total dissimilitude. But it is the reasoning of the judge, and not his decision, of which the claimants would avail themselves. He distinguishes between the effect which the employment of force by a belligerent owner, or by a neutral owner, would have on neutral goods.

The first is lawful, the last unlawful. The belligerent owner violates no duty; he is held by force, and may escape, if he can. From the marginal note, it appears, that the reporter understood this case to decide, in principle, that resistance by a belligerent vessel, would not confiscate the cargo. It is only in a case without express authority, that such materials can be relied on.

If the neutral character of the goods is forfeited by the resistance of the belligerent vessel, why is not the neutral character of the passengers forfeited by the same *cause? The master and crew are prisoners of war, why are not those passengers who did not engage in the conflict, also prisoners? That they are not, would seem to the court to afford a strong argument in favor of the goods. The law would operate in the same manner on both. [*430

It cannot escape observation, that in argument, the neutral freighter has been continually represented as arming the Nereide, and impelling her to hostility; he is represented as drawing forth and guiding her warlike energies. The court does not so understand the case. The Nereide was armed, governed and conducted by belligerents; with her force, or her conduct, the neutral shippers had no concern. They deposited their goods on board the vessel, and stipulated for their direct transportation to Buenos Ayres. It is true, that on her passage, she had a right to defend herself, did defend herself, and might have captured an assailing vessel; but to search for the enemy, would have been a violation of the charter-party and of her duty.

With a pencil dipped in the most vivid colors, and guided by the hand of a master, a splendid portrait has been drawn, exhibiting this vessel and her freighter as forming a single figure, composed of the most discordant materials, of peace and war. So exquisite was the skill of the artist, so dazzling the garb in which the figure was presented, that it required the exercise of that cold investigating faculty which ought always to belong to those who sit on this bench, to discover its only imperfection; its want of resemblance. The Nereide has not that centaur-like appearance which has been ascribed to her; she does not rove over the ocean, hurling the thunders of war, while sheltered by the olive branch of peace; she is not composed in part of the neutral character of Mr. Pinto, and in part of the hostile character of her owner. She is an open and declared belligerent; claiming all the rights, and subject to all the dangers, of the belligerent character. She conveys neutral property, which does not engage in her warlike equipments, nor in any employment she may make of them; which is put on board solely for the purpose of transportation, and which encounters the hazard incident *to its situation; the hazard of being taken into port, and obliged to seek another conveyance, should its carrier be captured. [*431

In this, it is the opinion of the majority of the court, there is nothing unlawful. The characters of the vessel and cargo remain as distinct in this as in any other case. The sentence, therefore, of the circuit court must be reversed, and the property claimed by Manuel Pinto for himself and his partners, and for those other Spaniards for whom he has claimed, be restored, and the libel, as to that property, be dismissed.

Johnson, J.—Circumstances, known to this court, have imposed upon me, in a great measure, the responsibility of this decision. I approach the

case with all the hesitation which respect for the opinion of others, and a conviction of the novelty and importance of some of the questions are calculated to inspire. The same respect imposes upon me an obligation briefly to state the course of reasoning by which I am led to my conclusion.

On the minor points, I feel no difficulty. There is nothing to support the charge of English domiciliation ; the charges of prevarication are satisfactorily explained ; and on the question of national character, we must yet awhile reluctantly yield to the acknowledgment that Buenos Ayres is not free.

On the construction of the Spanish treaty, I feel as little hesitation. That a stipulation calculated solely to produce an extension of neutral rights, should involve in itself a restriction of neutral rights ; that a mutual and gratuitous concession of a belligerent right, should draw after it a necessary relinquishment of a neutral right, which has never yielded but to express and (generally) extorted stipulation ; are conclusions wholly irreconcilable to any principle of logical deduction.

Nor does the argument founded on reciprocity stand on any better ground. There is a principle of reciprocity known to courts administering international law ; but I trust it is a reciprocity of benevolence, and that the angry passions which produce revenge and retaliation will never exert
*432] their influence on the administration of *justice. Dismal would be the state of the world, and melancholy the office of a judge, if all the evils which the perfidy and injustice of power inflict on individual man, were to be reflected from the tribunals which profess peace and good-will to all mankind. Nor is it easy to see how this principle of reciprocity, on the broad scale by which it has been protracted in this case, can be reconciled to the distribution of power made in our constitution among the three great departments of government. To the legislative power alone it must belong to determine, when the violence of other nations is to be met by violence. To the judiciary, to administer law and justice as it is, not as it is made to be by the folly or caprice of other nations.

The last question in the case is the only one on which I feel the slightest difficulty. The general rule, the incontestible principle is, that a neutral has a right to employ a belligerent carrier. He exposes himself thereby to capture and detention, but not to condemnation. To support the condemnation in this case, it is necessary to establish an exception to this rule ; and it is important to lay down the exceptions contended for, with truth and precision.

In the first place, it is contended, that a neutral has not a right to transport his goods on board of an armed belligerent. Secondly, that if this right be conceded, Pinto, in this case, has carried the exercise of it beyond the duties of fair neutrality : 1. By laying the vessel under the obligation of a contract to sail with convoy : 2. By chartering an entire armed vessel of the enemy, and thus expediting an armed hostile force : 3. By taking in enemy goods on freight, and thereby laying himself under an implied con-
*433] tract that the armament of the vessel should be used in its defence : *4. It was also contended, that he had, in fact, armed the vessel after chartering her, and increased her force by admitting passengers : 5. That the correspondence, found on board, shows that the armament was immediately directed against capture by Americans.

On the first and principal ground, much may be said, but nothing added, to the ingenious discussion which it has received from counsel. The question is, why may not a neutral transport his goods on board an armed belligerent? No writer on the law of nations has suggested this restriction on his rights; and it can only be sustained, on the ground of its obstructing the exercise of some belligerent right. What belligerent right does it interfere with? Not the right of search, for that has relation to the converse case; it is a right resulting from the right of capturing enemy's goods in a neutral bottom. It must be, then, the right, which every nation asserts, of being the sole arbiter of his own conduct towards other nations, and deciding for itself, whether property, claimed as neutral, be owned as claimed. The question is thus fairly stated between the neutral and belligerent. On the one hand, the neutral claims the right of transporting his goods in the hostile bottom: on the other, the belligerent objects to his doing it, under such circumstances as to impair his right of judging, between himself and the neutral, on the neutrality of his property and conduct. The evidence of authority, the practice of the world, and the reason and nature of things, must decide between them. All these are, in my opinion, in favor of the neutral claim.

Every writer on international law acknowledges the right of the neutral, to transport his goods in a hostile bottom. No writer has restricted the exercise of that right to unarmed ships. Every civilized nation (with the exception of Spain) has unequivocally acknowledged the existence of this right, unless it be relinquished by express stipulation; *and, even with regard to Spain, the evidence is wholly unsatisfactory, to [*434 prove that she maintains a different doctrine. My present belief is, that she does not; but, admit that does; and surely the practice of one nation, and that one, not the most enlightened or commercial, ought not to be permitted to control the law of the world.

And what is the decision of reason on the merits of these conflicting pretensions? Her first and favorite answer would be, that were the scales equally suspended between the parties, the decision ought to be given in favor of humanity. Already is the aspect of the world sufficiently darkened by the horrors of war. It is time to listen to the desponding claims of man, engaged in the peaceful pursuits of life. But these are considerations in favor of the neutral, to which the heart need not assent; they are addressed to the judgment alone. Admit the claim of the belligerent, and you fritter away the right of the neutral, until it is attenuated to a vision. Admit the claim of the neutral, and it is attended with a very immaterial change in the rights and interests of the belligerent.

Where are we to draw the line? If a vessel is not to be armed, what is to amount to an exceptionable armament? It extends to an absolute and total privation of the right of arming a hostile ship. Resistance, and even capture, is lawful to any belligerent that is attacked. On the other hand, what injury is done to the belligerent, by recognising the right of the neutral? The cargo of a belligerent neither adds to nor diminishes his right to resist. If empty, he must be subdued, before he can be possessed; and if laden, the right or faculty of resistance is in no wise increased. It is inherent in her national character, and can be exercised by strict right, [*435 without any reference to the cargo that she contains. *Suppose,

the case of a vessel and cargo, wholly neutral; even she possesses a natural right to resist seizure; but her resistance must be effectual, or international law pronounces her forfeited. What injury results to the belligerent cruizer? If the cargo be really neutral, the exercise of his right of judging becomes immaterial; and if it be contraband, or otherwise subject to condemnation, what reason in nature can be assigned, why the neutral owner should not throw himself upon the fortune of war, and rely upon the protection of your enemy? You treat him as an enemy, if captured, and why should not he regard you as an enemy, and provide for his defence against you? I can very well conceive, that a case may occur, in which it may become the policy of this country to throw down the gauntlet to the world, and assert a different principle. But the policy of these states is submitted to the wisdom of the legislature, and I shall feel myself bound by other reasons, until the constitutional power shall decide what modifications it will prescribe to the exercise of any acknowledged neutral right.

The second ground of exception resolves itself into several points, and presents to my mind the greatest difficulties in the case. 1. There is a stipulation contained in the charter-party, that the vessel shall sail with convoy. 2. Pinto chartered the whole vessel. 3. He took in sub-affreightment of hostile goods. 4. It is contended, he had contributed to the arming and manning of the vessel, after chartering her. 5. And that her equipment was pointedly against American capture.

With regard to the latter two points, I am of opinion, that the evidence does not prove that Pinto contributed to the armament of the vessel; and if she was armed by the owners, that it was against American capture, is immaterial. As to the passengers, Pinto had no control over the reception of them into the vessel. He had *taken the hold and two berths in the cabin; as to the residue, it remained subject to the disposal of the master or owner. With regard to the three other points, after the best consideration that I have been able to give the subject, I satisfy my mind by two considerations.

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1. I will not now give an opinion upon the abstract case of an individual neutral to all the world. It is known, that Pinto was liable to capture both by the French and Carthagenians. This justified him in placing himself under British protection; and if, in the exercise of this unquestionable right, he has incidentally impaired the exercise of our right of seizure for adjudication, we have nothing to complain of. The case occurs daily; and nothing but candor and fairness can be exacted of a neutral, under such circumstances.

2. There appears to prevail much misconception with regard to the control acquired by Pinto, in this vessel, under the charter-party. His contract gave him the occupation of the hold of the vessel and two berths in the cabin; but went no further. Over the conduct of the master and crew, in navigating or defending the vessel, it communicated to him no power. It is true, that by the conduct of the master and the fate of the vessel, he might be incidentally affected as a sub-freighter, and so far he had an interest in her defence; still, however, it is reducible to the general interest which he had in the performance of the voyage, and it does not appear, that he ever acted under an idea of being authorized to control the conduct of the master, or took any part in the conflict which preceded the capture.

I am of opinion, that the judgment should be reversed, and the property restored.

STORY, J. (*dissenting.*)—My opinion will be confined to the point last argued, because it definitely disposes of the cause, against the claim of Mr. Pinto. The facts material to this point are, that Mr. Pinto chartered the Nereide, an uncommissioned armed ship, belonging to British subjects, for a voyage from London *to Buenos Ayres, and back to London, at a stipulated freight. The ship was to be navigated, during the voyage, [*437 at the expense of the general owner, who expressly covenanted, in the charter-party with Mr. Pinto, that she should sail on the voyage, under British convoy. Mr. Pinto, having thus hired the whole ship, took on board sundry shipments, partly on his own or Spanish account, and partly on account of British merchants, from whom he was to receive, in lieu of freight, a portion of the profits and commissions. The Nereide sailed, with her cargo, under British convoy, and with instructions from the owner to the master, to govern himself, in relation to the objects of the charter-party, according to the direction of Mr. Pinto, who accompanied the ship in the voyage. During the passage to Buenos Ayres, the Nereide was accidentally separated from the convoy, and while endeavoring to regain it, was, after a vigorous but unsuccessful resistance, captured by the privateer Governor Tompkins, and brought into New York for adjudication. It is explicitly asserted, in the testimony, that Mr. Pinto took no part in the resistance, at the time of the capture.

The question is, whether, upon these facts, Mr. Pinto, assuming him to be a neutral, has so incorporated himself with the enemy interests, as to forfeit that protection which the neutral character would otherwise afford him? The general doctrine, though formerly subject to many learned doubts, is now incontrovertibly established, that neutral goods may be lawfully put on board of an enemy ship, without being prize of war. As this doctrine is asserted in the most broad and unqualified manner in publicists, it is thence attempted to be inferred, by the counsel for the claimant, that no distinction can exist, whether the ship be armed or unarmed, or be captured with or without resistance: arguments of this sort are liable to many objections, and are, in general, wholly unsatisfactory. Elementary writers rarely explain the principles of public law, with the minute distinctions which legal precision requires. Many of the most important doctrines of the prize courts will not be found to be treated of, or even glanced at, in the elaborate treatises of Grotius, or Puffendorf or Vattel. A striking illustration is their total silence as to the illegality and penal *consequences of a [*438 trade with the public enemy. Even Bynkershoek, who writes professedly on prize law, is deficient in many important doctrines which every day regulate the decrees of prize tribunals. And the complexity of modern commerce has added incalculably to the number as well as the intricacy of questions of national law. In what publicists are to be found the doctrines as to the illegality of carrying enemy dispatches, and of engaging in the coasting, fishing or other privileged trade of the enemy? Where are transfers *in transitu* pronounced to be illegal? Where are accurately and systematically stated all the circumstances which impress upon the neutral, a general, or a limited, hostile character, either by reason of his domicil, his

territorial possessions, or his connection in a house of trade, in the enemy country? The search would be nearly in vain, in the celebrated jurists whose authority has been quoted to silence the present inquiry. Yet the argument would be no less forcible, that these doctrines have not a legal existence, because not found in systematic treatises on the law of nations, than that which has been so earnestly pressed upon us by the counsel for the claimants. The assumed inference is then utterly inadmissible. The question before the court must be settled upon other grounds; upon a just application of the principles which regulate neutral, as well as belligerent, rights and duties. Let us then proceed to consider them.

It is a clear maxim of national law, that a neutral is bound to a perfect impartiality as to all the belligerents. If he incorporate himself into the measures or policy of either; if he become auxiliary to the enterprises or acts of either, he forfeits his neutral character; nor is this all. In relation to his commerce, he is bound to submit to the belligerent right of search, and he cannot lawfully adopt any measures whose direct object is to withdraw that commerce from the most liberal and accurate search, without the application on the part of the belligerent of superior force. If he resist this exercise of lawful right, or if, with a view to resist it, he take the protection of an armed neutral convoy, he is treated as an enemy, and his property is confiscated. Nor is it at all material, whether the resistance be direct or constructive. The resistance of the convoy is the resistance of all the ships associated under the common protection, without any *distinction whether the convoy belong to the same or to a foreign, neutral sovereign; for upon the principles of natural justice, a neutral is justly chargable with the acts of the party, which he voluntarily adopts, or of which he seeks the shelter and protection. *Qui sentit commodum, sentire debet et onus.* These principles are recognised in the memorable cases of *The Maria*, 1 Rob. 340, and *The Elsebe*, 5 Ibid. 173; and can never be shaken, without delivering over to endless controversy and conflict the maritime rights of the world.

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It has, however, been supposed, by the counsel of the claimants, that a distinction exists between taking the protection of a neutral, and of a belligerent, convoy. That in the former case, all armament for resistance is unlawful; but in the latter case, it is not only lawful, but in the highest degree commendable. That although an unlawful act, as resistance by a neutral convoy, may justly affect the whole associated ships; yet it is otherwise of a lawful act, as resistance of a belligerent ship, for no forfeiture can reasonably grow out of such an act, which is strictly justifiable.

The fallacy of the argument consists in assuming the very ground in controversy; and in confounding things, in their own nature entirely distinct. An act perfectly lawful in a belligerent, may be flagrantly wrongful in a neutral; a belligerent may lawfully resist search, a neutral is bound to submit to it; a belligerent may carry on his commerce by force, a neutral cannot; a belligerent may capture the property of his enemy on the ocean, a neutral has no authority whatever to make captures. The same act, therefore, that, with reference to the rights and duties of the one, may be tortious, may, with reference to the rights and duties of the other, be perfectly justifiable. The act then, as to its character, is to be judged of, not merely by that of the parties, through whose immediate instrumentality

it is done; but also by the character of those, who, having co-operated in, assented to, or sought protection from it, would yet withdraw themselves from the penalties of the act. It is analogous to the case at common law, where an act, justifiable in one party, does not, from that fact alone, shelter his coadjutor. They must stand or fall upon *their own merits. It would be strange, indeed, if, because a belligerent may kill his enemy, [*440 a neutral may aid in the act; or because a belligerent may resist search, a neutral may co-operate to make it effectual. It is, therefore, an assumption utterly inadmissible, that a neutral can avail himself of the lawful act of an enemy, to protect himself in an evasion of a clear belligerent right.

And what reason can there be for the distinction contended for? Why is the resistance of the convoy deemed the resistance of the whole neutral associated ships, let them belong to whom they may? It is not, that there is a direct and immediate co-operation in the resistance, because the case supposes the contrary. It is not, that the resistance of the convoy of the sovereign is deemed an act to which all his own subjects consent, because the ships of foreign subjects would then be exempted. It is, because there is a constructive resistance resulting, in law, from the common association and voluntary protection against search, under a full knowledge of the intentions of the convoy. Then, the principle applies as well to a belligerent as to a neutral convoy; for it is manifest, that the belligerent will, at all events, resist search; and it is quite as manifest, that the neutral seeks belligerent protection, with an intent to evade it. Is it, that an evasion of search, by the employment, protection or terror of force, is inconsistent with neutral duties? Then, *à fortiori*, the principle applies to a case of belligerent convoy, for the resistance must be presumed to be more obstinate, and the search more perilous.

There can be but little doubt, that it is upon the latter principle, that the penalty of confiscation is applied to neutrals. The law proceeds yet further, and deems the sailing under convoy as an act *per se* inconsistent with neutrality, as a premeditated attempt to oppose, if practicable, the right of search, and therefore, attributes to such preliminary act, the full effect of actual resistance. In this respect, it applies a rule analogous to that in cases of blockade, where the act of sailing with an intent to break a blockade, is deemed a sufficient breach, to authorize confiscation. And Sir W. Scott manifestly recognises the correctness of this doctrine in *The Maria*, *although the circumstances of that case did not require its rigorous application. [*441

Indeed, in relation to a neutral convoy, the evidence of an intent to resist, as well as of constructive resistance, is far more equivocal, than in case of a belligerent convoy. In the latter case, it is necessarily known to the convoyed ships, that the belligerent is bound to resist, and will resist, until overcome by superior force. It is impossible, therefore, to join such convoy, without an intention to receive the protection of belligerent force, in such manner, and under such circumstances, as the belligerent may choose to apply it. It is an adoption of his acts, and an assistance of his interests, during the assumed voyage. To render the convoy an effectual protection, it is necessary to interchange signals and instructions, to communicate information, and to watch the approach of every enemy. The neutral solicitously aids and co-operates in all these important transactions, and thus far

manifestly sides with the belligerent, and performs, as to him, a meritorious service—a service as little reconcilable with neutral duties, as the agency of a spy, or the fraud of a bearer of hostile dispatches. In respect to a neutral convoy, the inference of constructive co-operation and hostility is far less certain and direct. To condemn, in such case, is pushing the doctrine to a great extent, since it is acting upon the presumption, which is not permitted to be contradicted, that all the convoyed ships distinctly understood and adopted the objects of the convoy, and intimately blended their own interests with hostile resistance.

There is not, then, the slightest reason for the favorable distinction, as to the belligerent convoy, assumed by counsel. On the contrary, every presumption of hostility is, in such case, more violent, and every suspicion of unneutral conduct more inflamed. And so, in the argument of *The Maria*, 1 Rob. 346, it was conceded by the counsel for the claimants, and recognised by the court. It was there said by counsel, that it seemed admitted by the court, on a former day, that there was a just distinction to be made between the two cases of convoy, viz., between the convoy of an enemy's force, and a neutral convoy; that the former (*i. e.*, enemy convoy) would stamp a
*442] primary character of hostility on all ships *sailing under its protection, and it would rest on the parties to take themselves out of the presumption raised against them; but that, even in that case, it would be nothing more than a presumption, which had been determined by a late case before the Lords, *The Sampson*, an asserted American ship, sailing with French cruizers, at the time they engaged some English ships, and communicating with the French ships, by signal for battle. That, in that case, although there had been a condemnation in the court below, the Lords sent it to further proof, to ascertain whether there had been an actual resistance. Sir William Scott emphatically observed, "I do not admit the authority of that case, to the extent to which you push it. That question is still reserved, although the Lords might wish to know as much of the facts as possible." It is clear, from this language, that the learned judge did not admit that the party could be legally permitted to contradict the presumption of hostility attached to the sailing under an enemy convoy. On the contrary, he seemed to consider that the primary character of hostility, which, it was conceded on all sides, was stamped upon such conduct, could not be permitted to be rebutted, but was conclusive upon the party. The case of *The Sampson* was originally heard before the court of vice-admiralty, and the decree of condemnation was never disapproved of, if not ultimately affirmed, by the Lords of Appeal. I have been assured by very respectable authority, that no proof of actual resistance ever was, or could have been, made on the final hearing. The case, therefore, affords a strong inference of the law as understood and administered in the prize courts of Great Britain.

And may it be added, in corroboration, that in *Smart* v. *Wolff*, 3 T. R. 323, 332, Sir W. Scott (then advocate-general) asserted, without hesitation, that if the neutral refused search, or sailed under convoy of the enemy's ships of war, or conveyed intelligence to the enemy, they are waivers of the rights of neutrality. The very circumstance of his putting these three cases in connection, to illustrate his general argument, affords the most cogent

proof that he considered himself as stating a doctrine equally clear and well established as to all of them.(*a*)

*And this doctrine seems conformable to the sense of other European sovereigns. In the recent cases of the American ships, captured, [*443 while under British convoy, by the Danes, the right of condemnation was not only asserted and enforced by the highest tribunal of prize, but expressly affirmed by the Danish sovereign, after an earnest appeal made by the government of the United States. On that occasion, the Danish minister pressed the argument "that he who causes himself to be protected by that act (*i. e.*, enemy convoy), ranges himself on the side of the protector, and thus puts himself in opposition to the enemy of the protector, and evidently renounces the advantages attached to the character of a friend to him against whom he seeks the protection. If Denmark should abandon this principle, the navigators of all nations would find their account in carrying on the commerce of Great Britain, under the protection of English ships of war, without any risk;" and he further declared, "that none of the powers in Europe have called in question the justice of this principle." State Papers, 1811, p. 527.

It cannot be denied, that our own government have acquiesced in the truth and correctness of this statement. And if, to the general silence of the other European sovereigns, we add the positive examples of Great Britain and Denmark (the latter of whom has not of late years been deficient in zeal for neutral rights), it seems difficult to avoid the conclusion, that the doctrine is as well founded in national law, as it seems to me, to be in justice and sound policy.

Another argument which has been urged in favor of the assumed distinction ought not, however, to be omitted. It is, that a party, neutral to one power, may be *an enemy as to another power, and he may lawfully [*444 place himself under belligerent convoy, to escape from his own enemy. In such a predicament, it is, therefore, always open to the neutral to explain his conduct in taking convoy, and to show, by proofs, his innocent intentions as to all friendly belligerents. In my judgment, this supposed state of things would not remove a single difficulty. It is not in relation to enemies, that the question as to taking convoy can ever arise. It has reference only to the rights of friendly belligerents; and these rights remain precisely the same, whatever may be the peculiar situation of the neutral as to third parties. Was it ever heard of, that a neutral might lawfully resist the right

(*a*) Since this opinion was delivered, I find, by an account of all the appeals and final decisions thereon before the Lords of Appeal, published by order of the house of commons, in 1801, that the judgment of condemnation in *The Sampson* was affirmed by the Lords of Appeal. The following is a transcript of the printed account: "Sampson, Joshua Barney, master; cargo, sugar, coffee, cotton, indigo and dry goods, and specie, taken by his majesty's ship of war, Penelope, Bartholomew Samuel Rowley, Esq., commander, claimed for American subjects for ship, cargo and specie; sentence appealed from, pronounced at Jamaica, 22d April 1794—ship, cargo and specie condemned. Sentence in the court of appeals, viz., 31st May 1798, sentence affirmed, as to the specie claimed on behalf of Wacksmuth & Dutilh; and 21st of June, further proof directed to be made of the property of the ship, cargo and rest of the specie. 29th June 1799, ship, cargo and specie condemned."[1]

[1] See The Franklyn, 2 Acton 106; The Fanny, 1 Dods. 448.

of search of one power, because he was at war with another? And is not the evasion of this right just as injurious, whether the neutral be at peace with all the world, or with a part only?

There would be extreme difficulty in establishing, by any disinterested testimony, the fact of any such special intentions as the argument supposes. Independent of this difficulty, it would, in effect, be an attempt to repel, by positive testimony, a conclusive inference of law, flowing from the very act of taking convoy. The belligerent convoy is bound to resist all visitations by enemy ships, whether neutral to the convoyed ships, or not. This obligation is distinctly known to the party taking its protection. If, therefore, he choose to continue under the convoy, he shows an intention to avail himself of its protection, under all the chances and hazards of war. The abandonment of such intention cannot be otherwise evidenced, than by the *overt* act of quitting convoy. And it is impossible to conceive, that the mere secret wishes or private declarations of a party could prevail over his own deliberate act of continuing under convoy, unless courts of prize would surrender themselves to the most stale excuses and imbecile artifices. It would be in vain to administer justice in such courts, if mere statements of intention would outweigh the legal effects of the acts of the parties. Besides, the injury to the friendly belligerent is equally great, whatever might be the special objects of the neutral. The right of search is effectually prevented, by the
*445] presence of superior *force, or exercised only after the perils and injuries of victorious warfare. And it is this very evasion of the right of search, that constitutes the ground of condemnation in ordinary cases. The neutral, in effect, declares that he will not submit to search, until the enemy convoy is conquered, and then only because he cannot avoid it. The special intention of the neutral, then, could not, if proved, upon principle prevail, and it has not a shadow of authority to sustain it. The argument upon this point was urged in *The Maria* and *The Elsebe*, and was instantly repelled by the court.

On the whole, on this point, my judgment is, that the act of sailing under belligerent or neutral convoy is, of itself, a violation of neutrality, and the ship and cargo, if caught *in delicto*, are justly confiscable; and further, that if resistance be necessary, as in my opinion it is not, to perfect the offence, still, that the resistance of the convoy is, to all purposes, the resistance of the associated fleet. It might, with as much propriety, be maintained, that neutral goods, guarded by a hostile army, in their passage through a country, or voluntarily lodged in a hostile fortress, for the avowed purpose of evading the municipal rights and regulations of that country, should not, in case of capture, be lawful plunder (a pretension never yet asserted), as that neutral property on the ocean should enjoy the double protection of war and peace.

If these principles be correct, it remains to be considered, how far the conduct of Mr. Pinto brings him within the range of their influence. It is clear, that in the original concoction of the voyage, it was his intention to avail himself of British convoy. The covenant in the charter-party demonstrates this intention; a covenant that, from its terms, being made by the ship-owner, must have been inserted for the benefit and at the instance of the charterer. Under the faith of this stipulation, Mr. Pinto put his own property on board, and received shipments from persons of an acknowledged hostile character. The ship sailed on the voyage, under British convoy, with

Mr. Pinto on board, and though captured, after a separation from the convoy, she was in the very attempt to rejoin it. There is no pretence, therefore, of an abandonment of the convoy, and the **corpus delicti*, the character of hostility, impressed by the sailing under convoy, if any [*446 attached, remained, notwithstanding the separation. It is like the sailing for a blockaded port, where the offence continues, although, at the moment of capture, the ship be, by stress of weather, driven in a direction from the port of destination ; for the hostile intention still remains unchanged.

And here, to avoid the effect of the general doctrine, we are met with another distinction, founded upon the supposed difference between a belligerent and a neutral merchant ship, as to the taking of convoy. It is argued, that the belligerent ship has an undoubted right to take the protection of the convoy of the nation to which she belongs ; and that this extends a perfect and lawful immunity to the neutral cargo on board.

It is certainly incumbent on the counsel for the claimant, to support this exception to the general rule, by precedent or analogy. Nothing has been offered which, in my judgment, affords it the slightest support. It is not true, that a neutral can shelter his property from confiscation, behind an act lawful in a belligerent. The law imputes to the neutral the consequences of the act, if he might have foreseen and guarded against it, or if he voluntarily adopts it. Was it ever supposed, that a neutral cargo was protected from seizure, by going in a belligerent ship to a blockaded port? or that contraband goods, belonging to a neutral, were exempted from confiscation, because of such a ship, bound on a voyage lawful to the belligerent, but not to the neutral? yet the pretensions in these cases seem scarcely more extravagant than that now urged. Why should a neutral be permitted to do that, indirectly, which he is prohibited from doing directly? Why should he aid the enemy, by giving extraordinary freight for belligerent ships, sailing under belligerent convoy, with the avowed purpose of escaping from search, and often, with the concealed intention of aiding belligerent commerce, and yet claim the benefits of the most impartial conduct? Until some more solid ground can be laid for the distinction, than the ingenuity of counsel has yet suggested, it would seem fit to declare, *ita lex non scripta est.*

But even if the distinction existed, it could not apply *to the case [*447 at bar. This is a case where the claimant becomes the charterer of the whole vessel, for the voyage, and stipulates for the express benefit of the convoy. The ship, though navigated by a belligerent master and crew, was necessarily under the control and management of the charterer. He was the real effective *dux negotii.* Whatever may be the technical doctrine of the common or prize law, as to the general property in the ship, the charterer was, to all purposes important in this inquiry, the owner for the voyage, and the master his agent. Can there be a doubt, that, as to the shipments of the enemy freighters, Mr. Pinto was responsible for the acts of the master? Was he not materially interested in the safety and protection of these shipments, in respect to freight, commissions and profits? If they had been lost by capture, from the negligence of Mr. Pinto, or of the master, when by ordinary diligence and resistance the loss might have been avoided, would not Mr. Pinto have been responsible? How then it can be consistently held, that the ship was not essentially governed and managed by Mr. Pinto, and all her conduct incorporated with his interests, I profess

to be unable to comprehend. For what purpose should he insist on a covenant for convoy, if he never meant to derive aid and protection from it, to the whole cargo on board, and to range himself and his interests on the side of resistance? His private conduct, at the time of the capture, when resistance was almost hopeless, affords no evidence to repel the irresistible presumptions from his deliberate acts.

And here again, it has been argued, that Mr. Pinto had no hostile intentions against the United States; but that the taking of convoy was simply to resist the French and Carthagenians, who are the enemies of his own country. If such special intention could, in point of law, uphold his claim, which, for the reasons already stated, I am entirely satisfied, it could not, yet there is not, in the present case, within my recollection, any proof of such special intention. It rests upon the mere suggestions of counsel. How, indeed, could Mr. Pinto show, that he meant to yield his property to the search of the cruizers of the United States, when the deliberate act of assuming British convoy precluded the possibility of its exercise, unless acquired by victory, after resistance?

*448] *If this view of the case be correct, it must be pronounced, that Mr. Pinto, by voluntarily sailing under convoy, forfeited his neutrality, and bound his property to an indissolubly hostile character.

This, however, is not the only ground upon which the claim of Mr. Pinto ought to be repudiated. There was not merely the illegality of sailing under enemy convoy, up to the very eve of capture, but the fact of actual resistance of the chartered ship, and submission to search only in consequence of superior force. An attempt, however, is made to extract the case at bar, from the penalty of confiscation attached to resistance of search, upon the ground, that Mr. Pinto took no part in this resistance. It is asserted, that a shipper in a general ship is not affected by the act of the enemy master; that the charterer of the whole ship is entitled to as favorable a consideration; and that there is no difference, in point of law, whether the ship have, or have not, a commission, or be, or be not armed. It will be necessary to give to these positions a full examination.

In the first place, it is to be considered, whether a neutral shipper has a right to put his property on board of an armed belligerent ship, without violating his neutral duties? If the doctrine already advanced on the subject of convoy be correct, it is incontestible, that he has no such right. If he cannot take belligerent convoy, *à fortiori*, he cannot put his property on board of such convoy; or, what is equivalent, on board of an armed and commissioned ship of the belligerent. What would be the consequences, if neutrals might lawfully carry on all their commerce in the frigates and ships of war of another belligerent sovereign? That there would be a perfect identity of interests and of objects, of assistance and of immunity, between the parties. The most gross frauds and hostile enterprises would be carried on under neutral disguises, and the right of search would become as utterly insignificant in practice, as if it were extinguished by the common consent of nations. The extravagant premiums and freights which neutrals could well afford to pay for this extraordinary protection, would enable the bel-

*449] ligerent to keep up armaments of incalculable *size, to the dismay and ruin of inferior maritime powers. Such false and hollow neutrality would be infinitely more injurious than the most active warfare. It would

strip from the conqueror all the fruits of victory, and lay them at the feet of those whose singular merit would consist in evading his rights, if not, in collusively aiding his enemy. It is not, therefore, to be admitted, that a neutral may lawfully place his goods under armed protection, on board of an enemy ship. Nor can it be at all material, whether such armed ship be commissioned or not: that is an affair exclusively between a sovereign and his own subjects, but is utterly unimportant to the neutral. For whether the armament be employed for offence, or for defence, in respect to third parties, the peril and the obstruction to the right of search are equally complete. Nor is it true, as has been asserted in argument, that a non-commissioned armed ship has no right to capture an enemy ship, except in her own defence. The act of capture, without such pretext, so far from being piracy, would be strictly justifiable, upon the law of nations, however it might stand upon the municipal law of the country of the capturing ship. Vattel has been quoted to the contrary; but on a careful examination, it will be found that his text does not warrant the doctrine.

I have had occasion to consider this point, in another cause, in this court, and to the opinion then delivered, I refer, for a more full discussion of it. If the subject capture, without a commission, he can acquire no property to himself in the prize; and if the act be contrary to the regulations of his own sovereign, he may be liable to municipal penalties for his conduct. But as to the enemy, he violates no rights by the capture. Such, on an accurate consideration, will be found to be the doctrine of Puffendorf, and Grotius and Bynkershoek, and they stand confirmed by a memorable decision of the Lords of Appeal, in 1759. 2 Browne's Civil and Adm. app'x, 524; Grotius, lib. 3, ch. 6, § 8, 9, 10, and Barbeyrac's note, on § 8; Puffendorf, lib. 8, ch. 6, § 21, &c.; Bynk. Q. P. J. ch. 3, 4, 16, 17; 2 Wooddes. Lect. 432; Consol. del Mare, ch. 287, 288; 4 Inst. 152, 154; Zouch Adm. 101; Casaregis, Disc. 24, n. 24; Com. Dig. Admiralty, E. 3; Bulst. c. 27.

Admitting, however (what to me seems utterly inadmissible), *that a neutral may lawfully ship his goods on board the armed ship of an [*450 enemy, it will be of little avail, unless he is exempted from the consequences of all the acts of such enemy. If the shipment be innocent, it will be of little avail, in this case, if the resistance of the enemy master will compromit the neutral character of the cargo. To the establishment, therefore, of such an exemption, the exertions of counsel have been strenuously directed. It has been inferred from the silence of elementary writers, from the authority of analogous cases, and from the positive declarations of the court, in *The Catharina Elizabeth*, 5 Rob. 206.

The argument drawn from the silence of jurists has been already sufficiently answered. It remains to consider, that which is urged upon the footing of authority. The reasoning from supposed analogous cases is quite as unsatisfactory. It is not true, as to neutrals, that the act of the master never binds the owner of the cargo, unless the master is proved to be the actual agent of the owner. The act of the master may be, and very often is, conclusive upon the cargo, although no general agency is established. Suppose, he violate a blockade, suppress and fraudulently destroy the ship's papers, or mix up, under the same cover, enemy interests, will not the cargo share the fate of the ship? The cases cited are mere exceptions to the general rule. They, in general, turn upon a settled distinction, that the act

of the master shall not bind the cargo, where the act, under the circumstances, could not have been within the scope or contemplation of the shipper, at the time of shipment; or where his ignorance of the voyage, and of the intended acts of the master, is placed beyond the possibility of doubt. See *The Adonis*, 5 Rob. 256. The very case of resistance is a strong illustration of the principle. The resistance of the neutral master, has been deliberately held to be conclusive on the neutral cargo. *The Elsebe*, 5 Rob. 173; *The Catharina Elizabeth*, Ibid. 206. What reason can there be for a different rule in respect to a belligerent master?

It must be admitted, that the language of the court in the case of *The Catharina Elizabeth*, would, at first view, seem to support the position of the claimants' counsel. On a close examination, however, it will not be found *451] to *assert so broad a doctrine. The case was of a rescue, attempted by an enemy master, having on board a neutral cargo; and this rescue attempted, not of the captured, but of the capturing, ship. It is argued, that this resistance of the master exposed the whole cargo, intrusted to his management, to confiscation. The court held, that no such penalty was incurred. That the resistance could only be the hostile act, of a hostile person, who was a prisoner of war, and who, unless under parole, had a perfect right to emancipate himself, by seizing his own vessel. That the case of a neutral master differed from that of any enemy master. No duty was violated by such an act on the part of the latter; *lupum auribus teneo*, and if he could withdraw himself, he had a right so to do. And that a material fact in the case was, that the master did not attempt to withdraw his property, but to rescue the ship of the captor, and not his own vessel. Such was the decision of the court, upon which several observations arise. In the first place, the resistance was not made, previous to the capture; and therefore, whatever may be the extent of the language, it must be restrained to the circumstances of the case in judgment, otherwise, it would be extra-judicial. In the next place, it would be impossible to conceive how the fact, as to what vessel was seized, could be material, if the argument of the present claimant be correct, for in all events, the resistance, as to the cargo, would be without any legal effect. In the last place, it is clear, that the case is put by the court upon the ground, that the master, at the time of the act, had been dispossessed of his vessel by capture, and was a prisoner of war. He was, therefore, no longer acting as master of the ship, and had no further management of her. His rights and duties, as master, had entirely ceased by the capture, and there could be no pretence to affect the ship or cargo with his subsequent acts, any more than with the acts of any other stranger. The case would have been entirely different with a neutral master, whose relation to his ship continues, notwithstanding a capture and carrying in for adjudication. The case, therefore, admits of sound distinctions from that at bar, and cannot be admitted to govern it.

There is another text, not cited in the argument, which may be thought to favor the doctrine of the claimant's counsel. It is the only passage bear- *452] ing on the subject in *controversy which has fallen under my notice in any elementary work. Casaregis, in his Commercial Discourses (Disc. 24, n. 22), has the following remarks:—"*Verum tamen notandum est, quod si navis inimica onerata mercibus mercatorum amicorum aggressa fuerit, alteram inimicam et mercatores aut* domini mercium *operam ac indus-*

triam dedissent pro ea aggredienda tunc merces dominorum cadunt etiam sub præda, si navis predicta onerata mercibus fuerit deprædata, &c., et regulariter bona eorum qui auxilium inimices nostris præstant vel confederati cum iis sunt, prædari possunt." It is obvious, that Casaregis is here considering the case of an attack of an enemy merchant ship, laden with a neutral cargo, upon the ship of its enemy, in which the former is unsuccessful and is captured. Under such circumstances, he holds, that if the neutral shippers, or the persons having the management of the cargo (*domini mercium*) have aided in the attack, the cargo is forfeited, upon the ground, that all who assist or confederate with an enemy, are liable to be plundered, by the law of war. He does not touch the case, where an enemy merchant ship simply makes resistance, in her own defence, or resists the right of search; nor how far the master of such ship is the *dominus mercium*, or can by his own acts bind the cargo. Much less has he discussed the question, as to what acts amount to an incorporation into the objects and interests of the enemy, so as to affix a hostile character. It does not seem to me, that his text can be an authority, beyond the terms in which it is expressed. It pronounces affirmatively, that a co-operation in an attack will induce confiscation of the cargo (which cannot be doubted), but it does not pronounce negatively, that the resistance of an enemy master will not draw after it the same penalty. And if it were otherwise, it would deserve consideration, whether the opinion of a mere elementary writer, respectable as he may be, delivered at a time when the prize law was not as well settled as it has been in the present age, should be permitted to regulate the maritime rights of belligerent nations.

The argument, then, on the footing of authority, fails, for none is produced which directly points at circumstances like those in the case at bar. And upon principle, it seems quite as difficult to support it. I am unable *to perceive any solid foundation on which to rest a distinction between the resistance of a neutral and of an enemy master. The [*453 injury to the belligerent is, in both cases, equally great, for it equally withdraws the neutral property from the right of search, unless acquired by superior force. And until it is established, that an enemy protection legally suspends the right of search, it cannot be, that resistance to such right should not be equally penal in each party. I have, therefore, no difficulty in holding, that the resistance of the ship is, in all cases, the resistance of the cargo, and that it makes no difference, whether she be armed or unarmed, commissioned or uncommissioned. He who puts his property on the issue of battle, must stand or fall by the event of the contest. The law of neutrality is silent, when arms are appealed to, in order to decide rights; and the captor is entitled to the whole prize, won by his gallantry and valor. This opinion is not the mere inference, strong as it seems to me to be, of general reasoning. It is fortified by the consideration, that in the earliest rudiments of prize law, in the great maritime countries of Great Britain and France, confiscation is applied by way of penalty for resistance of search, to all vessels, without any discrimination of the national character of the vessels or cargoes. The Black Book of the Admiralty expressly articulates that any vessel making resistance may be attacked and seized as enemies; and this rule is enforced in the memorable prize instructions of Henry VIII. Clerke's Praxis 164; Rob. Collect. Marit. p. 10, and note, and p. 118. The ordi-

nance of France of 1584, is equally broad ; and declares all such vessels good prize ; and this has ever since remained a settled rule in the prize code of that nation.

Valin informs us, that it is also the rule in Spain ; and that in France, it is applied as well to French vessels and cargoes, as to those of neutrals, and allies. Coll. Marit. 118 ; Valin, *Traits des Prizes*, ch. 5, § 8, p. 80. There is not to be found in the maritime code of any nation, or in any commentary thereon, the least glimmering of authority, that distinguishes, in cases of resistance, the fate of the cargo, from that of the ship. If such a distinction could have been sustained, it is almost incredible, that a single ray of light should not have beamed upon it, during the long lapse of ages, in which maritime warfare *has engaged the world. And if any argument is to be drawn from the silence of authority, I know not under what circumstances it can be more forcibly applied, than against the exception now contended for.

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But even if it were conceded, that a neutral shipper, in a general ship, might be protected, the concession would not assist the present claimant. His interests were so completely mixed up and combined with the interests of the enemy ; the master was so entirely his agent under the charter-party, that it is impracticable to extract the case from the rule that stamps Mr. Pinto with a hostile character. The whole commercial enterprise was radically tainted with a hostile leaven. In its very essence, it was a fraud upon belligerent rights. If, for a moment, it could be admitted, that a neutral might lawfully ship goods in an armed ship of an enemy, or might charter such a ship, and navigate her with a neutral crew, these admissions would fall far short of succoring the claimant. He must successfully contend for broader doctrines, for doctrines which, in my humble judgment, are of infinitely more dangerous tendency than any which Schlegel and Hubner, the champions of neutrality, have yet advanced into the field of maritime controversy. I cannot bring my mind to believe, that a neutral can charter an armed enemy ship, and victual and man her with an enemy crew (for though furnished directly by the owner they are in effect paid and supported by the charterer), with the avowed knowledge and necessary intent that she should resist every enemy ; that he can take on board hostile shipments, on freight, commissions and profits ; that he can stipulate expressly for the benefit and use of enemy convoy, and navigate during the voyage under its guns and protection ; that he can be the entire projector and conductor of the voyage, and co-operate in all the plans of the owner, to render resistance to search secure and effectual ; and that yet, notwithstanding all this conduct, by the law of all nations, he may shelter his property from confiscation, and claim the privileges of an inoffensive neutral. On the contrary, it seems to me, that such conduct is utterly irreconcilable with the good faith of a friend, and unites all the qualities of the most odious hostility. It wears the habiliments of neutrality, only when the sword and the armor of an enemy become *useless for defence. If it be, as it undoubtedly is, a violation of neutrality, to engage in the transport service of the enemy, or to carry his dispatches, even on a neutral voyage, how much more so must it be, to enlist all our own interests in his service, and hire his arms and his crew, in order to prevent the exercise of those rights which, as neutrals, we are bound to submit to? The doctrine is founded in most perfect

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justice, that those who adhere to an enemy connection, shall share the fate of the enemy.

On the whole, in every view which I have been able to take of this subject, I am satisfied, that the claim of Mr. Pinto must be rejected, and that his property is good prize to the captors. And in this opinion, I am authorized to state, that I have the concurrence of one of my brethren. It is matter of regret, that in this conclusion, I have the misfortune to differ from a majority of the court, for whose superior learning and ability I entertain the most entire respect. But I hold it an indispensable duty, not to surrender my own judgment, because a great weight of opinion is against me, a weight which no one can feel more sensibly than myself. Had this been an ordinary case, I should have contented myself with silence; but believing that no more important or interesting question ever came before a prize tribunal, and that the national rights, suspended on it, are of infinite moment to the maritime world, I have thought it not unfit to pronounce my own opinion, diffident, indeed, of its fullness and accuracy of illustration, but entirely satisfied of the rectitude of its principles.

Sentence reversed.

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*Pratt and others, original Complainants, *v.* Thomas Law and William Campbell, original Defendants.

Thomas Law, original Complainant, *v.* Pratt and others, original Defendants.

Pratt and others, original Complainants, *v.* William N. Duncanson and Samuel Ward, original Defendants.

William Campbell, original Complainant, *v.* Pratt and others, and Duncanson and Ward, original Defendants.

Lands in the City of Washington.—Building covenant.—Relief in equity.—Equitable lien.—Discovery.—Attachment.

In the sales of lots, in the city of Washington, the lots are not chargeable for their proportion of an internal alley, laid out for the common benefit of those lots; although the practice so to charge them has been heretofore universally acquiesced in by purchasers; and if a purchaser has acquiesced in that practice, and has received a conveyance, accordingly, without objection, yet he does not thereby acquire a fee-simple in such proportion of the alley, and may, in equity, recover back the purchase-money which he has paid therefor.

If a purchaser of city lots stipulates to build, within a limited time, a house on every third lot purchased, or in that proportion, and receives conveyances for the greater part of the lots, he is not bound to build, in proportion to the lots conveyed, unless the whole number be conveyed.

In a case where it would be difficult to ascertain the injury resulting from the breach of contract, or the sum in damages by which the injury might be compensated, this court will not themselves ascertain the injury nor the damages, nor direct an issue *quantum damnificatus.*

Where a contract for the sale of land has been in part executed, by a conveyance of part of the land, and the vendor is unable to convey the residue, a court of equity will decree the repayment of a proportionate part of the purchase-money, with interest.

If three persons mortgage their joint property, to indemnify the drawer of bills of exchange, drawn for their accommodation, in case of protest; and if each of the mortgagors agree to take up a third part of the bills, upon their return under protest, and two of them neglect to take up their two-thirds, whereby the other mortgagor is compelled to take up the whole of the bills, in consequence of which, he requests the drawer not to release the mortgage, but to hold it for his benefit, a lien in equity is thereby created upon the mortgaged property, to the amount of two-thirds of the bills, in favor of that mortgagor who took up the whole.

Quære? Whether a subsequent incumbrancer can compel a prior incumbrancer to disclose the consideration which he gave for the notes of the debtor, upon which his incumbrance was founded?

An equity of redemption of real estate, in Maryland, is liable to attachment.

February 22d, 1815. These several suits in chancery, in the Circuit Court for the county of Washington, in the district of Columbia, being involved in each other, and relating to the same property, were heard and argued as one cause.

The first of these suits, in the order of time, was that of Pratt and others *v.* Duncanson and Ward, which was instituted on the 24th of March 1801. The bill prayed that Duncanson and Ward might be enjoined from selling certain squares in the city of Washington, which had been mortgaged by Morris, Nicholson and Greenleaf, to Duncanson, to indemnify him against the return of certain bills of exchange, which he had drawn for their accommodation, to the amount of 12,000*l.* sterling, a part whereof, viz., 7600*l.*, it was alleged had been taken up by Ward, who claimed payment from Duncanson, and persuaded him to advertise the mortgaged property for sale. The bill alleged, that although the bills had been taken up by Ward, he had done it

as the agent of Greenleaf, one of the mortgagors, and with his funds; and *prayed for general relief. The squares which were thus mortgaged to Duncanson, were included in a previous mortgage to Thomas Law. [*457

The next suit in order of time, was that of Pratt and others *v.* Thomas Law and William Campbell. The bill was filed on the 14th of December 1804. Its objects was to compel Law to release to the complainants, who were assignees of Morris, Nicholson and Greenleaf, certain squares in the city of Washington, which had been mortgaged by them, to secure to him the conveyance of certain lots and squares, in the same city, which they had contracted to convey to him, and which he was to select from a larger number, which they had purchased of the commissioners of the city; to compel Law to complete his selection; and to vacate certain releases made by him, at the solicitation of Campbell, who had attached the equity of redemption of some of the squares, which were included in the mortgage to Law.

The third suit, in the order of time, was that of Thomas Law *v.* Pratt and others. The bill was filed on the 4th of October 1805, and its object was, to foreclose the mortgage given to secure to Law the conveyance of 2,400,000 square feet of land, in the city of Washington, agreeable to a certain contract between him and Morris, Nicholson and Greenleaf; because about 400,000 square feet, which Law contended he had selected agreeable to his contract, had not been conveyed to him.

The last of these suits, in the order of time, was that of William Campbell *v.* Pratt and others (assignees of Morris, Nicholson and Greenleaf), and W. M. Duncanson and Samuel Ward. The bill was filed in June 1806, and was in the nature of a bill of interpleader. Its object was, to obtain a release from Duncanson, of the mortgage given to him by Morris, Nicholson and Greenleaf, to indemnify him against the return of certain bills of exchange drawn by him for their accommodation, and which Campbell alleged had been taken up by them, or some of them; which release, if made, would inure to the benefit of Campbell, inasmuch as he had attached, and under the proceedings upon the attachment, had *purchased, Morris and Nicholson's equity of redemption. [*458

In order to understand the argument of counsel, and the opinion of the court, it may be necessary to state more minutely the allegations of the parties.

The bill of Pratt and others against Law and Campbell stated, that Morris, Nicholson and Greenleaf, on the 3d of December 1794, gave to the defendant, Thomas Law, their bond, with the condition to convey to him in fee-simple, within ninety days from that date, "2,400,000 square feet of land in the city of Washington, the said Law having paid them the sum of five pence Pennsylvania currency, per square foot, for the same." That on the 4th of December 1794 (the day after the date of the bond), a written agreement was executed between the same parties, by which (after reciting the bond), Morris, Nicholson and Greenleaf covenanted, that if Law should, within eighteen months, be displeased with his purchase, they would return him the purchase-money, with interest, at the expiration of that term. And Law covenanted, that if, within the same term, he should finally determine to keep the land, he would, within four years from the time of such deter-

mination, cause to be built on every third lot, or in that proportion, one brick dwelling-house, or other brick building, at least two stories high; the lots were supposed to average 5265 square feet, each. The bill further charged, that Law did, within the limited time, elect to keep the land, and thereby became liable to build the houses mentioned in the agreement of the 4th of December 1794, but had not built them. That on the 10th of March 1795, the parties entered into another agreement, by which Law was "to have his selection, under his contract of the 4th of December last, in all squares in which the said Morris and Greenleaf have a right of selection, excepting water property, and excepting such squares as are now appropriated, or respecting which the said Morris, Nicholson and Greenleaf have made arrangements, a list of which squares is hereunto annexed." By the same agreement, Morris, Nicholson and Greenleaf covenanted to mortgage to Law other squares and lots, which were then in their possession, until
*459] they could give him *a good title to such property as he might select; Law agreed to give up his right to return the property, and thereby made the purchase absolute. He also agreed, to select by squares, and not by lots, and to close his selection, within ninety days from the date of the agreement, and stipulated, that the houses which he was to build should be such houses as Morris and Greenleaf were obliged to build by contract with the commissioners.

The bill further stated that Morris, Nicholson and Greenleaf, agreeable to that contract, on the 4th of September 1795, mortgaged to Law 857 lots, and 3333 square feet of land, the condition of which mortgage was, that Morris, Nicholson and Greenleaf should pay the penalty of the bond, or, agreeable to its condition, and to the contract of the 10th of March 1795, convey to Law, in fee-simple, with general warranty, 2,400,000 square feet, in the city of Washington. That Law selected about 2,000,000 square feet, but in making his selections, violated his agreement of the 10th of March 1795, by selecting lots in squares from which he was excluded by that agreement, to the injury of Greenleaf, who never assented to such selection. That Law had obtained titles to about 2,000,000 of square feet, and that there remain to be conveyed to him about 400,000 square feet, when he should have complied with his contract of selection, and when he should have built the stipulated number of houses.

That on the 13th of May 1796, Greenleaf conveyed to Robert Morris and John Nicholson, all his interest in the city of Washington, excepting three squares, "and excepting all such lots, lands and tenements as were either conveyed or sold, or agreed to be conveyed, by all or either of them, the said Greenleaf, Morris and Nicholson, or any of their agents or attorneys, to any person, prior to the 10th of July 1795." That on the 26th of June 1797, Morris, Nicholson and Greenleaf conveyed all their interest in the city of Washington, to Pratt and others, the present complainants.

*460] *That Law, knowing the complainants' interest in the property, and with intent to injure the complainants, and to benefit the defendant, Campbell, on the 4th of September, and 5th of October 1797, executed two deeds, releasing to Morris, Nicholson and Greenleaf, part of the mortgaged property, which had been attached by Campbell; which releases were executed by Law, with a full knowledge of the interest of the complainants in the morgaged property; in defiance of their express prohibition; and

with a fraudulent intent to vest the legal estate in Morris and Nicholson, so as to give effect to the attachment of Campbell. That Campbell had engaged to indemnify Law for that act. That the releases were executed, without the knowledge or consent of Morris, Nicholson and Greenleaf, or either of them, and were never delivered to them, or either of them, but were put on record by Law. The complainants prayed, that those deeds of release might be vacated and annulled. They stated, that they were ready, able and willing to carry into effect the contracts between Law and Morris, Nicholson and Greenleaf, and to do everything that in justice and equity ought to be done on their part; but that Law had refused and neglected to build the houses, and to make his selection within the time limited, and out of the squares prescribed; had violated his contract in setting up a claim and keeping the property mortgaged as a collateral security for making him titles to property, which titles he had prevented, by refusing to select the property, &c. The bill required Campbell to state when, from whom, and at what price he obtained the notes of Morris and Nicholson, upon which his attachment was issued; and prayed for general relief.

The answer of Law admitted, that he had received conveyances for "about 2,000,000 of square feet of ground, under the contract, but not within the time stipulated;" it stated the number and kind of houses which he had built; denied that he was bound to receive conveyances with a condition to build; the building contract being independent of the contract to convey the land. It stated, that he was induced to enter into the building contract, by the contract which Morris, Nicholson and Greenleaf had entered into with the commissioners, and others to build *a large number of houses, which contract, it averred, they never complied with. It [*461 stated also, that Morris and Nicholson assigned Law's building contract to the commissioners of the city, and that the present complainants were not the assignees thereof, nor had any interest therein; and that if they had, their remedy was at law and not in equity.

With regard to the releases of September and October 1797, he said, that the mortgaged property was more than ample security; that Morris and Nicholson were, in 1797, generally deemed bankrupts, that their creditors were suing out attachments, and he thought it unjust to keep covered, by his mortgage, from fair creditors, a property so much more than enough to secure his demands, and therefore, executed those releases. He admitted, that Campbell gave him a bond of indemnity, but denied, that he received any compensation. He admitted also, that one of the complainants desired him not to execute them; but he disregarded the request.

Exceptions having been taken to this answer, Mr. Law filed an amended answer, in which he insisted, that he was released from his building contract, because he had not received titles for all the lots he had purchased; or that, as he had originally four years from the date of the contract, to complete his buildings, and was to have had his titles in ninety days, he ought to be allowed four years from the time of receiving his titles. He affirmed, that he made his selection, within the time limited by his contract, and exhibited a copy thereof. He averred, that by the contract of March 10th, 1795, he had a right to select as well from the property which Greenleaf had contracted to purchase in his own name from D. Carroll, as from that which Morris and Greenleaf had contracted to purchase from the commissioners of the city.

That on the 14th of March 1796, after much trouble and vexation, he received his first conveyance of a part of his lots, amounting to 773,122¼ square feet; to obtain which, he had to release to Morris, Nicholson and Greenleaf a part of the mortgaged property, viz., squares Nos. 465, 468, 469, 470, 495, and 498. He averred, that any variation which might appear between his original selection and the squares afterwards conveyed to him, *was occa- *462]
sioned by the slow compliance on the part of Morris, Nicholson and Greenleaf with their contracts with Carroll and the commissioners. He stated, that they gave him full liberty to make another selection of any lots within their purchases or contracts, and referred to Morris and Nicholson's letter to him, of the 17th of September 1796, in which they said, "you may select by squares, out of any that are within our selection, although not chosen by you already, except water property, or where we have, since your selection, or before, improved on, or contracted for the sale of, that which you desire; and we wish you now to name the squares, as the selection and titles shall be completed for you without delay."

That in consequence of that letter, he made another selection, including other squares, and on the 20th of July 1797, received another conveyance of lots from the commissioners, containing 1,142,068¼ square feet. That he also received a deed, dated January 28th, 1797, directly from Morris and Nicholson, for 128,223 square feet, the title to which had since been decided by the chancellor of Maryland, not to have been in them, but the commissioners of the city.

He also stated, that after receiving these three conveyances, "he had selected to have the residue of what was due, conveyed to him out of the half of square 743, square 699, and square 696, containing 314,829½ square feet, which, if the deed of January 28th, 1797, had remained good, would have been near the *quota* to which he were entitled; but the said squares, or the proper portion thereof, never were conveyed, though the said Morris and Nicholson frequently promised so to do. That the said squares were a part of the property which they had contracted to purchase of the said Carroll, according to their contract of the 26th of September 1793" (a copy of which is exhibited, and appeared to be a contract by Greenleaf alone, with Carroll). He referred to a letter from Morris and Nicholson to him, of the 19th of March 1797, in which they said, "we are equally anxious with you to get Mr. Carroll paid, on his (Mr. Carroll's) account, upon our account, and upon your own account; and yet, with all this anxiety, we do not agree to sign the articles, which were *handed us yesterday; our objections *463]
thereto will be filed. But to make your mind at ease on the subject of the property to be conveyed to you by Mr. Carroll, and ours at ease about getting our property released from your mortgage, which it then ought to be, we propose to enter into a contract, with penalty, with you, to fix a limited time, within which the money shall be tendered to Mr. Carroll, say in six weeks, and on your part to covenant therein, that upon so doing you will release to us our mortgage, when Mr. Carroll makes the titles." He referred also to a letter from Mr. Morris to him, of the 21st of June 1797, in which Mr. Morris said, "I am in pursuit of money for Mr. Carroll, and expect success, but I hope, when it comes, he will not plague himself, and embarrass us, by a refusal of it. He ought to have had his money, and

I have always lamented, that we could not pay it, when due, but certainly we will pay as soon as we can."

The answer then averred, that Morris and Nicholson never paid the purchase-money due to Mr. Carroll, nor in any other respect complied with the contract with him, whereby they forfeited all right to the purchase of the property therein mentioned, and disabled themselves from conveying to the defendant, Law, the property he had so selected. That one of the purposes of the deed of assignment, under which the complainants claimed title, was, to pay Mr. Carroll, $13,000 due upon that contract, whereby it became their duty to pay that sum, so as to obtain titles for the defendant, Law; but they never did pay that sum to Mr. Carroll, and it was not now in their power to comply specifically with the contract between the defendant, Law, and Morris, Nicholson and Greenleaf.

To this answer, exceptions were also taken, and the complainants, Pratt and others, filed an amended bill, in which they contended, that the defendant, Law, had not made his selection in due time and manner, according to the original contract; that, therefore, the complainants might now satisfy the balance of the contract, by a conveyance of such lots as they should deem proper; and under that idea, had tendered to Mr. Law a conveyance for the quantity of land which he had a right to claim. *That by [*464
the original contract, Mr. Law had a right to select only out of the property which Morris and Greenleaf had contracted to purchase from the commissioners; for that was the only contract which gave them a right of selection. The complainants also contended, that if, upon Mr. Law's failure to select his lots, within the time limited, the right of selection did not revert to Morris, Nicholson and Greenleaf, yet he was bound to close his selection in a reasonable time, and before Morris and Nicholson had completed their selection, under the contract of Morris and Greenleaf with the commissioners; and that, after closing their selection, they were not bound to convey to Mr. Law, any lots not selected by them, or not before that time selected by him and notified to them. They admitted, that although Mr. Law had forfeited his right of selection, yet Morris and Nicholson, being desirous of gratifying him, and of stimulating him to make the stipulated improvements, caused to be conveyed to him, by deeds dated the 14th of March 1796, and the 20th of July 1797, 1,935,008 square feet of land, without annexing thereto the condition of building, which they had a right to insist upon, including therein sundry lots, not within his right of selection, whereby he obtained more valuable lots, and on better terms, than he was entitled to under his contracts.

They averred, that they are the *bonâ fide* purchasers, for a valuable consideration, of Morris, Nicholson and Greenleaf's equity of redemption in the mortgaged property, without notice of any agreements or transactions between them and the said Law, other than those which appeared on the face of the bond of the 3d of December 1794, the agreement of the 4th of December 1794, that of March 10th 1795, and the mortgage of the 4th of September 1795; and were not in equity bound by any other agreement, if any such existed.

They further stated, that the legal estate of the mortgaged premises, never was in Morris and Nicholson, or either of them, but was in Greenleaf alone. That after Greenleaf had sold to Morris and Nicholson, his interest

in the Washington lots, being largely their creditor, he caused all their prop-
*465] erty in the city to be attached by *process, issued under the laws of Maryland, on the 21st of April 1797, which attachment was for the benefit of the complainants, and was laid on the same property which, on the following day, was attached at the suit of the defendant, Campbell, which attachment, in favor of Greenleaf, was continued until and after the 26th of June 1797, when Morris and Nicholson assigned and transferred to the complainants, for a valuable consideration, all the attached property; whereupon, Greenleaf's attachment was dismissed by consent of the parties, inasmuch as the complainants had, by the assignment, obtained all the benefit which they could have obtained by prosecuting the attachment to judgment of condemnation. They averred, therefore, that if the defendant, Campbell, had any equitable claim to the property, by virtue of his attachment, the complainants had a prior equitable claim, by virtue of their prior attachment.

But they averred also, that neither Morris nor Nicholson ever had such an estate in the mortgaged premises as could be the subject of an attachment at law, or as could be condemned at law, or as could be seized and sold under a *fieri facias*; and that the defendant, Campbell, had notice of the complainants' legal and equitable title, when he purchased the property. That if Morris and Nicholson had any equitable interest therein, it was subject to the duty of doing justice to Greenleaf, the legal proprietor, by paying all they owed him, before the trust, as to them, would be decreed to be performed; and if they had an equity of redemption in the mortgaged lots, and if anything was seized, condemned and sold, under the said Campbell's attachment, it could only be the right which Morris and Nicholson had to redeem the said lots, by conveying to Mr. Law the balance of property due to him, and by satisfying all equitable claims which Greenleaf had upon them. And that, if the complainants should be compelled to convey to Mr. Law, the balance of property which he claimed, the defendant, Campbell, could have no right to the lots, as against the complainants, until he should have satisfied them for all the property which they should have been so
*466] compelled to convey to the defendant, *Law, and should also have satisfied all equitable claims of Greenleaf upon Morris and Nicholson.

The complainants further stated, that they had been informed and believed, that the attachments of the defendant, Campbell, were founded upon notes of Morris and Nicholson, purchased upon speculation, in market, and at a price far below their nominal value; and they contended, that Campbell could not, in equity, recover, even if he had a prior lien upon the lots, more than the *bonâ fide* actual value which he gave for the notes, with legal interest thereon. They called upon him to state what consideration he gave for the notes; and at what price he purchased in the mortgaged lots, at the sale under the *fi. fa.* issued upon the judgment on his attachments.

The answer of the defendant, Campbell, disclaimed all benefit and title under or by virtue of the releases executed by the defendant, Law, at his request; but claimed to hold entirely under the judgment of the court of appeals of Maryland upon his attachments; and referred to his bill of interpleader (as he termed it), and the transcript of the record of the court of appeals of Maryland exhibited therewith; by which transcript, it appeared,

that the attachments were issued on the 21st of April 1797, by virtue of the act of assembly of Maryland, of 1795, ch. 56, entitled "a supplement to the act, entitled an act directing the manner of suing out attachments in this province and limiting the extent of them;" and commanded the sheriff "to attach, seize, take and safe-keep all the land, tenements, goods, chattels and credits," of Robert Morris, which should be found in his bailiwick, "to the value of, as well the damages aforesaid, as," &c.; and to have the same before the judges of the general court, &c., then and there to be condemned, according to the act of assembly aforesaid, to the use of the said W. Campbell, unless the said Robert Morris should appear and answer to the said William Campbell, in a plea of trespass on the case, &c., according to law. The sheriff was also commanded to make known to the garnishees, that they appear, &c., to show cause why the lands, tenements, &c., should not be condemned, and execution thereof had and made, as in other cases of recoveries and judgments given in courts of record, according to the directions of the act of assembly, *aforesaid, &c. The like process was issued against the property of Mr. Nicholson. [*467

On the 22d of April 1797, the sheriff levied these attachments on part of the property included in the mortgage to Law, and particularly set forth in the sheriff's return. On the return of these attachments, Morris and Nicholson appeared by attorney, and upon argument, the general court quashed the sheriff's return; whereupon, Campbell took a bill of exceptions, which stated, that the plaintiff, Campbell, offered in evidence the deed of the 13th of May 1796, from Greenleaf, to Morris and Nicholson; whereby Greenleaf conveyed to them all his property in the city of Washington, excepting three squares, "and excepting all such squares, lots, lands and tenements, as were either conveyed or sold, or agreed to be conveyed, either by all or either of them, the said Morris, Nicholson and Greenleaf, or any of their agents, prior to the 10th of July 1795. That Campbell prayed condemnation of one moiety of certain squares, particularly described, as the property of Morris, and the other moiety as the property of Mr. Nicholson. That Morris and Nicholson offered in evidence, the mortgage to Mr. Law, of the 4th of September 1795, which included those squares; and that Campbell offered in evidence one of the releases of Mr. Law, dated the 5th of October 1797, to Morris, Nicholson and Greenleaf, which are mentioned in the bill of Pratt and others *v.* Law and Cambell; Morris and Nicholson then offered in evidence the deed of trust from Morris, Nicholson and Greenleaf to the complainants, Pratt and others, of the 26th of June 1797, conveying to them all the right and interest of Morris, Nicholson and Greenleaf, in the city of Washington; and proved, that the aforesaid deed of release from Mr. Law, to Morris, Nicholson and Greenleaf, was lodged by Mr. Law alone, in the proper office, to be recorded; and that it was executed by Mr. Law, with a knowledge of the aforesaid deed of trust to the complainants, against their will and express prohibition, and without the knowledge or assent of Morris, Nicholson and Greenleaf, or either of them; whereupon, the general court of Maryland was *of opinion, that neither Morris and Nicholson, nor either, had "such an estate in those squares, whereof the plaintiff could have judgment of condemnation." [*468

Upon this bill of exceptions, the cause was carried to the court of appeals of Maryland, who reversed the judgment of the general court "as to the

land contained in the return of the sheriff of Prince George's county ;" and adjudged, "that the lands and tenements so as aforesaid attached, that is to say," &c. (describing them) "be condemned towards satisfying unto the said William Campbell, as well the said sum of," &c., "and that the said W. Campbell have thereof execution," &c. "Whereupon, execution issued from the court of appeals, returnable to the general court." This execution was a special *fieri facias*, which, after reciting the attachment, the sheriff's return, the judgment of the general court, the writ of error, and the judgment of the court of appeals, commanded the sheriff of Prince George's county, that of the lands and tenements attached (describing the squares, &c.), he cause to be made the damages and costs, &c. Upon this execution, the sheriff sold the attached property to W. Campbell, the plaintiff, for a comparatively small sum.

Under these proceedings, the defendant, Campbell, in his answer, contended, that, by the laws and constitution of Maryland, his title and interest in the said lots was conclusive upon all the world, and that the judgment of the court of appeals of Maryland could not be opened. He admitted, however, that he acquired by those proceedings, no more interest or title than Morris and Nicholson had in the property, at the time of the attachment, and that Mr. Law's mortgage was a prior incumbrance ; but denied, that there was any other lien or incumbrance thereon. He contended, that he had a right to redeem the lots from that mortgage, on any terms which should be agreed upon between him and Mr. Law. He affirmed, that the complainants knew of his attachment, when they took their deed of assignment of the property. He denied, that the complainants had any valid attachment, prior to his. He admitted, that Morris and Nicholson had only
*469] an *equitable title in the lots, at the time of his attachment. He admitted, that he knew of the assignment to the complainants, when Mr. Law executed his release, and at the time he purchased the property under his attachment.

He demurred to so much of the bill as charged that he purchased the notes of Morris and Nicholson (upon which the attachment issued) on speculation, at a low price, and to so much as required him to state what consideration he paid therefor. To this answer, the complainants excepted, because the defendant, Campbell, did not answer that part of the bill to which he demurred.

The bill of Law against Pratt and others, stated the bond of Morris, Nicholson and Greenleaf, of the 3d December 1794, to convey to him 2,400,000 square feet of ground, in the city of Washington ; the agreement of the 10th of March 1795 ; and the mortgage of the 4th of September 1795. That he had received conveyances for 773,121¼ square feet, on the 14th of March 1796 ; for 1,142,068½ square feet, on the 20th of July 1797 ; and for 128,223 square feet, by a subsequent conveyance, the title of which last-mentioned quantity was defective. That Morris and Nicholson, having obtained all the right, title and interest of all the joint property of Morris, Nicholson and Greenleaf, in the city of Washington, in the year 1797, became insolvent, and conveyed the same to the defendants, Pratt and others. That neither Morris, Nicholson and Greenleaf, nor the defendants, Pratt and others, did procure from the commissioners of the city of Wash-

ington, a good, clear and sufficient title to the property, out of which the complainant, Law, had the right of selection ; so that, although he made his selection, and requested a conveyance of the remaining 400,000 square feet, the defendants refused to convey the same, and are unable to comply with the engagements of Morris, Nicholson and Greenleaf with him. Wherefore, he prayed a decree, that they should pay him the original purchase-money of five pence, Pennsylvania currency, per square foot, for the amount of square feet unconveyed, with interest from the 3d December 1794, by a certain day ; and in default thereof, that they should be foreclosed of their equity of redemption ; and for general relief.

The joint and several answer of the defendants, Pratt *and others, admitted the bond of 3d December 1794, the agreement of the 10th [*470 of March 1795, and the mortgage of the 4th of September 1795, which, it averred, was executed to remedy a defect in a former mortgage of the 11th May 1795. The defendants also produced the agreement of the 4th of December 1794. They admitted, that the complainant, Law, had received good titles to 1,915,189¾ square feet, in part compliance with the condition of the bond ; and that the title to the 128,223 square feet was defective. They admitted, that Morris, Nicholson and Greenleaf became insolvent, and conveyed all their interest to these defendants, as trustees for certain creditors. They did not admit, that either they, or Morris, Nicholson & Greenleaf were ever bound to procure a good title to all the property out of which the complainant had a right to select ; nor that he made his selection within the time limited by the contract of the 10th of March 1795 ; nor that they, or Morris, Nicholson and Greenleaf ever refused to convey to him any property which he had a right to demand under those agreements. They said, that they had been informed and believed, that the complainant, Law, never made a definite and final selection of lots to justify the condition of the bond ; but, without authority or limitation of time, assumed the right of varying his choice, from time to time, according as circumstances indicated a prospect of increasing value, and did not confine himself to the property, nor to the terms contained in the contract of the 10th of March 1795. They admitted, however, that Morris and Nicholson, as a matter of indulgence, acquiesced in the selections thus made, so far as they had the ability to convey the lots so selected. They contended, that upon the complainant's having failed to make his selection within the limited time, the right to select reverted to Morris, Nicholson and Greenleaf and that the complainants, as their assignees, had a right to select and tender a conveyance for the balance remaining unconveyed ; and that they had done so, but the complainant refused to accept the same.

They contended, also, that the complainant was not entitled to relief in equity, until he should have complied with *his agreement to build [*471 certain houses, according to the agreements of the 4th of December 1794, and 10th of March 1795 ; and they averred, that the damage they had sustained by reason of his not having built the houses, exceeded the value of the property remaining to be conveyed to him.

They claimed the benefit of his releases of certain parts of the mortgaged property, dated March 11th, 1796, September 4th, and October 5th, 1797, copies of which they exhibited ; and they denied, in general terms, that the mortgage was forfeited or the condition thereof broken.

After replication to this answer, the complainant, Law, filed an amended bill, stating in substance the same matters which were contained in his answers to the bill of Pratt and others against him. To this amended bill, the defendants, Pratt and others, filed their answer, referring to the proceedings in all the causes before mentioned, and praying that the whole might be considered as one cause. They averred, that the building contract constituted a material part of the consideration in the sale of lots to the complainant; that the assignment of that contract to the commissioners of the city, by Morris and Nicholson, was not valid, and did not exonerate the complainant from his obligation in equity to perform it. They proceeded to state with more minuteness, the facts and transactions stated in their original and amended bills against Law and Campbell.

They denied, that Morris and Nicholson could authorize the complainant to make a new selection, so as to embarrass the mortgaged property, or to disable themselves from complying with the terms of the mortgage, whereby subsequent incumbrancers, whose rights accrued before such new selection, could be defeated. They denied also, that they were bound by any agreements between the complainant and Morris and Nicholson, of which they had not notice, at the time of the assignment to these defendants.

*472] *The complainant having, in his amended bill, stated, that he had solicited to have the residue of what was due to him conveyed out of half of square 743, square 699, square 696, square 730, and the square north of 697, the defendants, in their answer, denied his right to select either of those squares. As to the square 743, which was the only one in which Morris and Greenleaf ever held any definite interest, they averred, that all their interest therein, consisting of one moiety thereof had been conveyed to him. That as to the squares 696 and 730, the complainant was expressly prohibited from selecting them, by the contract of the 10th of March 1795; and that neither of the squares 699, 730, 696, and north of 697 were mentioned in the complainant's selection of December 5th, 1795, nor in any former selection pretended to have been made by him; that neither of those squares ever belonged to Morris, Nicholson and Greenleaf, or either of them, nor were included in the 6000 lots bought by Morris and Greenleaf of the commissioners, or had been apportioned to them or either of them, or could of right be claimed by them or either of them, under any contract. To this answer, there was a general replication.

The bill of Pratt and others against Duncanson and Ward, was originally filed to obtain an injunction to prevent Duncanson from selling certain squares which he had advertised for sale, under a mortgage dated the 12th of September 1795, given to him by Morris, Nicholson and Greenleaf, to indemnify him against the return of certain bills of exchange which he had drawn for their accommodation, for 12,000*l.* sterling, 7600*l.* sterling of which had been taken up by the defendant, Ward, with the funds of Greenleaf, and the residue by Greenleaf himself; and to obtain a conveyance of those squares to the complainants, who were the assignees of Morris, Nicholson and Greenleaf's equity of redemption. Those squares were all included in the prior mortgage to Thomas Law.

After Duncanson and Ward had filed their answers, and testimony had

been taken in the cause, by which it appeared, that the facts stated in the bill were true, William Campbell filed a bill against all the parties to the cause, viz: Pratt and others, assignees of Morris, *Nicholson [*473 and Greenleaf, and Duncanson and Ward, in which bill (which he called a bill of interpleader), he set forth his attachment of the squares included in the mortgage to Duncanson, the condemnation thereof by the judgment of the court of appeals of Maryland (while the city of Washington was under the jurisdiction of Maryland), the *fieri facias* issued upon that judgment, and his purchase of the squares at the sheriff's sale; whereby he averred he acquired the equity of redemption of those squares. He stated, that the bills, mentioned in the mortgage, had all been discharged by Morris, Nicholson and Greenleaf, or one of them, or with their funds, and the property thereby exonerated; and prayed for a conveyance thereof to him; and for general relief.

The defendants, Pratt and others, in their answer, admitted, that they had heard, that the complainant, Campbell, claimed the lots mentioned in his bill, by virtue of a pretended judgment of condemnation, upon certain pretended attachments, issued upon certain pretended claims against Morris and Nicholson; but they denied the validity of those claims, and of all proceedings founded thereon; and averred, that if any such judgments of condemnation had been obtained, they were obtained, as they believed, by fraud and imposition practised upon the court rendering such judgments, by producing to such court certain pretended deeds of release, fraudulently executed by Thomas Law (meaning the releases mentioned in the bill of Pratt and others *v.* Law and Campbell). They averred, that they were not parties to such judgments, and could not be bound thereby. That the proceedings exhibited by the complainant appeared to be proceedings at law, and not in equity; and therefore, that if the complainant had any title under those proceedings, it must be a title at law, and his remedy was at law and not in equity; and that no proceeding by these defendants against Duncanson and Ward, in equity, could injure the complainant's title at law, if any he had. They, therefore, denied his right to relief in equity, and contended, that the court, as a court of equity, had not jurisdiction in the case stated by the complainant in his bill. They did not admit, that any valid attachment was laid on the property, before the assignment from Morris, Nicholson and Greenleaf to them. They averred, that on the day before the date of Campbell's attachment, Greenleaf, being a large creditor *of Morris and Nicholson, caused attachments, in his name, but for the use of these defend- [*474 ants, to be laid on the same property; which attachments remained in full force (if the property was liable to attachment for the debts of Morris and Nicholson), until and after their assignment of their interest therein to these defendants, when they, having by the assignment obtained all the benefit which they could have obtained by prosecuting the attachments to judgment of condemnation and sale, caused the attachments to be dismissed. And therefore, that if Campbell could claim any title in equity, under his attachments, these defendants had a prior claim in equity, by virtue of their prior attachments, and the assignment from Morris, Nicholson and Greenleaf. They denied, that the legal title was ever in Morris and Nicholson, or either of them, but was in Greenleaf alone, until conveyed to Thomas Law, by the mortgage of the 4th of September 1795, in whom it remained, until his

releases of the 4th of September, and 5th of October 1797, which releases, if valid, inured to the benefit of these defendants.

As to certain squares contained in the mortgage to Duncanson, viz., the square east of 546, the square east of 547, the squares 549 and 596, the square east of 596, and the square 597, they averred, that long before Campbell's pretended attachment, viz., on the 20th of June 1796, Morris and Nicholson conveyed to the said Greenleaf all their interest therein, for a valuable consideration, since which time, Morris and Nicholson have never had any interest therein. They averred, that the complainant had notice of all these facts, at the time of his purchase at the sheriff's sale, under his attachment.

They contended also, that if the complainant could, by any process of law, attach the equity of redemption, yet he could have no remedy in equity, unless he had offered and could show himself able to redeem the property, by a compliance with the contract between Law and Morris, Nicholson and Greenleaf, which he had not done.

They said, they had heard and believed, that the complainant's pre-
*475] tended attachments were founded on notes *of Morris and Nicholson, purchased in market, at a great discount, as an object of speculation, with a view to take the chance of such an attachment; and they were advised, that if the complainant should in equity have a prior lien on the property, he could not claim, in equity (as against these defendants who were *bonâ fide* creditors of Morris and Nicholson, and purchasers of their equity of redemption, for a valuable consideration, and who were seeking for satisfaction out of the same fund) more than the amount of money actually paid by the complainant, for the said notes and bills, with lawful interest thereon.

One of the defendants, John Miller, junior, assignee of Greenleaf, under the bankrupt law of the United States, answering separately, for himself, stated, that the bills for 12,000*l.* sterling, in the bill mentioned, were sold, and the proceeds thereof equally divided between Morris, Nicholson and Greenleaf, each of whom were bound in equity, as well as by agreement, to take up one-third of the amount, if they should come back protested. That they did come back protested; that Morris and Nicholson wholly failed to take up any part thereof, but the whole was paid by Greenleaf, with his own separate funds, and that Morris and Nicholson were still indebted to him for two-thirds of the amount of the 12,000*l.* sterling, with interest, charges, damages and costs of protest, and were also otherwise largely indebted to him, at the time of the attachment. That upon taking up the bills, Greenleaf informed Duncanson thereof, and forbade him to release the mortgage, on his intimating a design so to do, and requested him to retain the same as a security to him (Greenleaf), for the two-thirds of the amount of the said bills, which Duncanson agreed to do; and thereby became in equity a trustee of the mortgage for the benefit of Greenleaf; and this defendant, as his assignee, claimed a right to stand on the same equitable ground as Duncanson would have stood upon, if the bills had not been taken up, so far as respects two-thirds of the amount of the bills, with damages, &c.; and therefore, to have a prior equity to that of the complainant, if any he had.

There was evidence tending to show that Mr. Law made a selection of squares, within the time stipulated. And that the public property in

those squares, which *Morris and Greenleaf had contracted to purchase of the commissioners, was more than sufficient to satisfy Mr. Law's contract. That the commissioners had conveyed to him about 2,000,000 of square feet; and that it was probable, they would have conveyed the remaining 400,000 square feet also, at the same time, if Mr. Law would have taken them out of the squares contained in his first selection. No tender, however, was made to him of the balance out of those squares, and there was evidence that Morris and Nicholson had acquiesced in Mr. Law's claim to have part of the property which Greenleaf had contracted to purchase of Mr. Carroll, although neither Greenleaf nor Morris and Greenleaf, ever had any right of selection in that property. There was also evidence, that it was the universal practice of the commissioners, in selling lots, to charge each lot with the proportion of the alley laid out for the general benefit of the lots in the squares; and that such practice had been universally acquiesced in.

With regard to the opinion of the court of appeals of Maryland, upon the subject of Campbell's attachment, there was evidence, that the counsel for Morris and Nicholson had written a letter to Judge RUMSEY, the chief judge of the court of appeals of Maryland, requesting to know the extent and ground of the opinion of the court, upon which the judgment was rendered; and received from him the following answer:

"The court of appeals signed a regular judgment, under their hands. It does not contain the point upon which they gave it; but my brethren thought the covenant for a quiet enjoyment(*a*) was a lease for years, which was an interest subject to attachment, and this influenced their judgment, and they gave it accordingly. The opinion (whether a fee-simple, or an estate for years), will not alter the nature of the judgment, which, in my opinion, will be only of such interest as the party had in the estate, and, if tried in ejectment, can only operate so far. I own, privately, I was of opinion, that an attachment ought to lie against a mortgagor's interest, because he is considered, in chancery, as the *owner; because I would not send a man to chancery in so plain a case, where there [*477 ought to have been conformity in law; and because all men would secure themselves under this artifice. This also was agreeable to the practice of the city of London, where an equitable interest is attachable. But on this, the judges gave no opinion. Sufficient to them, was it, that in their opinion, any interest was attachable, and upon ejectment this would have been disclosed. In conformity to my opinion, I pointed out a case or two, that was in my common-place book, to Mr. Shaff, that indicated an equitable interest attachable. But this was done as an individual, not as a judge; but, being at the time of judgment, he might have mistaken. At the same time, I remarked, and do so now, that the distresses of my family and my own state of health, where such, that I could not be so much master of the subject as I wished.

"You were wrong, in delaying opening the points so long, in which you obliged the court to give a judgment, so late in the cause. And wherein is their judgment (hastily obtained), better than that of other courts? It

(*a*) The mortgage from Morris, Nicholson and Greenleaf to Mr. Law, contained a covenant that they should quietly enjoy the mortgaged property, until the condition of the mortgage should be broken.

quite destroys the use of a court of the last resort. I have opposed, I shall hereafter oppose, this practice, *totis viribus, ergo caveto.*

"There is no impropriety in asking the court's opinion; they always wish their sentiments to be known; and will, I hope, in a land of law and liberty, always be willing to disclose them when required. I am, &c.

"1st March 1801."

These causes having been heard together as one cause, the court below decreed as follows:

In the case of Pratt and others *v.* Law and Campbell, "that the complainants' bill be dismissed."

*478] *In the case of Law *v.* Pratt and others, that the defendants should pay to the complainant, on or before the 1st of April 1814, $25,832.88, being the original purchase-money for the part not conveyed, with interest from the 3d of December 1794, and in default thereof, that the mortgaged property should be sold to raise the same, &c.

In the case of Pratt and others *v.* Duncanson and Ward, no decree appeared to have been made.

In the case of Campbell *v.* Pratt and others (assignees of Morris, Nicholson and Greenleaf) and Duncanson and Ward, the defendants, Duncanson and Ward, never answered the bill, nor was it taken for confessed against them, nor was the bill dismissed or abated as to them, but the court below decreed, "that the defendants," Pratt and others, "and William M. Duncanson and Samuel Ward, release, convey and transfer to the complainant, William Campbell, all their interest and estate in the squares and lots of land sold under the complainant's attachment, as mentioned and set forth in his bill; and that the said complainant, his heirs and assigns, be for ever quieted in the title, possession and enjoyment of said squares and lots, against all the claims, interest and estate of the said defendants." From these decrees, Pratt and others appealed to this court.

The cases were argued, at great length, by *Jones* and *P. B. Key*, for the appellants, and by *J. Law*, *F. S. Key* and *Pinkney*, for the appellees, Law and Campbell.

In the case of Law *v.* Pratt and others, the argument turned almost entirely upon questions of fact.

In the cases of Pratt and others *v.* Law and Campbell, and Campbell *v.* Pratt and others, and Ward and Duncanson, the following questions were made: 1. Whether Campbell, by the judgment of condemnation, in the

*479] court of appeals of Maryland, and the proceedings *under it, acquired Morris and Nicholson's equity of redemption in the squares attached? 2. Whether J. Miller, the assignee of Greenleaf, had a prior equitable lien upon the squares mortgaged to Duncanson, to the extent of the two-thirds of the amount of the bills of exchange secured by that mortgage? 3. Whether Campbell was bound to disclose the consideration he gave for Morris and Nicholson's notes, upon which he obtained the attachments?

P. B. Key, for the appellants, contended, 1. As to the first point, that nothing was condemned under those attachments, but the legal estate of Morris and Nicholson, if they had any. An equitable estate is not liable to attachment or execution under the laws of Maryland. The judgment of the

court of appeals of Maryland, in this case, does not purport to condemn the equity of redemption, nor to designate what interest in the land Morris and Nicholson had.

It appears, by the letter from Judge Rumsey, the chief justice of that court, that the majority of the court was of opinion, that the covenant in the mortgage to Mr. Law, that Morris, Nicholson and Greenleaf should quietly enjoy the land, until default made, gave them a legal estate, in the nature of an estate for years, which was liable to condemnation; and that the court intended to condemn nothing more than the legal estate, whatever it might be, which Morris and Nicholson had in the land, at the time of the attachment. That it was the legal, and not the equitable estate, which they considered liable to condemnation, appears from the language of the judge. "But on this," says he (meaning, on the question whether an attachment ought to lie against a mortgagor's interest), "the judges gave no opinion. Sufficient to them, was it, that, in their opinion, any interest was attachable, and upon ejectment, this would have been disclosed." Now, no interest could, in Maryland, have been maintained upon ejectment, but a *legal [*480 estate; which shows that the court of appeals contemplated the condemnation of a legal interest only. This is sufficient to show that the judgment of the court of appeals is not conclusive evidence, that the equity of redemption of Morris and Nicholson was affected by the attachment.

By the construction which the courts of Maryland have uniformly given to the British statute of 5 Geo. II., making lands in the colonies liable for debts, nothing but the legal estate is liable to execution at law. The rule is the same in England. *Plunket* v. *Penson*, 2 Atk. 292; *Shirley* v. *Watts*, 3 Ibid. 200; *Burden* v. *Kennedy*, Ibid. 739. The act of assembly of Maryland, 1794, ch. 60, § 10, is founded upon this known and acknowledged rule of law. It recites, that "whereas, it often occurs, that persons against whom judgments or decrees are obtained, hold and possess, or claim, lands, tenements or hereditaments, by equitable title only, and the creditor or creditors of such persons are often without remedy, either at law or in equity," and then goes on to give the chancellor power to decree a sale of the equitable title; and to give the purchaser all the remedies which the person had whose equitable title is thus sold. The act of Maryland in 1810 (ch. 60) which, for the first time, subjected equitable estates to legal process, was passed ten years after the judgment of the court of appeals in this case, and is strong, if not conclusive evidence, that such estates were not, before that time, liable to such process.

But if an equity of redemption be liable to attachment, yet the complainants' equity is prior to that of Campbell, for they had a prior attachment, in the name of Greenleaf, against Morris and Nicholson, which was continued until they obtained an assignment of that equity of redemption which was the object of their suit. If I attach the personal property of a man, and before condemnation, he sell it to me, in satisfaction of my claim, I am under no obligation to proceed with my suit to judgment. I have already obtained the fruit of my action. If he does voluntarily, what the law would compel him to do, it is sufficient.

*2. As to the prior equity of Miller, assignee of Greenleaf under the [*481 bankrupt law of the United States. Greenleaf conveyed his rights in the Washington property, on the 13th of May, 1796, with certain excep-

tions, reservations and conditions. That conveyance was expressly made subject to this mortgage to Duncanson. All the rights of Greenleaf, growing out of those exceptions, reservations and conditions, were assigned by the bankruptcy, to Miller, one of the defendants to Campbell's bill, and one of the complainants in the bill against Law and Campbell. The bills secured by the mortgage to Duncanson were sold, and the proceeds equally divided between Morris, Nicholson and Greenleaf, each of whom agreed to take up one-third of the amount thereof, if they should return protested. They returned protested, and Greenleaf was obliged to take up the whole. Upon doing this, he requested Duncanson not to release the mortgage, but to retain it as his security. This Duncanson agreed to do; and thereby became a trustee, in equity, of the mortgage, for the benefit of Greenleaf. Ten of these squares, mortgaged to Duncanson, had been conveyed by Morris and Nicholson to Greenleaf, in June 1796, subject to Law's and Duncanson's mortgage; Morris and Nicholson, therefore, at the time of the attachment, had no equity of redemption in those ten squares. Four other squares are claimed by Ashley, another of these defendants, to whom Morris and Nicholson had assigned their equity of redemption, prior to Campbell's attachment.

3. As against these defendants, who are seeking satisfaction out of the same fund with Campbell, he ought not, even if he has a prior lien, to be permitted to enforce it, beyond the amount of what he paid for Morris and Nicholson's notes, with interest. Equity will not permit him to profit by our loss. "Equality is equity" (Maxims in Equity, p. 9). "A stranger who buys in a prior incumbrance shall be allowed only what he really paid, as against other incumbrancers." 1 Vern. 476. "But as against the owner of
*482] *the estate, who made the incumbrance, or his heir, he shall be allowed the whole that is due upon it." Morris and Nicholson, it is true, could not set up this defence; but we, who are their *bonâ fide* creditors, and assignees of their equity of redemption, for a valuable consideration, have a right to redeem Campbell's incumbrance, by paying him his purchase-money and interest.

F. S. Key, for Campbell, relinquished the claim as to the ten squares, conveyed to Greenleaf, and the four squares assigned to Ashley.

As to Miller's claim to a lien, in consequence of Greenleaf's payment of the bills, he contended, that no such lien was thereby created, or could be created, without an actual assignment of the mortgage. The condition of the mortgage was, that Morris, Nicholson and Greenleaf, or one of them, should take up the bills. One of them did take up the bills, and thereby the mortgage was discharged. The lien no longer existed, and the property reverted to Morris and Nicholson.

As to the claim that Campbell should be compelled to take only what he gave for the notes, he contended, that the judgment of the court of appeals had ascertained the amount of this debt, and that the judgment could not now be opened.

As to the question whether an equitable interest could be attached, he relied upon the judgment of the court of appeals as conclusive.

As to the prior attachment by Greenleaf, for the use of Pratt and others, he contended, that it created no lien, inasmuch as it was not pros-

ecuted to judgment. That the attachment and the deed of assignment could not be connected together, so as to preserve the inchoate lien which was commmenced by the attachment.

Pinkney, on the same side.—Campbell contends, not only that he has an equitable, but a legal title. His attachment gave him a legal title to an equitable thing. If it did not, it gave him no title. *Upon the great principles of justice, real property is as much liable for a man's [*483 debts, as personal. Uses were never extended in England until the statue of Hen. VIII. And the courts always refused to extend trusts, until the statue of frauds authorized them so to do. Nor could an equity of redemption be affected at law.

But this question here turns wholly upon the local law of Maryland, and the construction of the statute under which these attachments were issued. It is the act of 1795, ch. 56, which authorizes a justice of peace, &c., to issue his warrant to the clerk of the court, requiring him to issue an attachment "against the lands, tenements, goods, chattels and credits" of the debtor. The single question is, whether these were the lands of Morris and Nicholson, at the time of the attachment.

From the time of the colonization of Maryland, its jurisprudence has been divided between courts of law, and courts of chancery. If the statute speaks the language of the courts of chancery, as well as of law, the case is clear. In chancery, the mortgagor, and not the mortgagee, is owner of the land; the equity of redemption descends to the heir; the testator may devise it; his wife is entitled to dower; the husband is tenant by curtesy; in short, the mortgagor is owner of the land, as against all the world, except the mortgagee. The legislature, by its acts, speaks to the whole jurisprudence of the state, not to one branch only. A trust-estate was liable to execution and attachment long before. Why should not an equity of redemption be equally liable? The act expressly makes *credits* liable to attachment, which was as contrary to the course of the common law, as to subject equitable interests in land to condemnation. Lord MANSFIELD, in a case in Douglas's reports (2 Doug. 610), says, it is an affront to common sense, to say, that the mortgagor is not the real owner. The equity of redemption is the substantial ownership, in the view of all the world.

The act of Maryland of 1810, applies to executions *only, and not [*484 to attachments upon equitable interests in lands. The legislature supposed the case of attachments already provided for. The act of 1794 only shows that the legislature thought equitable interests in lands ought to be as much liable for debts, as legal interests. They also thought it expedient to give the purchaser of an equitable interest under the decree of the court, all the remedies, legal as well as equitable, which the debtor formerly had. The case of *Waters* v. *Stewart* (1 Caines Cases 47) is precisely analogous to this. The statute of New York, upon which that case arose, subjected to execution, "lands, tenements and real estate;" under which expressions, it was decided, that an equity of redemption of a mortgage in fee, was liable to be sold by virtue of a *fieri facias*.

It is said, however, that the court of appeals in Maryland was of opinion, that the covenant for quiet enjoyment was equivalent to a lease for years, which is a legal estate, and that they did not mean to condemn anything

more than that legal interest. But that covenant created no legal estate. No specific term was mentioned, during which Morris and Nicholson should hold it. It was not an estate for years. If anything was condemned by the judgment of the court of appeals, it must have been the equity of redemption; for that was the only interest in Morris and Nicholson, at the time of the attachment. To that equity of redemption, Campbell acquired a legal right.

But is said, that Campbell purchased the notes of Morris and Nicholson at a discount, and ought to be permitted to enforce his lien only to the extent of his purchase-money and interest. There is no evidence of the fact; but if there was, yet, if he was guilty of no fraud, he became the creditor of Morris and Nicholson, to the full amount of the notes; he was *pari gradu* with the other creditors, and he who got the first attachment was in the best situation. Campbell obtained the first effective lien. That of Greenleaf
*485] was only incipient; *it was abandoned, before it was complete; the assignment cannot be connected with it. The claim under the attachment, is a claim in the *post;* that under the assignment, is a claim in the *per.* No two claims can be more distinct. They cannot be amalgamated, nor is the latter a continuation of the former. The deed does not purport to be a continuation of the lien; nor could it transfer what Morris and Nicholson did not possess. *Non dat qui non habet.*

But it has been objected, that the judgment cannot be executed by a *fieri facias,* which is applicable only to legal estates in possession. But if the condemnation of an equity of redemption is sanctioned by the act, the sale of that equity under a *fieri facias* is equally sanctioned; the one is a necessary consequence of the other. An execution is as natural to a decree in equity, as to a judgment at law: in both cases, the thing is to be taken to satisfy the debt.

This is no longer a mere equitable lien. It is a right of property, derived from the attachment, the judgment, the execution, the sale and the purchase, which it may be necessary for a court of equity to effectuate; but the right is a legal right.

This was a proceeding *in rem,* and the judgment of the court of appeals of Maryland, is conclusive against all the world.

As to the rule cited from Maxims in Equity, p. 9, and found also in 1 Vern. 479, that "a stranger who buys in a prior incumbrance shall be allowed only what he really paid, as against other incumbrancers;" its authority is doubtful. It is questioned by two cases; one in Salkeld, cited in the margin; and the other in 2 Atk. 54, *Mullet* v. *Park.* And the doctrine applies only to agents, trustees, heirs-at-law, or executors. Campbell's incumbrance was a legal one: he had a statute title.

P. B. Key, in reply.—There cannot be a legal title to an equitable
*486] thing: it *is a solecism. No legal right can exist, without a legal remedy. It is true, there may be tenant by curtesy in an equity of redemption; but he has no legal estate. He has a just title, but it is an equitable title. His remedy is in equity, and not at law. A trust-estate may be sold under a *fieri facias,* because such a proceeding is expressly authorized by the statute of frauds. The general rule is, that equitable rights must be enforced by equitable means, and legal rights, by legal means.

The case in New York was decided upon the statute of that state, and a long previous practice under the statute of 5 Geo. II., c. 7.

The judgment of the court of appeals of Maryland does not purport to decide what sort of a title Morris and Nicholson had in the property attached. It was sufficient for them, that Morris and Nicholson were in possession. They considered that possession, under a covenant for quiet enjoyment, as a legal estate; and they gave judgment of condemnation, in order that Campbell might make out his title in ejectment. So says the Chief Judge of that court, in his letter, and that opinion is perfectly consistent with the terms of the judgment. No inference can be drawn from the judgment, that the court was of opinion, that an equity of redemption was subject to attachment; and the judge affirms that on that point the court gave no opinion. The point is, therefore, entirely open for discussion. No case has been produced from Maryland, in which an equity of redemption has been sold under a *fieri facias* or attachment. The want of such a case is strong evidence of the universal opinion of the courts of judicature, in Maryland, upon that point; and the statutes of 1794, c. 60, and 1810, c. 160, seem conclusively to show what was the opinion of the legislature.

March 11th, 1815. JOHNSON, J., delivered the opinion of the court, as follows:—In order to present a distinct view of the numerous questions which arise out of this intricate and voluminous case, we will pursue them through a history of the transactions in which they originated, and consider them in order as they occur.

*It is well known, that at the founding of this city, the proprietors of the soil gratuitously relinquished a proportion of their property to commissioners appointed to receive it. Morris, Nicholson and Greenleaf purchased city lands to the amount of fifty millions of square feet, to which quantity they were entitled on the 3d of December 1794. Of this quantity, 6000 lots were purchased from the commissioners; 220 lots, of Daniel Carroll, and the residue, of other persons not necessary to be specified in this case. In the agreement with the commissioners, they stipulate to choose the lots by squares; to build twenty houses *per annum* for seven years; and until the year 1796, not to sell, without the building stipulation. In the agreement with Carroll, the division was to take place by lots; not by selection, but alternately in order; and a variety of building and other stipulations were entered into, which, not being complied with, Carroll re-entered on his land, and the contract was finally abandoned. [*487

On the 3d of December 1794, Law entered into a contract with Morris, Nicholson and Greenleaf, for the purchase of 2,400,000 square feet of city land, at the rate of five pence, Pennsylvania currency, per foot, for which Law paid them 50,000*l.*, and took their bond to convey him that quantity of land, in the penalty of 100,000*l.* To secure this bond, the mortgage was given, which is the principal subject of these suits.

On the 13th of May 1796, Greenleaf conveyed all his estate and interest in the Washington lands, to Morris and Nicholson, who, on the 26th of June 1797, executed an assignment of all their interest to these complainants, (Pratt and others). Greenleaf afterwards becoming bankrupt, John Miller, one of these complainants, was made his assignee.

In the several bills and answers relative to these transactions, there

are various contradictory assertions on *the subject of fraud; but as there is no evidence to sustain any charge of that kind, and all the various writings executed between the parties appear fair, unimpeached and reconcilable, we shall wholly reject the consideration of that subject, and dispose of the case upon the unequivocal meaning of the contracts of the parties, and their various acts which have relation to the execution of those contracts.

By the bond to make titles, dated December 3d, 1794, Morris, Nicholson and Greenleaf are simply bound to make titles to Law, for the specified quantity of land in the city of Washington, leaving the situation of it, and the mode of selection, entirely undefined, and of course, retaining it to themselves. On the day following, the same parties entered into articles of agreement, having relation to objects which appear not to have entered into their contemplation originally, and which, on the face of them, bear the appearance of perfect reciprocity. An option is given to Law to decline his purchase, in eighteen months, and Law stipulates, that if he should not then decline it, he shall be bound to improve every third lot, pursuant to the original contract of Morris and Greenleaf with the commissioners, in a specified time.

On the 10th of March 1795, Law purchases other concessions. By relinquishing his right of declining the purchase, he is allowed the right of selecting the property to be conveyed to him, "excepting water property, and excepting such squares as are now appropriated, or respecting which the said Morris, Nicholson and Greenleaf have made arrangements." A list of the excepted squares is subjoined, numerically distinguished. Morris, Nicholson and Greenleaf also stipulate to secure Law in the discharge of their contract, by a mortgage of other lands in the city, "which are now in their possession, until they can give good and sufficient titles to the said Law, of such property as he may select, and of which the titles are not already vested in them," but Law is to select by squares; to select in ninety days, and to build in conformity with Morris and Greenleaf's contract with the commissioners. *From this contract, emanated the mortgage of the 4th of September 1795.

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It was evidently incumbent on Law to make his selection in ninety days, or show some adequate cause to excuse him from the discharge of that part of his agreement. The evidence that he did make his selection in the prescribed time, is contained in his amended answer, drawn from him by express allegations in the bill, and an exception to his answer, in which he swears that his selection was made in due time, and that a copy of his selection, thus made, was, in due time, communicated to the other parties. This fact, therefore, being uncontradicted by any evidence, and confirmed by the solicitude expressed by Law, in all his correspondence, to obtain his titles, must be considered as established, and throws upon the opposite party an obligation to show either, that he complied with the selection so made, or some sufficient reason why it was not complied with. For these purposes, they contend, that it was in part complied with, and that it was the fault of Law himself, that it was not wholly complied with.

I. It appears, that on the 14th of March 1796, there were conveyed to Law, 792,939 square feet of ground; and on the 20th of July 1797, 1,155,857 square feet. In these conveyances, Law acquiesces, with two exceptions: 1. That 128,223 square feet, contained in squares 727, 789 and 729,

have since been recovered of him by due course of law: 2. That in the computation of square feet, supposed to be conveyed to him, are included the superficies of the alleys passing through those squares in which the entire squares were not conveyed. To understand this objection, it is necessary to remark that, in the division between the commissioners and the proprietors, it frequently happened, that several lots in a square were assigned to the proprietor. In the selections made by Morris and Nicholson, and in those made by Law, the exigency of the agreement to choose by *squares was considered as gratified by the choice of all that part of a square which had been allotted to the commissioners. [*490

To the first exception, the assignees reply, that Law was conusant of the defect of title in the squares alluded to; that he took them with his eyes open, and therefore, cannot now claim indemnity. But we do not subscribe to this opinion. There is no evidence in the case, that he did agree to take these squares *cum onere*. The letter of the 1st of September 1799, proves nothing of the kind. The condition of the obligation is not complied with, by a conveyance of a defective title. The obligation to convey a good and sufficient title, with a general warranty, will carry with it the obligation to refund, in case of eviction. Law's knowledge of the incumbered state of the title is of no consequence, whilst the opposite party was under an obligation to make that title good and sufficient. The assignees are, in this respect, in no better situation than the original parties. Their rights and interests are altogether subordinate to those of Law. They take the property in every respect incumbered with the obligation to make good the contracts of Morris, Nicholson and Greenleaf with him, not only on general principles, but by express exception in favor of existing liens and incumbrances.

With regard to the allowance for the superficies of the alleys, we remark, that if the alleys be comprised under the denomination of streets, the conveyance of the ground which they cover would be void, and unquestionably, will not amount to a ratification of the contract. But from the president's instructions of the 17th of October 1791, there is reason to think, that they were rights of way, appurtenant to the lots of each square, respectively. If this claim of Law's extended to the alleys in those squares, of which the whole was conveyed to him, there would be some ground for disputing it. But as it is confined to those squares only in which the right could not be merged, because some one or more of the lots were the property of another, we think, the allowance ought to be made; for Law certainly has not acquired a title in fee-simple in those alleys.

*II. It is contended, that it was in Law's power to have obtained a full performance; and they charge him with various acts to which alone they attribute the non-compliance on their part. 1. His frequent varying of his selections. On this subject, there is a great variety of evidence and many contradictory allegations. But upon the whole, it appears, that after acquiescing in a number of changes, the selections, about the last of the year 1796, settled down to 699, 696 and half of 743, and the deficiency, if any, to be supplied out of squares 730, and north of 697. But Law's inclination to vary his selections furnishes no sufficient excuse; for a tender of a conveyance, conformable to any one of those selections, would have been a performance. [*491

On the 5th of December 1796, it appears, a deed was tendered, and this is asserted to have been a legal performance of their part of the agreement. Law contends that it was not, because it contained the building stipulation, a distinct, independent contract, and which ought not to have been made a part of this conveyance. This question appears, at that time, to have been submitted to counsel, and decided in favor of Law. Whether correctly or not, it is now too late to inquire ; for it appears to have been acquiesced in, and conveyances executed for nearly the whole of the same land which was contained in the tendered deed. The conveyance tendered cannot, even if in unexceptionable form, be now considered as a performance for the balance unconveyed, since the land contained in it constitutes a great part of that for which credit is given upon the agreement ; and after receiving conveyances in a different form, it is surely too late now, to contend for the sufficiency of those tendered.

III. It is contended, that the selection of squares 696, 699 and 743 was not sanctioned by the contract of March 1795, and therefore, Morris and Nicholson were under no obligation to convey. It appears, that these squares
*492] were situated in Carroll's *land, and in the division between Carroll and the commissioners, were assigned to the former. They thus became a part of that land out of which Morris and Nicholson were to be entitled to have conveyed to them their 220 lots, and it is contended, that Law's right of selection could not extend to these lots, because they were to be assigned alternately ; whereas, Law's right of selection was to be made by squares out of those in which Morris and Greenleaf had the right of selection. It appears, however, that Morris and Nicholson acquiesced in Law's right to select from Carroll's land, and in a letter of March 19th, 1797, explicitly acknowledge it.

The solution of this apparent inconsistency is to be found in an observation previously made on another point in this case. A selection by squares was, in practice, considered by these parties as complied with, when made of all those lots contained in any given square which were owned by the party bound to convey. There could then be no reason for excluding Law from enjoying his right of selection from among the squares contained in Carroll's land. The objection certainly comes too late at this day. In Morris's letter to Mr. Cranch, of February 22d, 1796, is contained an express recognition of the correctness of that selection, or, at least, of his acceptance of it in lieu of one more correctly made. This act, with its attendant consequences, must be considered by this court as giving legitimacy to the selection, though it had been otherwise indefensible. Had Law been then informed, that this selection was not authorized by contract, he would have been thrown on his right to amend his selection, at a time when he might have done it, with little prejudice to his interest. But at this time, it is surely too late to retract an assent given nearly twenty years ago.

With regard to the two other squares selected, as it was only provisional, to make up any deficiency that might exist, after conveying the three positively selected ; until the three absolutely chosen were conveyed, nothing final could be done with these.

The last objection is founded on Law's failure to comply with his build-
*493] ing contract. *But to this we answer : Law was not restricted as to the specific lots on which the buildings were to be erected. His

choice, therefore, extended over the whole, and the obligation was not complete, until the whole land was conveyed to him. We are of opinion, that the selection was sufficiently proved ; and that Morris, Nicholson and Greenleaf were in default with regard to the deficiency of land. On them, therefore, must fall the consequences, of a state of things produced by their own default.

But there are other reasons, furnished by the case, in support of this opinion. Law had advanced very considerably, in the discharge of his building contract. He asserts (and it is hardly possible to believe otherwise), that he was originally induced to enter into that stipulation, in consideration of similar stipulations entered into by Morris, Nicholson and Greenleaf with the commissioners and Carroll, and urges their failure, as his excuse in part for desisting from building. But be this as it may, it is impossible for the ingenuity of man to devise any expedient, by which a mean of comparison can be resorted to, that would enable this court, or a jury, to ascertain the injury resulting from this cause, or the sum in damages by which it may be compensated. We, therefore, put the building contract entirely out of the case.

It then only remains to decide, what remedy Law is entitled to? It is contended, in behalf of Morris, Nicholson and Greenleaf, that it should be by specific performance, or by an issue *quantum damnificatus ;* that, at any rate, it should not be by a decree to refund the purchase-money, with interest, as the value of the residue was necessarily diminished by the gratification of so large a proportion of his right to select.

To obtain a specific performance is no object of Law's bill ; it is incumbent on the opposite party, therefore, to show some ground of right to force such a decree upon him. But considering, as we do, that Law is not in default, there can be no reason to decree a specific performance [*494 *when everything shows that it would be productive of nothing but loss. Besides, a specific performance, such as would answer the ends of justice between these parties, has now become impossible. Carroll's property is resumed ; a large proportion of the land purchased of the commissioners, sold under legal process, and thus the benefit of selection so diminished, that if performance were to take place, it must take place stripped of this its most valuable appendage ; whilst the diminution of the value of property, and the change of circumstances, produced by a lapse of twenty years, would render it mockery to call any execution specific.

An issue *quantum damnificatus* it is certainly competent to this court to order in this case ; but it is not consistent with the equity practice to order it, in any case in which the court can lay hold of a simple, equitable and precise rule to ascertain the amount which it ought to decree. In this case, the failure on the part of Morris, Nicholson and Greenleaf, certainly, was as early as December 1796, at a time when there is no reason to suppose that any diminution in the value of property had taken place.

And as to the argument, that the value of the right of selection diminished in proportion to the exercise of it ; that each subsequent choice was of less value than the preceding, we think, it is a sufficient answer, that Law never appears to have enjoyed the full benefit of his right of selection, in consequence of the difficulties which appear, at all times, to have obstructed his getting titles from the commissioners or others. And finally, when his choice

settled down upon the squares 727, 789 and 729, and on Carroll's squares 696, 699 and half of 743, he was evicted from the three former, and never could get the title to the three latter. Now, these squares nearly make up his deficiency, and there is reason to believe, they are among the most valuable of his choice. At any rate, they appear to have been the favorite objects of his choice. We are, therefore, of opinion, that the rule of equity in this case is that adopted by the court below; to wit, refunding, at the rate of purchase, according to the quantity actually deficient; but that interest is to be calculated only from the time when the selections were finally made, which we fix at 1st of January 1797. *With regard to the actual deficiency, it is understood, that there will be no difficulty in adjusting it, as the measurement and calculations of Mr. King will be acquiesced in.

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We must next determine in what manner the money to be decreed to Law, in pursuance of the foregoing principles, is to be raised from the mortgaged premises, and this leads us to the connection between the interests of Law, and those of Campbell and Duncanson. Campbell was holder of the negotiable paper of Morris and Nicholson to a considerable amount. Greenleaf had conveyed to Morris and Nicholson all his interest in the mortgaged premises, so that each of them was entitled to an undivided half part of the equity of redemption. Campbell sued out an attachment against Morris and Nicholson, severally, under the laws of Maryland (as this part of the district was then under the jurisdiction of Maryland), and had it levied on sundry of these mortgaged squares, specifically designating them by their numbers. An issue was made up, and at the trial before the court to which the writ was returnable, the question was distinctly made, whether the equitable interest of the defendants in these squares was the subject of attachment. That court decided, that they were not; and the plaintiff appealed to the court of appeals to have their judgment reversed. On the hearing before the court of appeals, the decision of that court is reversed, and the squares attached are specifically and numerically condemned to satisfy the debt due to Campbell. And finally, process issues out of that court, to the sheriff of the county, reciting the attachment and condemnation of these squares, describing them with equal precision, and commanding the sheriff to make, from the said lands, the money necessary to satisfy the judgment. Under this writ, the squares, so condemned, were sold; Campbell becomes the purchaser; and Law, at the instance of Campbell, and without the privity of the assignees, executes a release to Morris and Nicholson, which is put on record; at the same time, taking a bond of indemnity from Campbell, against all consequences that might result from this act.

*496] *Much ability has been exhibited in argument, on the question whether an equitable interest in lands and tenements be the subject of attachment, under the laws of Maryland. But we are of opinion, that we are not now at liberty to enter into the consideration of that question. The decision of the court of appeals is final and conclusive on this point; the question was fully brought before them; and although it had not fixed the law, would have fixed the fate of these lands, beyond reversal.

Some doubt is entertained, by one member of the court, whether the laws of Maryland go further than to authorize the condemnation of this interest to satisfy the judgment, so as to leave the plaintiff still under the

necessity of applying to an equitable tribunal to effect a sale. But the majority are of opinion, that the attachment-act, in making this interest tangible, makes it subject to the ordinary process of the law-courts, and that, in vesting in the courts in which the condemnation takes place, the power to issue execution, as in case of other judgments, it has left it with those courts so to fashion its process as to meet the exigency of each case. In this case, the very special nature of the execution shows that it has been fashioned with great care and learning. We, therefore, hold the sale, under this execution, to be valid.

Some conclusions were attempted to be drawn, in favor of the assignees, from the inadequacy of the price at which the property sold, and from the following state of facts: Greenleaf had issued an attachment, to the use of the assignees, against this property of Morris and Nicholson, a day prior to that of Campbell. Subsequent to that of Campbell, Morris and Nicholson assigned all their interest in this property to these assignees. Greenleaf's attachment was never prosecuted to judgment.

It is contended, that this union between the prior lien and the interest attached, defeats the immediate lien. But we cannot admit this conclusion. *Levying an attachment has the double effect of creating a lien, and instituting an action. But the lien is only inchoate; it awaits the [*497 judgment of the court for its consummation, and must fall with the suit. To decide otherwise, would be to permit the defendant, by collusion, or his own act, to nullify the lien of the subsequent attachment.

As to the inadquacy of price, the evidence is full, to show that it was produced altogether by the steps taken by the agents of the assignees, to embarrass or prevent the sale, and by the supposed weight of the incumbrances resting upon the land. In this respect, therefore, there is no imputation to be cast upon Campbell.

With regard to the release, it is very evident, that, as it was never accepted by the assignees, it ought in no wise to operate to their prejudice; nor ought Campbell to derive any benefit from it, as it was gratuitously proposed by him, under an arrangement with Law. Give efficacy to this release, and consider how it will operate? Campbell purchases at a reduced price, subject to an incumbrance; but give effect to this release, and he holds an absolute fee, absolved from all incumbrance.

Again, the property mortgaged to Law, is liable for the whole amount to be raised for his indemnity; but give efficacy to this release, and whilst Campbell acquires an unincumbered estate, on the one hand; on the other, the residue of the mortgaged property (that of which the assignees have not been deprived by sale of the sheriff) must be sacrificed, to raise the money due to Law. From this, it will follow, either that a ratable abatement should be made by Law, proportionate to the squares by him released to Campbell, or that those squares should contribute their due proportion towards paying Law.

Before we proceed to apply these principles to the final disposal of the case, it is necessary to show in what manner the interests of Duncanson and Ward become involved with those of these other parties. Duncanson, at at the request of Morris, Nicholson and *Greenleaf, and for their use, [*498 drew bills on a variety of correspondents to the amount of 12,000*l.* On the 12th of September 1795, Norris, Nicholson and Greenleaf executed

a mortgage of eighteen squares in the city of Washington to indemnify Duncanson against the return of these bills. They were eighteen of the squares previously mortgaged to Law. Of these bills, about 7600*l.* were returned under protest, as the property of Ward; and that sum, together with the damages, was paid on the 26th of December 1796, to Ward, by Greenleaf. No satisfaction was entered on the mortgage, nor any assignment demanded, until a day long subsequent. The residue of the bills were also returned and paid by Greenleaf. Thus circumstanced, whilst the mortgage appeared on record in full life, when, in fact, defunct, as the purpose for which it was created had been answered, the attachment of Campbell was levied on thirteen of these squares, and they were finally condemned, sold and purchased by him. After the sale, notice was given to Duncanson, not to release, and that an assignment to Miller, the assignee of Greenleaf, would be demanded of him. The demand of Greenleaf, on Morris and Nicholson, arising from taking up these bills, was contained in his assignment to Miller; and this payment is among the items making up the debit side of the account stated between Greenleaf and Morris and Nicholson. Miller, the assignee, contends, that he is entitled to such an assignment from Duncanson, and therefore, to be considered in this court as entitled to all the advantages which he would have derived from such an assignment, if actually made.

On the one hand, Campbell had, at the sale, all the benefit of this sum, as an existing incumbrance upon the land. It was, in fact, so much credited on the purchase-money for which it sold; but on the other, it is contended, that it was a fraud upon the public, to keep up the appearance of an existing mortgage on this property, when it was in fact satisfied; that the agents of the assignees alone knew this fact, and good faith demanded of them that they should have avowed it.

*499] *We are of opinion, that the answer to this argument is complete. The assignees did not conceive it to be a satisfied mortgage; they then supposed, and now contend, that an equitable interest in the security, given for the payment of the bills, resulted to Greenleaf for two-thirds of the sum paid by him on the bills, and passed to them on the assignment. This reply, whether correct in point of law or not, certainly removes all imputation of fraud. But if it did not, what reason can be assigned why Campbell should take to himself a benefit from it? Had it been productive, in any mode, of injury or loss to him, it might have been urged with some plausibility; but there is no reason to suppose, that any such effect has resulted from it. It could only operate to produce the sales of the squares; and in this respect, all the effects produced by it resulted to his benefit altogether.

One thing is indisputable; that if this mortgage be decreed satisfied, Campbell has acquired an interest which he never purchased, and acquired that interest in property which ought otherwise belong to the assignees. It might, perhaps, be made a question, whether the whole amount, apparently secured by the mortgage, ought not to be made the measure of compensation to the assignees; for to that amount, it may reasonably be supposed, the price of the property was reduced at the sale; to that amount were they damnified, and to that amount, the purchaser was benefited. But it would not be consistent with the nature of these purchases, to apply that rule to them with strictness. The uncertainty under which a purchase

is made, when made subject to an unliquidated incumbrance, gives such a purchase somewhat the nature of a speculation, which the purchaser ought, to a reasonable extent, to have the benefit of, if it prove lucrative. It is, therefore, only on the ground of an equitable existing lien upon the mortgaged premises, or equitable claim upon Campbell, that the court can decree in favor of the assignees. And as Campbell has filed his bill of interpleader, in the nature of a bill to redeem, we think, the court at liberty, when decreeing in his favor, to impose on him such equitable terms as the nature of the case suggests.

The foregoing reasoning proves that Campbell ought, in conscience, to make compensation to the mortgagor,* the former proprietor of the fee, for that part of the interest which the mortgage appeared to [*500 cover. He did not purchase it, and therefore, although strict right may secure to him the whole, he ought to be charged with a sum in compensation for the interest so acquired, above what was proposed to be sold.

Again, had these bills not been taken up, and the holder prosecuted all the drawers and indorsers to insolvency, there can be no doubt, that the holder would have been entitled to charge the mortgaged premises, in equity, with the payment of the bills. But what difference is there, in equity, between the case of any other holder of these bills, and that of Greenleaf, who, when liable, equitably, only for one-third, was compelled to take up the whole, and did it with his own funds? It consists only in this—that the one becomes creditor for the whole; the other only for two-thirds.

Upon the whole, we are of opinion, that the thirteen squares purchased by Campbell should be ratably charged with the payment of the debt resulting, under these transactions, from Morris and Nicholson, to Greenleaf.

Pratt and others, Plaintiffs below, *v.* Thomas Law and William Campbell.

Decree.—This cause came on to be heard, &c. Whereupon, it is ordered, adjudged and decreed, that the decree of the circuit court for the district of Columbia, in this case be reversed and annulled; and this court decrees, that the complainants shall be permitted to redeem the mortgaged premises, exclusive of those squares purchased by the said William Campbell, upon paying and satisfying to the said Thomas Law, at the rate of five pence, Pensylvania currency, per square foot, for the actual difference between the number of square feet conveyed to the said Law, and the number of 2,400,000 square feet which Morris, Nicholson and Greenleaf were bound to convey, deducting from the number of square feet, said to have been conveyed to Law, the square feet covered by the alleys in those squares in which the entire square was not conveyed to Law, with interest on the sum so to be liquidated, calculated from the first day of January 1797, at six per cent. *And it is further decreed, that [*501 towards paying and satisfying the sum so to be ascertained, the said William Campbell do pay and contribute a sum proportionate to the ratio, which the squares purchased by him bear to the residue of the premises mortgaged to Law, in quantity of square feet, with interest thereon from the first of January 1797. That on payment of the said sum, the said

Thomas Law shall re-convey to the complainants all those squares, or other mortgaged premises which were not sold as aforesaid; and to the said William Campbell all those squares which the said William Campbell attached and purchased as in bill and answer set forth.

And the court further decrees, that if the said William Campbell shall not, in six months after the liquidation of the sum to be paid by him and notice thereof, with interest thereon as aforesaid, pay and satisfy to the said complainants, the sum so liquidated, then the said squares, so purchased by him, shall be sold, under order of the said circuit court, to pay and satisfy that sum; and that this cause be remanded to the said circuit court, for further proceedings necessary to carry into effect this decree.

PRATT and others, Defendants below, *v.* THOMAS LAW.

DECREE.—This cause came on to be heard, &c. Whereupon, it is ordered, adjudged and decreed, that the decree of the circuit court be reversed and annulled; and this court decrees, that the said mortgaged premises, whereof the said Thomas Law prays foreclosure, shall be sold, under order of the circuit court for the district of Columbia, in the county of Washington, to pay and satisfy, to the said Thomas Law, so much of the sum adjudged to the said Law, in the case of these defendants against the said Law and W. Campbell, decided at this term, as will be proportionate to the ratio which the said portion of the said premises bears to that proportion of the said premises to which the said Law executed a release
*502] in favor of Campbell, as in bill mentioned; unless the said *complainants shall, in six months after liquidation of the said sum, and notice thereof, pay and satisfy to the said Law, so much of the said sum as is, in this decree, ordered to be raised. Upon payment of which sum, the said Law (shall) release to the said complainants, his interest in the said premises.

It is further ordered, that this cause be remanded to the circuit court for the district of Columbia, in the county of Washington, for further proceedings to carry into effect this decree.

PRATT and others, Defendants below, *v.* WILLIAM CAMPBELL.

DECREE.—This cause came on to be heard, &c. Whereupon, it is ordered, adjudged and decreed, that the decree of the circuit court be reversed and annulled; and this court decrees, that whenever William Campbell shall pay and satisfy to John Miller, junior, assignee of James Greenleaf, so much of the two-thirds of the sum paid by Greenleaf on the bills secured by the mortgage to Duncanson, as will be proportionate to the ratio which the squares bought by Campbell, subject to the mortgage to Duncanson, bear, in quantity, to the whole eighteen squares mortgaged to Duncanson, then the said Campbell shall hold the said squares so purchased by him, free and discharged of the said mortgage; and the said Duncanson, and the complainants, shall thereupon convey and assign to the said Campbell all their right and interest in the said squares so purchased by him. And it is further ordered and decreed, that if the said Campbell shall not,

within six months next after the liquidation of the sum to be paid by him, and notice thereof, pay and satisfy the said sum to the said Miller, then the said squares so purchased by him shall be sold, under order of the circuit court, and the proceeds thereof applied to the payment thereof; having regard, nevertheless, to any other existing prior lien upon the said squares; and this cause is remanded to the circuit court for further proceedings thereon, to carry into effect this decree.[1]

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[1] See Campbell *v.* Pratt, 5 Wheat. 429; Same *v.* Same, 2 Pet. 354.

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