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REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

FEBRUARY TERM 1817.

By HENRY WHEATON,
COUNSELLOR AT LAW.

VOL. II.

FOURTH EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

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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.

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RULES AND ORDERS

OF THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1817.

WHENEVER it shall be necessary or proper, in the opinion of the presiding judge, in any circuit court, or district court exercising circuit court jurisdiction, that original papers of any kind should be inspected in the supreme court, upon appeal, such presiding judge may make such rule or order for the safe-keeping, transporting and return of such original papers as to him may seem proper, and this court will receive and consider such original papers in connection with the transcript of the proceedings.

In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence, by testimony of witnesses, shall be taken under a commission to be issued from this court, or from any circuit court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories to be filed by the party applying for the commission, and notice to the opposite party, or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories, within twenty days from the service of such notice. Provided, however, that nothing in this rule shall prevent any party from giving oral testimony, in open court, in cases where by law it is admissible.

CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1817.

SLOCUM *v.* MAYBERRY *et al.*

Admiralty jurisdiction.—Seizures.

The courts of the United States have exclusive jurisdiction of all seizures made on land or water, for a breach of the laws of the United States; and any intervention of a state authority which, by taking the thing seized out of the hands of the United States officer, might obstruct the exercise of this jurisdiction, is unlawful.[1]

In such a case, the court of the United States, having cognisance of the seizure, may enforce a re-delivery of the thing, by attachment, or other summary process.

The question, under such a seizure, whether a forfeiture has been actually incurred, belongs exclusively to the courts of the United States, and it depends upon the final decree of such courts whether the seizure is to be deemed rightful or tortious.

If the seizing officer refuse to institute proceedings to ascertain the *forfeiture, the district court may, upon application of the aggrieved party, compel the officer to proceed to adjudication, or to abandon the seizure. [*2

And if the seizure be finally adjudged wrongful, and without probable cause, the party may proceed, at his election, by a suit at common law, or in the instance court of admiralty, for damages for the illegal act.

But the common-law remedy in such a case must be sought for in the state courts; the courts of the United States having no jurisdiction to decide on the conduct of their officers, in the execution of their laws, in suits at common law, until the case shall have passed through the state courts.

Where a seizure was made, under the 11th section of the embargo act of April 1808, it was determined, that no power was given by law, to detain the cargo, if separated from the vessel, and that the owner had a right to take the cargo out of the vessel, and to dispose of it in any way not prohibited by law; and in case of its detention, to bring an action of replevin therefor, in the state court.

ERROR on a judgment rendered by the Supreme Court for the state of Rhode Island.

John Slocum, the plaintiff in error, was surveyor of the customs for the port of Newport, in Rhode Island, and under the directions of the collector,

[1] Gelston *v.* Hoyt, 3 Wheat. 246; Burke *v.* Trevitt, 1 Mason 96. And see New Jersey Steam Navigation Co. *v.* Merchants' Bank, 6 How. 386–92.

had seized the Venus, lying in that port, with a cargo ostensibly bound to some other port in the United States. The defendants in error, who were owners of the cargo, brought their writ of replevin, in the state court of Rhode Island, for the restoration of the property. The defendant pleaded that the Venus was laden in the night, not under the inspection of the proper revenue-officers; and that the collector of the port, suspecting an intention to violate the embargo laws, had directed him to seize and detain
*3] her, until the opinion of the president *should be known on the case; and concluded to the jurisdiction of the court. The same matter was also pleaded in bar. To both these pleas, the plaintiff in the state court demurred, and the defendants joined in demurrer. Judgment having been rendered in favor of the plaintiff, in the state court, the cause was removed into this court by writ of error.

The *Attorney-General*, for the plaintiff in error.—1. The seizure was well made, under the 11th section of the embargo act of the 25th of April 1808. The nature and extent of the power vested in the revenue officers was settled in the case of *Crowell* v. *McFadon*, 8 Cr. 96. Even admitting, that, according to the doctrine held in the case of *The Paulina*, 7 Cr. 52, the landing without a permit, contrary to the second section, does not work a forfeiture (the denial of a clearance being the only penalty), still, the efficacy of the eleventh section justifies and protects the officer.

2. The case being brought under the cognisance of the United States, and within the jurisdiction of their courts, by the just exercise of an authority by one of their officers, the state court had no right to interfere, and arrest the seizure by its process. In the case of *The Favourite*, 4 Cr. 347,(*a*) three of the judges held, that "the conduct of the salvors in taking the goods out of the possession of the revenue-officers, though by legal pro-
*4] cess, was improper." This intimation *is the stronger, as the wrecked goods were adjudged not liable to duties; and it is fortified by the opinion of a learned judge, in the supreme court of New York, upon an analogous question. 9 Johns. 239, *per* KENT, Ch. J.(*b*)

(*a*) See also Soderstrom's Case, 1 Binn. 138; 2 Hall's Law Journal 195.

(*b*) This was an application to the supreme court of the state of New York, at August term 1812, for the allowance of a writ of *habeas corpus*, directed to John Christie, a lieutenant-colonel in the army of the United States, to bring up the body of Jeremiah Ferguson, founded upon an affidavit of his father, stating that he was an enlisted soldier in the 13th regiment of infantry in the army of the United States, then under the command of Christie, and that the said Jeremiah Ferguson was an infant under the age of twenty-one years, &c., and that he enlisted without his father's consent, and was desirous of being released and discharged. The Chief Justice, in delivering his opinion, stated, "that the present case being one of an enlistment under color of the authority of the United States, and by an officer of that government, the federal courts have complete and perfect jurisdiction in the case; and there is no need of the jurisdiction or interference of the state courts; nor does it appear to me, to be fit, that the state courts should be inquiring into the abuse of the exercise of the authority of the general government. Numberless cases may be supposed, of the abuse of power, by the civil and military officers of the government of the United States; but the courts of the United States have competent authority to correct all such abuses, and they are bound to exercise that authority. The responsibility is with them, not with us; and we have no reason to doubt of their readiness, as well as ability, to correct and punish

Hunter, contrà.—1. It is conceded, that the opinion or suspicion of the collector authorised him to detain any vessel, ostensibly bound with a cargo to some port of the United States, until the pleasure of the president should be known. This is not a replevin for the vessel. As to that, the owners submitted to the suspicion of the collector, and the pleasure of the president; but as to the cargo, neither of these officers had, by law, the power of detaining it. A momentary and unavoidable detention of the cargo, incidental to the seizure of the vessel, might, indeed, be deemed a necessary consequence of an undeniable power; but could never give the seizing officer a right to continue the detention *of the cargo, after the vessel was securely detained. Cargo, in the revenue laws, in the law [*5 of prize, and in questions of salvage, insurance and freight, is contradistinguished from vessel. The system of the embargo laws was intended to prevent exportation; and in order to accomplish this only, they authorized the detention of the vehicle, without which no exportation could take place. Even the vessel was not forfeited, but detained; and the cargo was neither forfeited nor detained, but left in the possession of the owners to be freely consumed at home. The laws of the United States having then exerted their energy, and performed their office, the subsequent proceedings were illegal. In the case of *Crowell* v. *McFadon*, the action was trover. Lucrative damages were sought for a conversion proved not to be wrongful, but assented to by the party. Here, the action is replevin, and the *party [*6 only seeks to retain what is universally admitted to be his property. *Incommoda vitantis quam commoda petentis melior est causa.*

2. The plea to the jurisdiction of the state court is fatally defective, in not stating another jurisdiction. Doct. Pl. 23; 1 Ves. 213; *Mostyn* v. *Fabrigas*, Cowp. 172; 2 Ves. 237; 3 Atk. 662.

3. But even supposing the decision of this court must be against the jurisdiction of the state court, no judgment can be pronounced upon that basis. The thing in controversy cannot be restored to the plaintiff in error, for he never owned or claimed it; and the authority of *The Paulina*, 7 Cr. 52, is sufficient to dissipate the mistaken notion of a forfeiture to the United States. No collision between the state and national judicatures can, therefore, arise. Even if the state court has improperly interfered, it is, at the worst, an innocent officiousness; since that court has determined the question, precisely as the national tribunals would have done, and has merely anticipated the beneficence they intended. The mischief that the common-law writ of prohibition seeks to remedy is, the inconvenience of having the same question determined different ways, according to the court in which the suit is depending. But if it be shown to the court trying a suggestion

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every abuse of power, under that government. The judicial power of the United States is commensurate with every case arising under the laws of the union; and the act of congress (1 U. S. Stat. 76) gives to the federal courts, exclusively of the courts of the several states, cognisance of all crimes and offences, cognisable under the authority of the United States." The other judges concurred in refusing to allow the *habeas corpus*, deeming that a question of sound legal discretion; but reserved themselves as to the jurisdiction of the state courts.[1]

[1] Tarble's Case, 13 Wall. 397; Shirk's Case, 3 Grant (Pa.) 460; Ex parte Neill, 8 Bl. C. C. 156; Ex parte Farrand, 1 Abb. U. S. 140; Ex parte Hopson, 40 Barb. 34.

in prohibition, that the question has been, or must be, determined exactly as the appropriate court would determine it, its merely being drawn *at aliud examen*, would not be a sufficient ground for issuing the writ of prohibi-
*7] tion. 3 Bl. Com. c. 7. *No usurpation can be ultimately successful against the national jurisdiction. The very clause of the judiciary act of 1789 (§ 25) by which the cause is brought here, shows that this jurisdiction is amply armed for self-defence. But this transaction does not present anything for the judicial powers of the United States to act upon. The case of *The Favourite* was a question of salvage, depending, as such questions always do, upon personal merit and propriety of conduct. A severe assertion even of legal right may, in many instances, amount to demerit. In the case of *Mr. Soderstrom*, 1 Binn. 138, the very words of the 9th section of the judiciary act expressly excluded the state courts from jurisdiction. In that case, there was a personal privilege in the consul, and an absolute disability in the court. The *dictum* of the chief justice of the supreme court of New York, in the case of *Ferguson*, was disclaimed by the rest of the court, although under the particular circumstances of the case, they declined to interfere. Unless the state tribunals have a right to interfere, with the aid of their preventive process, in a case where the national jurisdiction has not lawfully attached, property detained under color of authority may be dissipated by rapacious profusion, because a timely replevin could not be interposed.

The *Attorney-General*, in reply.—1. The plea of the defendant in the court below covers both the vessel and the cargo, and being demurred to,
*8] its facts *are admitted. Both must be detained, where they are seized contemporaneously; and to permit a subsequent transshipment of the cargo from the vessel, where it was found *in delicto*, to another, would be to defeat the policy of the law. In the case of *Otis* v. *Watkins*, 9 Cr. 339, both vessel and cargo were removed trom Provincetown to Barnstable, yet the conduct of the collector was held justified.

2. The rule, that he who pleads to the jurisdiction ought to give it to some other court, must be taken with the proper qualifications. Another jurisdiction must be shown, where it exists, or is intended to be claimed, over the subject-matter of the suit. But here, it was intended only to except to the officious, unlawful jurisdiction of that court where the officer was impleaded.

3. The plea of the defendant in the court below is not an avowry, which goes for a restitution of the thing in controversy; he merely makes cognisance, acknowledges the taking, but justifies under the law, and the orders of the collector. Hence the argument, that a reversal of the judgment below would imply a restitution of the cargo to the seizing officer as his property, is inapplicable. Where, from the circumstances of the case, it was lawful to take, and yet, from intervening events, unlawful to detain, the defendant cannot be entitled to a return. Roll. Abr. 319; Bull. N. P. 55. The seizure, in this case, though it looked to no direct forfeiture, or even to a trial, yet, being a necessary incident to a seizure, having in view a forfeiture,
*9] *it falls within the scope of the 9th section of the judiciary act, as fairly as the cases positively enumerated; and a contrary determina-

tion would efface from the statute book those preventive means by which a complexity of litigation is avoided.

February 12th, 1817. MARSHALL, Ch. J., delivered the opinion of the court, and after stating the facts, proceeded as follows :—In considering this case, the first question which presents itself is this—has the constitution, or any law of the United States, been violated or misconstrued by the court of Rhode Island, in exercising its jurisdiction in this cause?

The judiciary act gives to the federal courts exclusive cognisance of all seizures made on land or water. Any intervention of a state authority which, by taking the thing seized out of the possession of the officer of the United States, might obstruct the exercise of this jurisdiction, would unquestionably be a violation of the act; and the federal court having cognisance of the seizure, might enforce a re-delivery of the thing, by attachment or other summary process against the parties who should divest such a possession. The party supposing himself aggrieved by a seizure cannot, because he considers it tortious, replevy the property out of the custody of the seizing officer, or of the court having cognisance of the cause. If the officer has a right, under the laws of the United States, to seize for a supposed forfeiture, the question, whether that forfeiture has been actually incurred, belongs exclusively to the *federal courts, and cannot be drawn to another [*10
forum; and it depends upon the final decree of such courts, whether such seizure is to be deemed rightful or tortious. If the seizing officer should refuse to institute proceedings to ascertain the forfeiture, the district court may, upon the application of the aggrieved party, compel the officer to proceed to adjudication, or to abandon the seizure. And if the seizure be finally adjudged wrongful, and without reasonable cause, he may proceed, at his election, by a suit at common law, or in the admiralty, for damages for the illegal act. Yet, even in that case, any remedy which the law may afford to the party supposing himself to be aggrieved, other than such as might be obtained in a court of admiralty, could be prosecuted only in the state court. The common-law tribunals of the United States are closed against such applications, were the party disposed to make them. Congress has refused to the courts of the Union the power of deciding on the conduct of their officers, in the execution of their laws, in suits at common-law, until the case shall have passed through the state courts, and have received the form which may there be given it. This, however, being an action which takes the thing itself out of the possession of the officer, could certainly not be maintained in a state court, if, by the act of congress, it was seized for the purpose of being proceeded against in the federal court.

A very brief examination of the act of congress will be sufficient for the inquiry, whether this cargo was so seized. The second section of the act, *pleaded by the defendant in the original action, only withholds a [*11
clearance from a vessel which has committed the offence described in that section. This seizure was made under the 11th section, which enacts, "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 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 authority given respects the vessel only. The cargo is in no manner the object of the act. It is arrested in its course to any other port, by the detention of the vehicle in which it was to be carried; but no right is given to seize it, specifically, or to detain it, if separated from that vehicle. It remains in custody of the officer, simply because it is placed in a vessel which is in his custody; but no law forbids it to be taken out of that vessel, if such be the will of the owner. The cargoes thus arrested and detained were generally of a perishable nature, and it would have been wanton oppression, to expose them to loss, by unlimited detention, in a case where the owner was willing to remove all danger of exportation.

This being the true construction of the act of congress, the owner has the same right to his cargo that he has to any other property, and may exercise over it every act of ownership not prohibited by law. He may,
*12] consequently, demand it from the officer, *in whose possession it is, that officer having no legal aight to withhold it from him; and if it be withheld, he has a consequent right to appeal to the laws of his country for relief.

To what court can this appeal be made? The common-law courts of the United States have no jurisdiction in the case; they can afford him no relief. The party might, indeed, institute a suit for redress, in the district, court, acting as an admiralty and revenue court; and such court might award restitution of the property unlawfully detained. But the act of congress neither expressly, nor by implication, forbids the state courts to take cognisance of suits instituted for property in possession of an officer of the United States, not detained under some law of the United States; consequently, their jurisdiction remains. Had this action been brought for the vessel, instead of the cargo, the case would have been essentially different. The detention would have been by virtue of an act of congress, and the jurisdiction of a state court could not have been sustained. But the action having been brought for the cargo, to detain which the law gave no authority, it was triable in the state court.

The same course of reasoning which sustains the jurisdiction of the court of Rhode Island, sustains also its judgment on the plea in bar. The two pleas contain the same matter; the one concluding to the jurisdiction of the court, and the other in bar of the action. In examining the plea to the jurisdiction, it has been shown, that the officer had no legal right to
*13] detain the property; consequently, his plea was *no sufficient defence, and the court misconstrued no act of congress, nor committed any error, in sustaining the demurrer.

Judgment affirmed, with costs.

Greenleaf *v.* Cook.

Promissory note.—Failure of consideration.

Where a promissory note was given for the purchase of real property, *held*, that the failure of consideration, through defect of title, must be total, in order to constitute a good defence to an action on the note.

Quære? Whether, after receiving a deed, the party could avail himself even of a total failure of consideration?

But where the note is given, with full knowledge of the extent of an incumbrance, and the party thus consents to receive the title, its defect is no legal bar to an action on the note.

Any partial defect in the title or the deed, is not inquirable into by a court of law, in an action on the note; but the party must seek relief in chancery.[1]

Error to the Circuit Court of the United States, for the district of Columbia. James Greenleaf instituted a suit in that court on a promissory note, executed by the defendant, who pleaded the general issue.

On the trial, the defendant gave in evidence a deed executed by Pratt, Francis and others, by James Greenleaf, their attorney, *conveying to him a lot of ground in the city of Washington, for the purchase of which the promissory note in the declaration mentioned was given. He also gave in evidence a deed from Morris, Nicholson and others, to Thomas Law, purporting to be a mortgage of a great number of squares and lots in the city of Washington, and among others, of the square comprehending the lot purchased by the defendant, together with the proceedings in a suit in chancery, instituted by the said Thomas Law, against Pratt, Francis and others, in which a decree of foreclosure was pronounced. He then produced a witness, who proved, that at the time of the sale, the lot was not, in his opinion, exclusive of improvements, worth more than the sum mentioned in the note. [*14

Upon this testimony, the counsel for the defendant moved the court to instruct the jury, that if they believed the testimony, the law was for the defendant, which instruction the court refused to give, the judges being divided in opinion thereon. The counsel for the plaintiff then moved the court to instruct the jury, that the law was for the plaintiff, which opinion the court also refused to give, being still divided.

The counsel for the plaintiff then produced testimony to prove that the lot of ground, in payment for which the promissory note mentioned in the declaration was given, had been sold to a certain John Bickly, who took possession thereof, and resided thereon, during his life; that after his death, his widow continued to reside thereon, until she intermarried *with the defendant, and that the defendant still resided thereon. That previous to the execution of the promissory note, on which this suit was instituted, he received full and complete information of the deed of mortgage in the foregoing bill of exception mentioned, and of the probable effect of that deed. That, with this knowledge, after consultation and mature consideration, he received the deed for the lot, and gave his promissory note [*15

[1] But in Withers *v.* Greene, 9 How. 213, it was determined, that in an action on a promissory note, between the original parties, a partial failure of consideration may be set up as a defence *pro tanto*. This was re-affirmed, in Van Buren *v.* Digges, 11 How. 476. And see Phœnix Ins. Co. *v.* Fiquet, 7 Johns. 383; Olmsted *v.* Stewart, 13 Id. 238; Hills *v.* Bannister, 8 Cow. 32; Spalding *v.* Vandercook, 2 Wend. 431; Burton *v.* Stewart, 3 Id. 336; Judd *v.* Dennison, 10 Id. 512; Payne *v.* Cutler, 13 Id. 605.

for the purchase-money. He then moved the court to instruct the jury, that if they believed the facts thus stated on testimony, the plaintiff was entitled to recover in this action. But the court, being again divided, refused to give the opinion required.

The counsel for the plaintiff took exceptions to the proceedings of the court on each point, in not giving their opinions as asked. The jury found a verdict for the defendant, upon which judgment was rendered, and the cause came before this court on a writ of error.

Jones, for the plaintiff in error, argued, that where a party purchases real property, without fraud on the part of the vendor, the vendee takes it at his own risk, unless he has a warranty against the acts of all the world. That there is no distinction between a direct action to recover back the purchase-money, and a defence for want of consideration. In this case, there is no eviction, but a mere contingent incumbrance only, proper for the exclusive cognisance of a court of equity, which court may *decree a specific performance, or compensation, as its justice may require. Sugd. on Vend. 312–18, and authorities there cited.

*16]

Law, contrà, contended, that if this were a case of an express agreement to take any or no title, the doctrine cited from Sugden would apply ; but that here the vendor promised to give the vendee a clear and unincumbered title. A court of chancery will never decree a specific performance, without a perfect title at law and in equity ; and the defence on account of defect of title is as available in the one *forum* as the other. 2 Com. on Cont. 52.

February 8th, 1817. Marshall, Ch. J., delivered the opinion of the court, and after stating the facts, proceeded as follows :—On the first exception, it has been argued, that there is a failure of consideration, which constitutes a good defence in this action. Without deciding whether, after receiving a deed, the defendant could avail himself of even a total failure of consideration, the court is of opinion, that to make it a good defence, in any case, the failure must be total. The prior mortgage of the premises, and the decree of foreclosure, do not produce a total failure of consideration. The equity of redemption may be worth something ; this court cannot say how much ; nor is the inquiry a proper *one in a court of law, in an action on the note. If the defendant be entitled to any relief, it is not in this action.

*17]

But if any doubt could exist on the first exception, there is none on the second. The note was given, with full knowledge of the case. Acquainted with the extent of the incumbrance, and its probable consequences, the defendant consents to receive the title which the plaintiff was able to make, and on receiving it, executes his note for the purchase-money. To the payment of a note given under such circumstances, the existence of the incumbrance can certainly furnish no legal objection.

It has been also said, that the deed is defective. If it be, the defendant may require a proper deed, and it is not impossible, but there may be circumstances which would induce a court of equity to enjoin this judgment,

until a proper deed be made. But the objections to the deed cannot be examined in this action.

Judgment reversed.(*a*)

*Judgment.—This cause came on to be heard on the transcript of the record of the circuit court of the United States, for the county of Washington, and was argued by counsel. All which being seen and considered, it is the opinion of this court, that there is error in the proceedings of the said circuit court, in this, that the said court refused to instruct the jury, on the application of the counsel for the plaintiff, that on the facts given in evidence to them, if believed, the plaintiff was entitled to recover in that action; wherefore, it is considered by this court, that the said judgment of the said circuit court be reversed and annulled, and that the cause be remanded to the said court, to be proceeded in according to law. [*18

Otis *v.* Walter.

Embargo.

In seizures under the embargo laws, the law itself is a sufficient justification to the seizing officer, where the discharge of duty is the real motive, and not the pretext, for detention; and it is not necessary to show probable cause.

But the embargo act of the 25th of April 1808, related only to vessels ostensibly bound to some port in the United States, and a seizure, after the termination of the voyage, is unjustifiable; and no further detention of the cargo is lawful, than what is necessarily dependent on the detention of the vessel.

It is not indispensable to the termination of a voyage, that the vessel should arrive at the *terminus* of her original destination; but it may be produced by stranding, stress of weather, or any other cause inducing *her to enter another port, with a view to terminate her voyage *bonâ fide*. [*19

But if a vessel, not actually arriving at her port of original destination, excites an honest suspicion in the mind of the collector, that her demand of a permit to land the cargo, was merely colorable, this is not a termination of the voyage, so as to preclude the right of detention.

Error to the Supreme Judicial Court of the state of Massachusetts. This was an action of trover, brought in the state court, in which Walter, the plaintiff in that court, recovered of Otis, the defendant in that court, damages for the conversion of sundry articles constituting the cargo of a vessel called the Ten Sisters.

The defendant in the court below, collector of the port of Barnstable, in Massachusetts, had detained the vessel, under suspicion of an intention to violate the embargo laws, particularly the act of the 25th of April 1808, §§ 6 and 11. The vessel sailed from Ipswich, with a cargo of flour, tar and

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(*a*) By the French law, the price of the sale of real property cannot be recovered by the vendor, if the vendee, has been disturbed (*troublé*) in his possession, by prior incumbrances, or has just ground for apprehension on that account, until the litigation concerning them is terminated; unless, indeed, the vendor gives sufficient security to lindemnify the vendee in case of eviction. Pothier, *de Vente*, n. 280. Code Napoleon, liv. 3, tit. 6, ch. 5, n. 1653. For the various distinctions in our law as to when the vendee may detain the purchase-money, if incumbrances are discovered, previously to the payment of it, and to what relief he is entitled, if evicted after the money is actually paid, see Sugden's Law of Vendors, as above cited, which contains a complete digest of the cases in equity on this subject.

rice, in order to carry the same to Barnstable, or to a place called Bass River, in Yarmouth; and proceeded to Hyannis, in the collection district of Barnstable. On her arrival there, the master applied to the collector for a permit to land the cargo, which was refused by the latter, who shortly afterwards seized and detained the vessel, under the above-mentioned acts. This detention was given in evidence, as a defence to the action, under the general issue, and the Chief Justice of the supreme court of Massachusetts instructed the jury, "that the said several matters and things, so allowed
*20] and proved, *were not sufficient to bar the plaintiff of his said action, nor did they constitute or amount to any defence whatever in the action," &c. Whereupon, the jury found a verdict, and the court rendered a judgment, for the plaintiff.

The *Attorney-General*, for the plaintiff in error, argued, that this case fell under the principle of that of *Crowell* v. *McFadon*, 3 Cr. 94, and it would appear that the vessel was *in itinere;* but that even if this were not the state of the case, the jury ought to have been left to make their own inference from the facts, and not to have been charged by the judge, that no defence whatever was made out.

Read, for the defendant in error, contended, that the case of *Otis* v. *Bacon*, 8 Cr. 589, was perfectly in point, and showed that the vessel, having arrived at her port of discharge, was no longer within the operation of the embargo laws; and that if the collector's defence was not completely made out—if it was, in any respect, materially defective—it was not made out at all.

February 21st, 1817. Johnson, Justice, delivered the opinion of the court.—This was an action of trover, brought in the state court of Massachusetts, in which Walter, the plaintiff in that court, recovered of Otis, damages for the conversion of sundry articles, constituting the cargo of a
*21] vessel called the Ten Sisters. *Otis, the collector of Barnstable, had detained the vessel, under suspicion of an intention to violate the embargo laws. (Act of the 25th of April 1808, §§ 6 and 11.)

It has already been decided, in such cases, that it is not necessary to show probable cause; that the law confides in the discretion of the collector, and is, in itself, a sufficient justification, when the discharge of duty is the real motive, and not the pretext, for detention. But it has also been decided, that the law relates only to vessels, ostensibly bound to some port in the United States; that a seizure is unjustifiable, after the termination of a voyage; and that no further detention of the cargo is lawful, than what is necessarily dependent upon the detention of the vessel.

In this case, there was no ground for charging the collector with oppression or malversation; and the only point insisted on in the argument was, that she had actually terminated her voyage. As the clearance is not in evidence in the cause, we are obliged to take the *termini* of the voyage from the testimony of the master, who swears that he sailed from Ipswich, "with a cargo of tar, flour and rice, to carry the same to Barnstable, in the county of Barnstable, or to a place called Bass River, in Yarmouth, in said county;" that he "proceeded to Hyannis, in the district of Barnstable: that on his arrival there, he applied for a permit to land, which was refused by the col-

lector, who, in a day or two afterwards, seized the vessel, and detained her, under the embargo acts." Ipswich lies to the north of the peninsula *which terminates in Cape Cod; the port or bay of Barnstable, on the north side of that peninsula; Bass River and Hyannis Bay, on the south; all of them known as distinct places, but all lying within the county and collection district of Barnstable. And although Hyannis Bay lies within the district of Barnstable; yet to reach it, in sailing from Ipswich, you must pass both the town of Barnstable and the mouth of Bass River. [*22

The defence of the collector in the state court was founded on the authority to detain, vested in him by the act of congress. The instruction of the Chief Justice of that state was in these words: "that the said several matters and things, so allowed and proved, were not sufficient to bar the plaintiff of his said action, nor did they constitute or amount to any defence whatever in the action."

Instructions couched in such general terms may serve to embarrass a court exercising appellate jurisdiction; but it is a mistake, to suppose, that it precludes such a court from a view of the errors which may have been committed on the trial. It has before been decided, that it only obliges this court to look through the whole cause, and examine if there be nothing in it which ought to have called forth a different instruction or judgment. In this case, we are of opinion, that, conformable to our former decisions, the instruction given could only have been sanctioned, on the supposition that the vessel had actually terminated her voyage. But here, it is contended, that this court stand committed by an admission *in the case of *Otis* v. *Bacon*, 7 Cr. 589, that a destination to Barnstable is satisfied by an arrival in Hyannis Bay. [*23

We have looked into the record in that case, and find that it will support no such inference. It is true, that Mud-hole, the place at which the vessel had arrived in that case, is in Hyannis Bay. But the question of fact did not arise, for the collector had acquiesced in the termination of the voyage there, by actually granting a permit to land. And the grant of the permit was expressly made a ground, in the state court, of the instruction to the jury. Now, it is not indispensable to the termination of the voyage, that the vessel should arrive at the *terminus ad quem* she was destined. It may as well be produced by stranding, by stress of weather, or by any other cause, inducing her to enter another port, honestly, with a view to terminate her voyage. But if a vessel, not actually arriving at her port of destination, excite an honest suspicion in the mind of the collector, that her demand of a permit was merely colorable, we are of opinion, that this can neither be held to be an actual, or admitted termination of the voyage, so as to preclude the right of detention. Had the destination in this case been generally to Barnstable, or the town of Barnstable, there may have been some color of ground for arguing, that her arrival at Hyannis was the termination of her voyage; but as the destination was expressly to Barnstable or Bass River, within the county of *Barnstable, her arrival at one or the other of those places was indispensable to the termination of her voyage, supposing her really, in fact, to have had no ulterior destination. [*24

But a destination may be colorable, and intended only to mask an ulterior and illegal destination; and hence, we are of opinion, that, unless the fact be conceded, by some such unequivocal act, as was done by the collector in

the case of *Otis* v. *Bacon*, it is a question which ought to be left, in the instruction of the court, open to the jury. And that if any positive instruction on the subject had been given to the jury in this cause, it ought to have been in favor of the defendant, as the arrival in Hyannis Bay would not have been deemed a legal termination of the voyage, either on a policy of insurance, a charter-party, bottomry-bond, or any other maritime contract.

A majority of the court are, therefore, of opinion, that the court of Massachusetts erred in this case, and that the judgment ought to be reversed.

Judgment reversed.

Mr. Justice STORY did not sit in this cause.

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*25] *MCIVER *et al.*, Lessees, *v.* RAGAN *et al.*

Limitation.

The plaintiffs in ejectment claimed under a grant from the state of North Carolina, comprehending the lands for which the suit was brought, and the defendants claimed under a junior patent, and a possession of seven years, which, by the statutes of that state and Tennessee, constitutes a bar to the action, if the possession be under color of title: to repel this defence, the plaintiffs proved, that no corner or course of the grant, under which they claimed, was marked, except the beginning corner; that the beginning, and nearly the whole land, and all the corners, except one, were within the Cherokee Indian boundary, not having been ceded to the United States, until the year 1806, within seven years from which time the suit was brought; but the land in the defendant's possession, and for which the suit was brought, did not lie within the Indian boundary: *Held*, that, notwithstanding the laws of the United States prohibited all persons from surveying or marking any lands within the Indian territory, and the plaintiffs could not, therefore, survey the land granted to them, the defendants were entitled to hold the part possessed by them for the period of seven years under color of title.

McIver *v.* Reagan, Cooke 366, affirmed.

ERROR to the Circuit Court for the district of West Tennessee. The plaintiffs in error brought an ejectment in that court for 5000 acres of land, in possession of the defendant, Ragan, and on the trial, gave in evidence a grant from the state of North Carolina of 40,000 acres, comprehending the lands for which the suit was instituted.

The defendants claimed under a junior patent to Mabane, and a possession of seven years held by Ragan, which, by the statutes of North Caro-
*26] lina and *Tennessee, constitutes a bar to the action, if the possession be under color of title.

To repel this defence, the plaintiffs proved, that no corner or course of the grant, under which they claimed, was marked, except the beginning corner. That the beginning, and nearly the whole land, and all the corners, except one, were within the Indian boundary, being part of the lands reserved by treaty for the Cherokee Indians. These lands were not ceded to the United States, until the year 1806, within seven years from which time, this suit was instituted. But the land, in possession of the defendant, Ragan, and for which this ejectment was brought, did not lie within the Indian boundary.

The laws of the United States prohibited all persons from surveying or marking any lands within the country reserved by treaty for the Indians.

Upon this testimony, the counsel for the plaintiffs requested the court to instruct the jury, that "the act of limitations would not run against the

plaintiffs, for any part of the said tract, although such part should be out of the Indian boundary, until the Indian title was extinguished to that part of the tract which includes the beginning corner, and the lines running from it, so as to enable them to survey their land, and prove the defendant to be within their grant." But the judge instructed the jury, that, "although the Indian boundary included the beginning corner, and part of the lines of the said tract, yet, if the defendants had actual possession of part of the said tract, not so included within the said Indian boundary, and retained possession thereof for seven *years, without any suit being commenced, the plaintiff would thereby be barred from a recovery." To this [*27 opinion, the plaintiffs, by their counsel, excepted.

The jury found a verdict for the defendants, on which a judgment was rendered, and the cause was brought before this court by writ of error.

February 6th. *Swann* and *Campbell*, for the plaintiffs in error and in ejectment.—1. Statutes of limitation, all over the world, except certain cases of a peculiar nature from their operation; and the impediment in this case is analogous to the exceptions expressly provided. The case of civil war interrupting all the proceedings in courts of justice, is not stronger than the present; the omission in the statute ought, therefore, to be supplied by judicial equity.

2. The act of the 30th of March 1802, ch. 13, § 5, prohibits the surveying, or attempting to survey, or designating any of the boundaries, &c., of lands within the Indian territory, under severe penalties; and the party could not have obtained a passport from the officers authorized to grant it, by the 3d section of the act, in order to survey lands, but merely to go into the Indian country for any lawful purpose.

3. The record does not regularly deduce the defendant's title. There is no presumption raised, that Ragan continued his possession under Mabane, and without it, that possession would not be under color of title, according to the statutes of limitation of North Carolina and Tennessee, and the decision *of this court in the case of *Patton's Lessee* v. *Easton*, [*28 1 Wheat. 476.

Jones and *Thomas*, contrà.—The exceptions in the statute of limitations (which statute gives the right of property as well as of possession) are expressed by the legislature, and cannot be multiplied by implication. But supposing the statute not to apply to lands within the Indian boundary; the lands held by the defendant was not within the Indian boundary, and therefore, the limitation applies to it. If the plaintiffs had instituted a suit, they might have entered the Indian country, under an order of court, and surveyed the lands. The character of the defendants' posssession, and not that of the plaintiffs, is to determine the right of property.

February 11th, 1817. MARSHALL, Ch. J., delivered the opinion of the court, and after stating the facts, proceeded as follows:—It is contended by the plaintiffs in error, that the judge misconstrued the law, in his instructions to the jury. The case is admitted to be within the act of limitations of the state of Tennessee, and not within the letter of the exceptions. But it is contended, that as the plaintiffs were disabled, by statute, from surveying their land, and consequently, from prosecuting this suit with effect,

they must be excused from *bringing it; and are within the equity, though not within the letter of the exceptions.

The statute of limitations is intended, not for the punishment of those who neglect to assert their rights by suit, but for the protection of those who have remained in possession, under color of a title believed to be good. The possession of the defendants being of lands, not within the Indian territory, and being in itself legal, no reason exists, as connected with that possession, why it should not avail them and perfect their title as intended by the act. The claim of the plaintiffs to be excepted from the operation of the act, is founded, so far as respects this point, not on the character of the defendants' possession, but on the impediments to the assertion of their own title.

Wherever the situation of a party was such as, in the opinion of the legislature, to furnish a motive for excepting him from the operation of the law, the legislature has made the exception. It would be going far, for this court to add to those exceptions. It is admitted, that the case of the plaintiffs is not within them, but it is contended to be within the same equity with those which have been taken out of the statute; as where the courts of a country are closed, so that no suits can be instituted. This proposition cannot be admitted. The difficulties under which the plaintiffs labored, respected the trial, not the institution of their suit. There was no obstruction to the bringing of this ejectment at an earlier day. If, at the trial, a
*30] survey had been *found indispensable to the justice of the cause, the sound discretion of the court would have been exercised, on a motion for a continuance. Had such a motion been overruled, the plaintiffs would have been in the condition of all those who, from causes which they cannot control, are unable to obtain that testimony which will establish their rights. If this difficulty be produced by the legislative power, the same power might provide a remedy; but courts cannot, on that account, insert in the statute of limitations, an exception which the statute does not contain. It has never been determined, that the impossibility of bringing a case to a successful issue, from causes of uncertain duration, though created by the legislature, shall take such case out of the operation of the act of limitations, unless the legislature shall so declare its will.

It has also been contended, that in this case, the possession is not under color of title. The ejectment was served on Ragan, who was the tenant in possession; and on his motion, David Mabane and John Thomson, executors of the last will and testament of James Mabane, deceased, and landlords to the said Henry Ragan, were admitted as defendants with him in the cause. At the trial, they produced a grant for the land in controversy to James Mabane, and proved, "that Ragan took possession of the same, under James Mabane, the grantee, in 1804, and continued to occupy the same ever since."

It is argued, that though Ragan is stated to have taken possession under
*31] Mabane, he is not stated to *have continued that possession under Mabane, and this court will not presume that he did so. Without such presumption, his possession, it is said, would not be under color of title, and consequently, would be no bar to the action, according to the statute of Tennessee. The court cannot yield its assent to this hypercriticism on the language of the exceptions. The representatives of Mabane came in as defendants and plead the general issue. They are stated on the record to

be the landlords of Ragan. When Ragan is said to have taken possession under Mabane, and to have continued to occupy the land, the fair inference is, that the possession was continued under the same right by which it was originally taken. Neither the statement of the counsel, nor the opinion of the court turns, in any degree, on the nature and character of Ragan's possession, but on the disability of the plaintiffs to survey their land. For all these reasons, this court is decidedly of opinion, that the possession of Ragan was the possession of Mabane, and was under color of title.

Judgment affirmed.

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*Hunter *et al. v.* Bryant. [*32

Marriage settlement.

H., in contemplation of marriage with B., gave a bond for $5000 and interest, to trustees, to secure to B. a support, during the marriage, and after the death of H., in case she should survive him; and to their child or children, in case he should survive her; with condition, that if H. should, within the time of his life, or within one year after the marriage (whichsoever of the said terms should first expire), convey to the trustee some good estate, real or personal, sufficient to secure the annual payment of $300 for the separate use of his wife, during the marriage, and also sufficient to secure the payment of the said $5000 to her use, in case she should survive her husband, to be paid within six months after his death; and in case of her death before her husband, to be paid to their child or children; or, if H. should die before B., and by his will should, within a year from its date, make such devises and bequests as should be adequate to these provisions, then the bond to be void: H. died, leaving his widow B. and a son, having, by his last will, devised a tract of 1000 acres of land in the Mississippi territory, to his son, in fee; a tract of 10,000 acres in Kentucky, equally between his wife and son, with a devise over to her in fee, of the son's moiety, if he died before he attained "the lawful age to will it away;" and the residue of his estate, real and personal, to be divided equally between his wife and son, with the same contingent devise over to her, as with regard to the tract of 10,000 acres of land. The value of the property thus devised to her, beside the contingent interest, might have been estimated, at the time of H.'s death, at $5000. B. subsequently died, having made a nuncupative will, by which she devised all her estate, "whether vested in her by the will of her deceased husband, or otherwise," to be divided between her son and the plaintiff below (Bryant), with a contingent devise of the whole to the survivor. The son afterwards died, and the plaintiff brought this bill to charge the lands of H. with the payment of the bond of $5000, and interest, to which the plaintiff derived his right under the nuncupative will of B. By the laws of Kentucky, this will did not pass the real estate of the testator, but was sufficient to pass her personal estate, including the bond. **Held*, that the provision made in the will of H. for his wife, must be taken in satisfaction of the bond, but subject to her liberty to elect between the provision under the will and the bond, and that this privilege was extended to her devisee, the plaintiff. [*33

Actual maintenance is equivalent to the payment of a sum secured for separate maintenance, and therefore, interest upon the bond, during the husband's lifetime, was not allowed.

Under all the circumstances of the case, it was determined, that the bond was chargeable on the residue of the estate, and of this, the personalty first in order.

Bryant *v.* Hunter, 3 W. C. C. 48, reversed.

Appeal from the Circuit Court for the district of Pennsylvania. This cause was argued by *Key* and *Hopkinson*, for the appellants and defendants, and by *Jones*, for the plaintiffs and respondents.

March 12th, 1817. Johnson, Justice, delivered the opinion of the court.—This is an appeal from a decree in equity, in the district of Pennsylvania, on a bill filed by Thomas Y. Bryant, against the legal representatives of John Hare. The object of the bill is to charge the lands of Andrew Hare,

now deceased, through John Hare, to the appellants, defendants in the court below, with the payment of a bond for $5000 and interest, given by Andrew Hare, in contemplation of marriage with Margaret Bryant, the mother of John Hare. The land lies partly in the state of Kentucky, and partly in the Mississippi territory, and five of the defendants live in the state of Pennsylvania, the sixth, in the state of Virginia. The bill was originally
*34] *filed against all six of the legal representatives of John Hare; but the name of Mary Dickinson, the resident in Virginia, being stricken out by leave of court, five only were made defendants below.

The bond is executed to George Hunter and William Hunter, two of these appellants (the penalty is in the usual form), and bears date the 10th of Novemher 1789. The condition is in these words: "Whereas, by the permission of God, a marriage is intended to be had and solemnized between the above-bound Andrew Hare and Margaret Bryant, of the city of Philadelphia, spinster, and the said Andrew Hare, in consideration of the said marriage, and to secure a decent and competent support to and for his said intended wife, as well during the marriage, as after his death, in case she should survive him, and to all and every the child or children which may be born of the said marriage, in case he should survive her, hath agreed, that the sum of 5000 Mexican dollars, part of the estate whereof, by the blessing of God, he is now possessed, and the interest and income thereof accruing annually, should be vested in trustees, for the sole and separate use of the said Margaret Bryant, his intended wife, or the children born of her body, in the manner hereinafter mentioned. Now, the condition of the above obligation is such, that if the said Andrew Hare do and shall, within the time of his life, or within the term of one year after the marriage shall take effect (whichsoever of the said terms shall first expire), convey and
*35] assure to the above-named George and William Hunter, the next *friends of the said Margaret Bryant, and trustees by her for this special purpose chosen, or the survivor of them, or his heirs, executors, administrators or assigns, some good estate, real or personal, sufficient to secure the payment of 300 Mexican dollars, as aforesaid, to the trustees, or the survivor of them, on every the 10th day of November, in every year after the date hereof, for the sole and separate use of the said Margaret, his intended wife, during the intended marriage; which annual payment shall be at her own disposal, and shall be paid upon her own orders or receipts, independent and free from the intermeddling, charge or control of her said intended husband, and shall not be liable to any of his contracts, debts, or engagements whatsoever, and also sufficient to secure the payment of the sum of $5000 as aforesaid, to and for the sole use of the said Margaret, in case she shall survive her said intended husband, to be paid to the said trustees, or the survivor of them, for her use, within six months next after the death of her said intended husband, and in case of her death before her said intended husband, to be paid to the said trustees, or the survivor of them, for the use of all and every of the child or children of the said Margaret, to be born in pursuance of the intended marriage, to be equally divided amongst them, if more than one, but if but one, then the whole to the use of the said one. Or, if the said Andrew Hare shall die before the said Margaret, and by his testament and last will, shall, within the said year from the date hereof, give and bequeath to her such estates,

legacies, bequests *and provisions, as shall be fully adequate to the provisions here intended to be made for her, and her child or children; then, and in either of the said cases, the above-written obligation shall be void, otherwise, the same shall remain in full force and virtue at law, in this state of Pennsylvania, and in all other states or kingdoms whatever."

The marriage accordingly took effect, and except when the husband was necessarily absent, in prosecution of his business as a merchant, the parties lived constantly together, in great harmony, and in a style fully consonant with the husband's resources. In 1793, he established himself in Lexington, Kentucky, and was engaged in mercantile transactions, until his death, which happened in 1799.

By his will, Andrew Hare devised a tract of 1000 acres of land, lying in the Mississipi territory, to his son John, in fee; a tract of 10,000 acres, in the state of Kentucky, equally between his wife and son, with a devise over to her in fee, of the son's moiety, if he died before he attained "the lawful age to will it away;" and the rest and residue of his estate, real and personal, he gives to be equally divided between his wife and son, with the same contingent devise over to her, as is given with regard to the Kentucky tract of 10,000 acres. The value of the property thus devised to her, independent of the contingent interest which has since fallen, might reasonably have been estimated, at the time of the testator's death, at about $5000.

In 1801, about eighteen months after the husband, the wife died; after having made a nuncupative *will, by which she devised all her estate, "whether vested in her by the will of Andrew Hare, her deceased husband, or otherwise," to be divided between her son John, and the complainant below, Thomas Y. Bryant, with a contingent devise of the whole to the survivor. [*37

John Hare died, aged about eleven years; and under this nuncupative will it is, that Thomas Y. Bryant derived his right to this bond. According to the laws of Kentucky, this will was not sufficient to pass the landed estate of Margaret Hare, but it is good as to the personal estate, including the bond, which was the subject of this suit.

The defence set up in the answer below is, that the provision made in the will of the husband for his wife must be taken in satisfaction of this bond, inasmuch as he would otherwise have left his child, who ought to have been, and evidently was, the primary object of his care, probably, destitute of support. And this court unanimously acquiesce in the correctness of this reasoning. For every bequest is but a bounty, and a bounty must be taken as it is given. Positive words are not indispensably necessary, to attach a condition. It may arise from implication, and grow out of a combination of circumstances which go to show, that without attaching such condition to a bequest, the primary views and prominent duties of the testator will be pretermitted. In this case, in addition to the striking improbability of the testator's intending to leave his child destitute, or even dependent, there are two circumstances which tend to show, that the testator had no *expectation, that in addition to the provision for his widow, his estate was to be made liable for this heavy debt. First, the condition of the bond holds out the alternative of making provision by will, in satisfaction of it. And although we do not accede to the construction contended for, that this necessarily extended to his whole life, but think it was, in legal [*38

strictness, limited, by the latter words of the condition, to his death within one year, yet the words in the prior part of the condition, "within the term of his life," were well calculated to excite in the mind of a man, whose habits of thinking had not been corrected by technical exercise, an idea that he was legally, as well as conscientiously, complying with his obligation when executing this will. Secondly. The principal part of his bounty to his wife consists of the one-half of the rest and residue of his estate, with a contingent devise over to her, of the other half, on the decease of his son; thus disposing of the whole, and giving to her the one-half of the natural and ordinary fund for the payment of this bond; a disposition of his effects that would have been idle, under the supposition that this bond was to be exacted of his estate.

But in the actual state of the rights and interests of these parties, at least, in the view which this court takes of them, this question becomes a very immaterial one. For the complainant, Bryant, acquires nothing of the estate of Andrew Hare, under the will of Mrs. Hare, but that part of the personalty which she acquired under the residuary bequest of her husband.

*39] And this being, unquestionably, the *fund first to be applied to the payment of debts, it must, in his hands, be first subjected to the payment of this debt. It is only as connected with Mrs. Hare's acquiescence or election to take under the will, that the question of satisfaction becomes material. In which case, we should be bound to dismiss the bill altogether, on the ground of satisfaction. But here, we are of opinion, that the evidence of election is not sufficient to bind Mrs. Hare. That she was perfectly at liberty to reject the provision under the will of her husband, and rest alone on her bond, is unquestionable. And if this election was never deliberately made, in her lifetime, there can be no reason for denying the extension of it to her representative, Bryant. He now makes that election, in demanding the payment of this bond, and we conceive that nothing unequivocally expresive of that election has before occurred, at least, nothing that ought to preclude it. If the will had expressly given the property devised to her, in satisfaction of this bond, she would have been put on her guard, and more cautious conduct might have been required of her; but although a court may raise the implication, she was not bound to do it, and her mind was not necessarily led to an election. It is true, that, in her will, she notices the property acquired under her husband's will; but this is perfectly consistent with the idea, that she took, under her husband's will, something in addition to her interests under the bond, independent of that will. We are, therefore, of opinion, that the complainant is entitled to satisfaction of this

*40] bond; and as, in the course of events, the interests of *the obligees, who stood in the relation of trustees to Margaret Bryant, have become hostile to those of the *cestui que trust*, he must have the aid of this court to enforce it. The only questions, then, are, how the bond shall be stated, and how the money shall be raised? And here, the question occurs, on the allowance of interest during the husband's lifetime.

On this subject, the majority of the court is satisfied, that actual maintenance is equivalent to the payment of a sum secured for separate maintenance. It is true, the husband cannot claim his election; but if the wife and her trustees never demand it, it is considered as an acquiescence or waiver, on their part, and this court will not afterwards enforce payment. 2 P.

Wms. 84; 3 Ibid. 355; 2 Atk. 84; 4 Bro. C. C. 326. In the present case, there is nothing in the bond that holds out the idea of making this interest an accumulating fund; no demand of a settlement was ever made; the parties lived together in perfect harmony, and the wife was maintained in a style fully adequate to the provision stipulated for. This bond was intended as a provision against the husband's inability or unwillingness to maintain his wife; but whilst steadily pursuing his avocation as a merchant, and faithfully discharging his duties as a husband, the reasonable conjecture is, that it was thought really best for his family not to withdraw so large a sum from his small capital. If the trustees or the wife had desired that a settlement should be made *in pursuance of the condition, they might have demanded it, and enforced a compliance, at law or in equity. [*41 We, therefore, think, that interest on the bond is not to be computed during the husband's life.

The only remaining question is, how the money is to be raised, or on what funds the bond is to be charged. And here there can be no doubt, that the first fund to be exhausted is the residue of the estate; and of this, the personal residue first in order. This, of course, sweeps all that part of Andrew Hare's estate that Bryant acquired under the will of Mrs. Hare; and included in this we find Hustin's bond for $3272.86. The one-half of this bond was decreed in the court below, to be an equitable off-set against Hare's bond. All we know on the subject of this off-set is extracted from the confessions of the complainant himself. From these it appears, that the testator, Hare, held a bond of Hustin's for the delivery of a quantity of pork. This bond it was purposed to exchange for one for the delivery of a quantity of tobacco, and the testator, in his lifetime, dispatched the complainant as his agent, with instructions to effectuate the exchange. To enable him to do so, he assigned the bond for the pork to the complainant, instead of executing a common power of attorney. Whilst absent for this purpose, and before he had completed the arrangement with Hustin, Hare died; and Bryant proceeded no further, until he had consulted Mrs. Hare and Mr. Todd, as executrix and executor of the will of Hare, on the propriety of proceeding. "On conferring with Mrs. Hare, and advising with Mr. Todd," to use Bryant's *own equivocal language, he effected a negotiation, and having received the tobacco, took it down to New [*42 Orleans, where, not meeting with a ready sale, he deposited it with one Moore, the factor and correspondent of Hare, in his lifetime. He took Moore's receipt for the tobacco so deposited, and all that we are told of the transaction subsequently is, that at the instance of Mr. Todd, he assigned that receipt to some house, under the firm of John Jordan & Co., but who they were, or what finally became of the tobacco, the case does nos show; and for aught that appears to us, the proceeds of that adventure may at this day lie in the hands of the factor, subject to the order of the executor of Andrew Hare.

The court below thought these facts sufficient to charge Mrs. Hare with one-half the amount of Hustin's bond. But this court are of opinion, that the evidence is not sufficient for them to decide finally on the subject. Although it be generally true, that the executor, who, by taking an inferior security, or unreasonably extending time of payment, brings a loss upon his testator's estate, shall himself be liable, yet there are many objections to

applying that principle to this case. The executor, who takes charge of the affairs of a man in trade, must, necessarily, on the winding up of his affairs, be allowed a reasonable latitude of discretion; and in general, where there is manifest fidelity, diligence and ordinary judgment displayed, this court will always, with some reluctance, enforce the rigid rules which courts have been obliged, for the protection of estates, to impose upon the conduct of executors. In the principal case, the language of Thomas Bryant *is *43] by no means positive as to the consent of either the executor or executrix, to this transaction. He says, that he did it, "after conferring with Mrs. Hare, and advising with Mr. Todd." But it does not follow, that either of them assented, because they were consulted, or that they did anything more than express an opinion on the expediency of the measure. Neither of them had then qualified, nor was it at all certain, that they would qualify, and the only person then empowered to act on this subject was Bryant himself; who, by virtue of the assignment which he held, possessed a power which legally survived his principal. Under this assignment, it was, that the negotiation was effected, and not by virtue of any power derived to him from the supposed assent of the executrix. Moreover, admitting the consent of the executrix, it is still doubtful, whether any change of security did in fact take place. For Hustin still remained the debtor—the articles of agreement substituted for the original bond bear the aspect of the purchase of a bond, rather than the relinquishment of an advantage; the greater part, if not the whole balance, of the original debt, was also payable in tobacco; and if the loss finally sustained proceeded, as is probable, from the insolvency of the factor, and not the reduced value of the commodity, this was by no means a necessary consequence of the change. Upon the whole, we are of opinion, that the estate of Margaret Hare ought not, in this mode, and upon the evidence now before us, to be charged with any part of Hustin's debt. For aught we know, Bryant may himself be liable for the whole, *by means of his mismanagement in the agency, *44] or it may be in the power of the defendants to prove such acts of the executrix as may amount to a *devastavit*. On these points, we do not mean to express an opinion, or prejudice the rights of the appellants; we only mean to decide, that the evidence in this case is not sufficient to sustain this discount.

After having settled these principles, the decree below must be reversed, and the case remanded for such further proceedings as are necessary to carry into effect the views of this court. But as only five-sixths of the land are represented in this court, we can decree for only five-sixths of the balance of the bond. After applying to it the residuary personal estate, for the balance, the complainant will have to pursue his remedy against Mary Dickinson, unless the representatives shall have the prudence voluntarily to join in any sales of land that may be made under this decree.

Decree.—Whereupon, it is ordered, adjudged and decreed, that the decree of the circuit court of Pennsylvania district be reversed and annulled. And this court decrees, 1st. That the complainant, Thomas Y. Bryant, is entitled to recover of the estate of Andrew Hare the sum of $5000, with interest thereon, at six *per centum per annum* from the day of the death of the said Andrew. 2d. That the defendant, George Hunter, do pay

to the complainant in the court below, the balance in his hands of money of the estate of the said Andrew, with interest at the same rate, from the day it was *demanded by the said complainant. 3d. That the complainant, after giving credit for the sum that shall be thus paid him [*45 by the said defendant, and all other sums received by the said Margaret in her life, or the complainant since her death, from, or on account of, the estate of the said Andrew, as well as the value of any part of the personal residue of the said Andrew's estate, which may have come to their, or either of their, hands, according to the date of such receipts, shall have the aid of the said circuit court to compel these defendants to raise by sale (if sufficient for that purpose) of their respective shares of the real estate of the said Andrew, descended to them, five-sixths of the balance that shall be computed to be due on the said bond, calculated as above directed. And lastly, that the cause be remanded to the circuit court for further proceedings.

Decree accordingly.

Duvall *v.* Craig *et al.*

Abatement.—Covenant by trustee.—Independent covenants.—Covenant against incumbrances.—Profert.

Variances between the writ and declaration are matters pleadable in abatement only, and cannot be taken advantage of, upon general demurrer to the declaration.[1]

A trustee is, in general, suable only in equity; but if he chooses to bind himself by a personat covenant, he is liable at law, for a breach thereof, although he describe himself as covenanting as trustee.

*Where the parties to a deed covenanted severally against their own acts and incumbrances, and also to warrant and defend against their own acts, and those of all other [*46 persons, with an indemnity in lands of an equivalent value, in case of eviction; it was held, that these covenants were independent, and that it was unnecessary to allege in the declaration, any eviction, or any demand or refusal to indemnify with other lands, but that it was sufficient to allege a prior incumbrance, by the acts of the grantors, &c., and that the action might be maintained on the first covenant, in order to recover pecuniary damages.

Where the grantors covenanted generally against incumbrances made by them, it may be construed as extending to several, as well as joint incumbrances.

No *profert* of a deed is necessary, where it is stated only as inducement, and where the plaintiff is neither a party nor privy to it.

An averment of an eviction under an elder title, is not always necessary, to sustain an action on a covenant against incumbrances; if the grantee be unable to obtain possession, in consequence of an existing possession or seisin, by a person claiming and holding under an elder title, it is equivalent to an eviction, and a breach of the covenant.[2]

Error to the Circuit Court for the district of Kentucky. The *capias ad respondendum* issued in this case was as follows:

"The United States of America, to the marshal of the Kentucky district, greeting: You are hereby commanded to take John Craig, Robert Johnson and Elijah Craig, if they be found within your bailiwick, and them safely keep, so that you have their bodies before the judge of our district court, at the capitol, in Frankfort, on the first Monday in March next, to answer

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[1] Nor under the general issue. Chirac *v.* Reinecker, 11 Wheat. 280. And see How *v.* McKinney, 1 McLean 319; Elliott *v.* Holmes Id. 466; McKenna *v.* Fisk, 1 How. 247.

[2] Peters *v.* Bowman, 98 U. S. 59.

William Duvall, a citizen of the state of Virginia, of an action of covenant; damages fifty thousand dollars; and have then and there this writ. In testimony whereof, Harry Innes, Esq., judge of our said court, hath caused the
*47] *seal thereof to be hereunto affixed, this 22d day of January 1804, and of our Independence the 28th.

THOMAS TURNSTALL, C., D. C."

Whereupon, the plaintiff declared against John Craig, Robert Johnson and Elijah Craig, in covenant, for that whereas, on the 28th day of February 1795, &c., the said John, and the said Robert and Elijah, as trustees to the said John, by their certain indenture of bargain and sale, &c., did grant, bargain, sell, alien and confirm unto the said plaintiff, by the name of William Duvall, of the city of Richmond and state of Virginia, his heirs and assigns for ever, a certain tract of land, lying and being in the state of Kentucky, &c., together with the improvements, water-courses, profits and appurtenances whatsoever, belonging, or in any wise appertaining; and the reversion, and remainder and remainders, and profits thereof; and all the estate, right, title, property and demand of them, the said John Craig, and Robert Johnson and Elijah Craig, trustees for the said John Craig, of, in and to the same: to have and to hold the lands thereby conveyed, with all and singular the premises, and every part and parcel thereof, to the said William Duvall, his heirs and assigns for ever, to the only proper use and behoof of him, the said William, his heirs and assigns for ever: and the said John Craig, and Robert Johnson and Elijah Craig, trustees to the said John Craig, for themselves, their heirs, executors and administrators, did covenant, promise and agree to and with the said William Duvall, his
*48] heirs and assigns, that the premises before mentioned, *then were, and for ever after should be, free, of and from all former and other gifts, bargains, sales, dower, right and title of dower, judgments, executions, titles, troubles, charges and incumbrances whatsoever, done or suffered to be done by them, the said John Craig and Sarah his wife, and Robert Johnson and Elijah Craig, trustees for the said John Craig, as by the said indenture will more at large appear. And the said William, in fact, saith, that the premises before mentioned were not, then and there, free, of and from all former gifts, grants, bargains, sales, titles, troubles, charges and incumbrances whatsoever, done and suffered to be done by the said John Craig and Sarah his wife, and Robert Johnson and Elijah Craig, trustees to the said John Craig; but on the contrary, the said John Craig and Robert Johnson, theretofore, to wit, on the 11th day of May 1785, assigned the place and certificate of survey of said land to a certain John Hawkins Craig, by virtue of which said assignment, Patrick Henry, governor of the commonwealth of Virginia, granted the said land to said John Hawkins Craig, and his heirs for ever, by letters-patent, dated the 16th day of September 1785, and now here shown to the court, the date whereof is the day and year aforesaid, which said patent to the said John Hawkins Craig, on the day and year first aforesaid, at the district aforesaid, was in full force and virtue, contrary to the covenant aforesaid: by reason of which said assignment, patent and incumbrance, the said William hath been prevented from
*49] having and enjoying all or any part of the premises above mentioned. *And thereupon, the said William further saith, that the defendants

aforesaid, although often requested, have not kept and performed their covenant aforesaid, &c. To which declaration, there was a general demurrer, and joinder in demurrer, and a judgment thereupon, in the circuit court, for the defendants.

The indenture referred to into the plaintiff's declaration was in the following words:

"This indenture, made this 28th day of February 1795, between John Craig and Sarah, his wife, and Robert Johnson and Elijah Craig, trustees for the said John Craig, all of the state of Kentucky, of the one part, and William Duvall, of the city of Richmond, and state of Virginia, of the other part, witnesseth, that the said John Craig, for and in consideration of the sum of two thousand pounds, current money of Kentucky, to him, the said John Craig, in hand paid, the receipt whereof they do hereby acknowledge, and for ever acquit and discharge the said William Duvall, his heirs, executors and administrators, have granted, bargained and sold, aliened and confirmed, and by these presents, do grant, bargain and sell, alien and confirm, unto the said William Duvall, his heirs and assigns for ever, a certain tract of land, lying and being in the state of Kentucky, and now county of Scott, formerly Fayette, on the waters of the Ohio river, below the Big Bone lick creek; it being the same lands that the said John Craig covenanted, by a writing obligatory, sealed with his seal, and dated the second day of December 1788, to convey to Samuel McCraw, of the city of Richmond, *and which said writing the said Samuel McCraw, on the back there- [*50
of, indorsed and transferred the same, on the 27th day of February 1789, to William Reynolds, and which is bounded as follows: beginning at a poplar and small ash, corner to William Bledsoe, about thirty miles nearly a south course from the mouth of Licking; thence S. 15° E., 520 poles, with the said Bledsoe's line, crossing four branches, to an ash and beech; thence S. 75° W., 150 poles, to a hickory and beech; thence S. 15° E., 400 poles, crossing a branch, to a sugar tree and beech, near a branch; thence S. 75° W., 87 poles, to three beeches, corner to Robert Sanders; thence with his line, S. 15° E., 600 poles, crossing two branches, to a poplar and sugar tree; thence S., 60 poles to a sugar tree and beech; thence west 2174 poles, crossing five branches, to a large black walnut; thence north, 1580 poles, crossing a large creek and four branches, to a sugar tree and ash; thence E., 2006 poles, crossing five branches, to the beginning; containing twenty thousand four hundred and forty acres: together with the improvements, water-courses, profits and appurtenances whatsoever to the same belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, and profits thereof, and all the estate, right, title, property and demand of them, the said John Craig and Sarah, his wife, and Robert Johnson and Elijah Craig, trustees for the said John Craig, of, in and to the same; to have and to hold the land hereby conveyed, with all and singular the premises, and every part and parcel thereof, to the said William Duvall, his heirs and *assigns for ever, to the only proper use and behoof of [*51
him, the said William Duvall, his heirs and assigns for ever. And the said John Craig and Sarah his wife, and Robert Johnson and Elijah Craig, trustees to the said John Craig, for themselves, their heirs, executors and administrators, do covenant, promise and agree, to and with the said William Duvall, his heirs and assigns, by these presents, that the premises

before mentioned now are, and for ever after shall be, free of and from all former and other gifts, grants, bargains, sales, dower, right and titles of dower, judgments, executions, title, troubles, charges and incumbrances whatsoever, done or suffered to be done by the said John Craig and Sarah, his wife, and Robert Johnson and Elijah Craig, trustees for the said John Craig. And the said John Craig and Sarah, his wife, and Robert Johnson and Elijah Craig, trustees for the said John Craig, and their heirs, all and singular the premises hereby bargained and sold, with the appurtenances, unto the said William Duvall, his heirs and assigns, against him the said John Craig and Sarah, his wife, and Robert Johnson and Elijah Craig, trustees for the said John Craig, and their heirs, and all and every persons whatsoever, do and will warrant and for ever defend, with this warranty, and no other, to wit, that if the said land, or any part thereof, shall, at any time, be taken by a prior legal claim or claims, that then and in such case, they, the said John Craig and Sarah, his wife, and Robert Johnson and Elijah Craig, trustees for the said John Craig, and their heirs, shall make
*52] good to the said William Duvall *and his heirs, such part or parts so lost, by supplying to his, the said William Duvall's, use, other lands, in fee, of equal quantity and quality, to be adjudged of by two or more honest, judicious, impartial men, mutually chosen by the parties for ascertaining the same. In witness whereof, the said John Craig and Sarah, his wife, and Robert Johnson and Elijah Craig, trustees for the said John Craig, have hereunto set their hands and seals, the date first in this indenture written.

Signed, sealed and delivered in presence of,
Charles W. Byrd,
T. S. Treshly,
Thomas Corneal,
Christopher Greenup,
Robert Saunders,
James Taylor,
Jos. Wiggleworth,
George Christy."

John Craig, (L. S.)
Sarah Craig, (L. S.)
Robert Johnson,
Trustee for John Craig, (L. S.)
Elijah Craig,
Trustee for John Craig, (L. S.)

B. Hardin, for the plaintiff, made the following points: 1. That the variance between the writ and declaration, as to the description of the par-
*53] ties, *was immaterial. Naming two of the defendants as trustees, is only *descriptio personæ*, and could not alter the nature of the covenant. 2. Judgment was rightly rendered against the defendants in their individual capacity. 3. It was unnecessary to aver a demand and refusal of other lands of equivalent value as an indemnity, this covenant not being sued upon; and the action might be maintained upon the first covenant against incumbrances, by the parties to the deed. 4. That the breach alleged in the declaration was sufficient. 5. That it was unnecessary to make *profert* of the assignment described in the breach.

Talbot, contrà.—1. The variance between the writ and declaration is a substantial variance, and is, therefore, available, on general demurrer. The parties, Robert Johnson and Elijah Craig, are not sued in their fiduciary character; but they are declared against as trustees to the said John, who is the *cestui que trust*, and could not be joined in an action at law with the

trustees. They covenanted as trustees, and a court of equity is the proper *forum* in which they ought to be sued. 2. Having covenanted as trustees, no individual judgment could be rendered against them. 3. Supposing the trustees to be liable in their individual capacity, the two covenants in the deed are to be construed in connection; the clause as to an indemnity with other lands of an equivalent value, ought to be applied to both; and the declaration is fatally defective, in not alleging a demand and refusal to indemnify with other lands. 4. The covenant, *on which the breach is assigned, is against the joint and not the several incumbrances of [*54 the parties to the deed; the incumbrance alleged is the act of two of the parties only. 5. There is no *profert* of the assignment to John Hawkins Craig, by which the incumbrance was created; nor is it shown to have been made for a valuable consideration. 6. There is no averment of an eviction of the plaintiff, under the assignment, which was absolutely necessary to sustain the action on the covenant against incumbrances.

M. B. Hardin, in reply.—1. The variance between the writ and declaration could only be taken advantage of by a plea in abatement. 2. As between a trustee and the *cestui que trust*, a court of chancery is the only jurisdiction; but trustees may bind themselves individually, so as to be amenable at law. The present case is not that of a covenant binding the trustees, only as to the trust-fund in their hands; but they covenant for themselves, their heirs, executors, &c.. The mere description as trustees, therefore, becomes immaterial. 3. The covenants are independent, and the action may be maintained to recover pecuniary damages, without alleging an eviction and demand of other lands of equivalent value. 4. Where there is any doubt, a covenant is to be construed most strongly against the covenantors; and in a case of this nature, the law considers an act done by one or more of the covenantors as a breach of the covenant. 5. No *profert* of the assignment was necessary, because the action was not founded *upon it, nor [*55 was the plaintiff a party or privy to it; and the omission of *profert* was ground of special demurrer only.

March 1st, 1817. Story, Justice, delivered the opinion of the court.—Several points have been argued in this case, upon which the opinion of the court will be now pronounced. In the first place, it is stated, that a material variance exists between the writ and declaration, of which (being shown upon *oyer*) the court, upon a general demurrer to the declaration, are bound to take notice; and if so, it is fatal to the action. The supposed variance consists in this, that in the writ, all the defendants are sued by their Christian and surnames only; whereas, in the declaration, the deed on which the action is founded is averred to be made by the defendant, John Craig, and by the other defendants, Robert Johnson and Elijah Craig, "as trustees to the said John," and the covenant on which the breach is assigned, is averred to be made by the said John Craig, and Robert Johnson and Elijah Craig, "trustees to the said John." The argument is, that the writ is founded upon a personal covenant, and the declaration upon a covenant *en auter droit*, upon which no action lies at law; or if any lies, the writ must conform in its language to the truth of the case. It is perfectly clear, however, that the exception, even if a good one, cannot be taken advantage of upon general demurrer to the declaration, for such a demurrer is in bar to the action;

whereas, variances between the writ and declaration are matters pleadable in abatement only.

*56] *But there is nothing in the exception itself. A trustee, merely as such, is, in general, only suable in equity. But if he chooses to bind himself by a personal covenant, he is liable at law, for a breach thereof, in the same manner as any other person, although he describe himself as covenanting as trustee; for, in such case, the covenant binds him personally, and the addition of the words "as trustee" is but matter of description, to show the character in which he acts, for his own protection, and in no degree affects the rights or remedies of the other party. The authorities are very elaborate on this subject. An agent or executor who covenants in his own name, and yet describes himself as agent or executor, is personally liable, for the obvious reason, that the one has no principal to bind, and the other substitutes himself for his principal.(*a*)

(*a*) Where a person acts as agent for another, if he executes a deed for his principal, and does not mean to bind himself personally, he should take care to execute the deed in the name of his principal, and state the name of his principal only, in the body of the deed. White *v.* Cuyler, 6 T. R. 176. Wilkes *v.* Black, 2 East 142. The usual and appropriate manner is to sign the deed, "A. B., by C. D., his attorney," If, instead of pursuing this course, the agent names himself in the deed, and covenants in his own name, he will be personally liable on the covenants, notwithstanding he describes himself as agent. There are numerous cases to be found in the books illustrative of this doctrine decided in the text. Thus, in Appleton *v.* Birks, 5 East 148, where the defendant entered into an agreement, under seal, with the plaintiff, by the name of T. B., of &c., "for, and on the part and behalf of the right honorable Lord Viscount Rokeby," and covenanted for himself, his heirs, executors, &c., "on the part and behalf of the said Lord Rokeby," and executed the agreement in his own name, it was held, that he was personally liable on the covenant. So, where a committee for a turnpike corporation contracted under their own hands and seals, describing themselves as a committee, they were held personally responsible. Tibbetts *v.* Walker, 4 Mass. 595. So, where a person signed a promissory note in his own name, describing himself as guardian, he was held bound to the payment of the note in his personal capacity. Thatcher *v.* Dinsmore, 5 Mass. 299; Foster *v.* Fuller, 6 Id. 53; Chitty on Bills (Story's ed.) 40, and note. So, where administrators of an estate, by proper authority from a court, sold the lands of their intestate, and covenanted in the deed, "in their capacity as administrators," that they were seised of the premises, and had good title to convey the same; that the same were free of all incumbrances, and that they would warrant and defend the same against the lawful claims of all persons; it was held, that they were personally responsible. Sumner *v.* Williams, 8 Mass. 162; Thayer *v.* Wendall, 1 Gallis. 37.[1] In respect to public agents, a distinction has been long asserted, and is now generally established; and therefore, if an agent of the government contract for their benefit, and on their behalf, and describe himself as such, in the contract, he is held not to be personally responsible, although the terms of the contract might, in cases of a mere private nature, involve him in a personal responsibility. Macbeath *v.* Haldimand, 1 T. R. 172; Unwin *v.* Wolseley, 1 Id. 674; Myrtle *v.* Beaver, 1 East 135; Rice *v.* Shute, Id. 579; Hodgdon *v.* Dexter, 1 Cranch 363; Jones *v.* Le Tombe, 3 Dall. 384; Brown *v.* Austin, 1 Mass. 208; Freeman *v.* Otis, 9 Id. 272; Sheffield *v.* Watson, 3 Caines 69.[2]

[1] One who signs and seals an instrument is bound, though in the body of it, he is named as agent of another person. Quigley *v.* De Haas, 82 Penn. St. 267; Ulam *v.* Boyd, 87 Id. 477; Lutz *v.* Linthicum, 8 Pet. 185; Stone *v.* Wood, 7 Cow. 753; Kiersted *v.* Orange and Alexander *v.* Railroad Co., 69 N. Y. 343.

[2] Parks *v.* Ross, 11 How. 362; Crowell *v.* Crispin, 4 Daly 100.

*The reasoning upon this point disposes, also, of the second made at the argument, viz., that the covenant being made by Robert Johnson and Elijah Craig, as trustees, no individual judgment can be rendered against them. It is plain, that the judgment is right, and, indeed, there could have been no other judgment rendered, for at law a judgment against a trustee in such special capacity is utterly unknown.

Having answered these minor objections, we may now advance to the real controversies between the *parties. It is contended, that the two covenants in the deed are so knit together, that they are to be construed in connection, so that the clause as to an indemnity with other lands, in case of an eviction by a prior legal claim, is to be applied as a restriction to both covenants; and if so, then the action cannot be sustained, for the declaration does not allege any eviction, nor any demand or refusal to indemnify with other lands. There is certainly considerable weight in the argument. It is not unreasonable to suppose, that when the parties had provided a specific indemnity for a prior claim, they might mean to apply the same indemnity to all the other cases enumerated in the first covenant. But something more than the mere reasonableness of such a supposition must exist, to authorize a court to adopt such a construction. The covenants stand distinct in the deed, and there is no incongruity or repugnancy in considering them as independent of each other. The first covenant being only against the acts and incumbrances under the parties to the deed, which, they could not but know, they might be willing to become responsible to secure its performance by a pecuniary indemnity; the second including a warranty against the prior claims of strangers also, of which the parties might be ignorant, they might well stipulate for an indemnity only in lands of an equivalent value. The case ought to be a very strong one, which should authorize a court to create, by implication, a restriction, which the order of the language does not necessarily import or justify. It ought to be one in which no judicial doubt could *exist of the real intention of the parties, to create such a restriction. It cannot be pronounced, that such is the present case; and this objection to the declaration cannot, therefore, be sustained. [*58 [*59

The remaining objections turn upon the sufficiency of the breach alleged in the declaration. It is contended, that the covenant on which the breach is assigned is against the joint, and not the several acts and incumbrances of the parties to the deed, and that, therefore, the breach, which states an assignment by John Craig and Robert Johnson only, is wholly insufficient. It is certainly true, that, in terms, the covenant is against the acts and incumbrances of all the parties, and the words "every of them" are not found in the deed. Some of the incumbrances, however, within the contemplation of the parties are not of a nature to be jointly created; as, for instance, the incumbrance of dower and title of dower. This very strongly shows that it was the intention of the parties, to embrace in the convenant several as well as joint acts and incumbrances. There is also a reference in the premises of the deed to a covenant for a conveyance previously made by John Craig to Samuel McCraw, against which it must have intended to secure the grantees; and if so, it fortifies the construction already stated. If, therefore, the point were of a new impression, it would be difficult to sustain the reasoning, which would limit the covenant to the joint acts of

all the grantors; and there is no authority to support it. On the contrary, *Meriton's case*, though stated with some difference by the several reporters, *60] seems to *us completely to sustain the position that a covenant of this nature ought to be construed as including several as well as joint incumbrances, and has certainly been so understood by very learned abridgers. *Meriton's Case*, Noy 86; s. c. Poph. 200; Latch 161; Bac. Abr. Covenant, 77; Com. Dig. Condition, E. This objection, therefore, is overruled.(*a*)

*61] *Another exception is, there is no *profert* of the assignment described in the breach, nor is it shown to have been made for a valuable consideration. Various answers have been given at the bar to this exception; and without deciding on others, it is a sufficient answer, that the plaintiff is neither a party nor privy to the assignment, nor conusant of the consideration upon which it was made, and therefore, is not bound to make a *profert* of it, or show the consideration upon which it was made.

The last exception is, that the breach does not set forth an entry or eviction of the plaintiff, under the assignment and patent to John Hawkins Craig. Assuming that an averment of an entry and eviction under an elder title be, in general, necessary to sustain an action on a covenant against

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(*a*) It may not, perhaps, be useless to the learned reader, to state the substance of Meriton's case as given in the various reporters. In Noy's reports 86, the case is thus succinctly given: "A. and B. lease to M. for years, and covenant that he may claim without disturbance, interruption or incumbrance by them, and an obligation was made for performance, &c.; A. makes another lease to C., who enters, and M. brought debt, &c. (on the obligation); and by the court, it is well, for the covenant is broken, and '*them*' shall not be taken jointly only, but severally also." In Latch 161, the case stands as follows: "Debt upon an obligation. Two make a lease for years, by indenture, and covenant that the lessee should not be disturbed, nor any incumbrance made by them; one of the lessors made a lease to a stranger, who disturbed, &c. The condition was to perform covenants. And it was agreed by Dodderidge, Jones and Whitelock to be a breach of the condition, for '*them*' shall not be taken jointly; but if either of them disturb the lessee, it is a breach of the condition." The case, therefore, as stated in both of these reports, is substantially the same. But in Popham's reports 200, it is reported somewhat differently. It is there stated, to be an action of covenant, upon a covenant in an indenture between the plaintiffs and their lessors, whereby the lessors covenant to discharge them of all incumbrances done by them or any other person, and the plaintiffs assign for breach that one of the lessors had made a lease. It was moved in arrest of judgment, that the breach was not well laid, "because it is only laid to be done by one of them, and the covenant is to discharge them of incumbrances done by *them*, which shall be intended joint incumbrances. Dodderidge, J.—The covenant goes as well to incumbrances done severally as jointly, for it is of all incumbrances done by them or any other person; and so was the opinion of all the other justices; and therefore, the exception was overruled." From this last report, it would seem, that the covenant was against incumbrances, not only of the lessors, but of other persons, and it might, at first view, be thought that some stress was laid by the court upon the last words. But upon a careful consideration, even supposing (what may well be doubted) that Popham's is the more correct report, it would not seem, that the latter words, "any other person," could be properly held to embrace the lessees, or either of them; for "other" is used as exclusive of them; and therefore, the cause must have turned substantially upon the import of the preceding words, "of them," *i. e.*, whether embracing several as well as joint incumbrances. In this view, all the reports are consistent, and put the case upon the real point in controversy.

incumbrances (on which we give no opinion), it is clear, that it cannot be always necessary. If the grantee be unable to obtain possession, in consequence of an existing possession or seisin by a person claiming and holding under an elder title, this would certainly be equivalent to *an eviction and a breach of the covenant. In the case at bar, the breach [*62 is assigned in a very inartificial and lax manner; but it is expressly averred, that the assignment and patent to John Hawkins Craig was a prior conveyance, which was still in full force and virtue, "by reason of which said assignment, patent and incumbrance, the said William (the plaintiff,) hath been prevented from having and enjoying all or any part of the premises above mentioned." We are all of opinion, that upon general demurrer, this must be taken as an averment, that the possession of the premises was legally withheld from the plaintiff, by the parties in possession under the prior title thus set up.(*a*)

Judgment reversed.

(*a*) The usual covenants in conveyances of real property by the grantor are, that he is lawfully seised in fee of the premises; that he has good right and title to convey the same; that they are free of all incumbrances; that the grantor, his heirs, &c., will warrant and defend the same to the grantee, his heirs, &c., against the lawful claims of all persons. The manner of assigning breaches upon these covenants deserves the attention of all persons who aspire to a reasonable knowledge of the duties of special pleaders. In case of the covenants of seisin, and of good right and title to convey, it is sufficient to allege the breach, by negativing the words of the covenant. Bradshaw's case, 9 Co. 60 *b*; s. c. Cro. Jac. 304; Lancashire *v.* Glover, 2 Show. 460; 2 Saund. 181, note a, by Mr. Sergeant Williams; Greenby *v.* Wilcocks, 2 Johns. 1; Sedgwick *v.* Hollenback, 7 Id. 376; Marston *v.* Hobbs, 2 Mass. 433; Bender *v.* Fromberger, 4 Dall. 436; Pollard *v.* Dwight, 4 Cranch 421. The covenant for quiet enjoyment is not broken, unless some particular act is shown, by which the plaintiff is interrupted; and therefore, it is necessary to set forth in the breach assigned in the declaration, an actual eviction or disturbance of the possession of the grantee. Francis' Case, 8 Co. 91 *a*; Anon., Com. 229; 2 Saund, 181, note; Waldron *v.* McCarty, 3 Johns, 471; Kortz *v.* Carpenter, 5 Id. 120. *And where the eviction or disturbance is by a stranger [*63 it is further necessary to allege that the eviction was by a lawul title. Holden *v.* Taylor, Hob. 12; Foster *v.* Pierson, 4 T. R. 617; Hodgson *v.* East India Company, 8 Id. 281; Greenby *v.* Wilcocks, 2 Johns. 1; Folliard *v.* Wallace, 2 Id. 305; Kent *v.* Welsh, 7 Id. 258; Vanderkaar *v.* Vanderkaar, 11 Id. 122; Marston *v.* Hobbs, 2 Mass. 433. But it is not necessary to allege the eviction to be by legal process. 2 Saund. 181, note; Foster *v.* Pierson, 4 T. R. 617, 620. And where the covenant is, that the grantee shall enjoy, without the interruption of the grantor himself, his heirs or executors, it is held to be a sufficient breach, to allege that he or his heirs or executors entered, without showing it to be a lawful entry, or setting forth his title to enter. Lloyd *v.* Tomkies, 1 T. R. 671, and cases cited; 2 Saund. 181, note; Sedgwick *v.* Hollenback, 7 Johns. 376. The covenant of general warranty is governed by the same rules, for the grantee must assign as a breach, an ouster or eviction by a paramount legal title. Greenby *v.* Wilcocks, 2 Johns. 1; Folliard *v.* Wallace, 2 Id. 395; Kent *v.* Welsh, 7 Id. 258; Sedgwick *v.* Hollenback, Id. 376; Vanderkaar *v.* Vanderkaar, 11 Id. 122; Marston *v.* Hobbs, 2 Mass. 433; Emerson *v.* Proprietors of Minot, Id. 464; Bearce *v.* Jackson, 4 Id. 408. In respect to the covenant against incumbrances, it seemed admitted by Mr. Chief Justice Parsons, in Marston *v.* Hobbs, 2 Mass. 433, that there was no authority directly in point; but he held, that in principle, it was analogous to a covenant for quiet enjoyment; and said, that in the entries, the incumbrance is specially alleged in the count. See also, Bickford *v.* Page, 2 Mass. 455. It does not, however, seem necessary to allege an ouster or eviction, on the breach of a covenant against incumbrances; but only

to allege the special incumbrance as a good and subsisting one. Prescott *v.* Trueman, 4 Mass. 629. And a paramount title subsisting in a third person, is an incumbrance, within the meaning of the covenant. Prescott *v.* Trueman, 4 Mass. 627. So, a public town-way is, in legal contemplation, an incumbrance on the land over which it is laid. Kellogg *v.* Ingersoll, 2 Mass. 87. See Ellis *v.* Welsh, 6 Id. 246.

There is some diversity of opinion as to the damages recoverable upon a breach of these several covenants. Upon the covenants of seisin, and of good right and title to convey, it is held by the courts of New York and Pennsylvania, that the grantee is entitled to the purchase-money, and interest from *the time of the purchase. Staats *v.* Ten Eyck's Executors, 3 Caines 111; Pitcher *v.* Livingston, 4 Johns. 1; Bender *v.* Fromberger, 4 Dall. 441. The same rule has been adopted in Massachusetts. Bickford *v.* Page, 2 Mass. 455; Marston *v.* Hobbs, Id. 433; Caswell *v.* Wendall, 4 Id. 108. But if the grantee has actually enjoyed the lands for a long time, the purchase-money and interest for a term not exceeding six years prior to the time of eviction is given; for the grantee, upon a recovery against him, is liable to account for the mesne profits, for that period only. Staats *v.* Ten Eyck's Executors, 3 Caines 111; Caulkins *v.* Harris, 9 Johns. 324; Bennet *v.* Jenkins, 13 Id. 50. As to the covenant against incumbrances, it seems generally held, that the grantee is entitled to nominal damages only, unless he extinguish the incumbrance; and if he extinguish it, for a reasonable and fair price, he is entitled to recover that sum, with interest from the time of payment. Delavergne *v.* Norris, 7 Johns. 358; Hull *v.* Dean, 13 Id. 105; Prescott *v.* Freeman, 4 Mass. 627. And the costs, if any, to which he has been put by an action against him on account of the incumbrance. Waldo *v.* Long, 7 Johns. 173. In respect to the covenant for quiet enjoyment and of general warranty, the rule of damages adopted in New York and Pennsylvania is, to give the purchase-money with interest and the costs of the prior suit; but no allowance is made for the value of any improvements. Staats *v.* Ten Eyck's Executors, 3 Caines 111; Pitcher *v.* Livingston, 4 Johns. 1, SPENCER, J., dissenting; Bennet *v.* Jenkins, 13 Id. 50; Bender *v.* Fromberger, 4 Dall. 441. The same rule has been adopted in Tennessee. Talcot *v.* Bedford's Heirs, Cooke 446. But, in relation to covenants of warranty, the courts of Massachusetts have adopted a different rule, and allowed the damages, or, in other words, the value of the property at the time of eviction. Gore *v.* Brazier, 3 Mass. 523. And the same rule appears to be adopted in South Carolina. Liber *v* Parsons, 1 Bay 19; Guerard's Executors *v.* Rivers, Id. 265. And in Virginia. Mills *v.* Bell, 3 Call 326; Humphrey's Administrators *v.* McClenachan's Administrators, 1 Munf. 493. And in Connecticut. Horsford *v.* Wright, Kirby 3. Where there is a failure of title, as to part only of the land granted, it has been held, that the grantee cannot recover back the whole consideration-money. If the title has failed as to an individed part of an entire tract, the grantee is entitled to a like proportion of the consideration; but if it be of a *specific proportion of the tract, the damages are to be apportioned according to the measure of value between the land lost and the land preserved; that is, the portion of the consideration-money to be recovered is to be in the same ratio to the entire consideration, that the value of the part, as to which the title has failed, is to the value of the whole tract. Morris *v.* Phelps, 5 Johns. 49.

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In respect to these covenants running with the land, it has been held in New York and Massachusetts, that if the grantor be not seised, at the time of conveyance, the covenant of seisin is immediately broken, and no action can be brought by the assignee of the grantee, against the grantor; for after the covenant is broken, it is a *chose in action*, and incapable of assignment. Greenby *v.* Wilcocks, 2 Johns. 1; Bickford *v.* Page, 2 Mass. 455. But in a recent case in England, a different doctrine was held; and it was adjudged, that such a covenant runs with the land, and though broken in the time of a testator, is a continuing breach in the time of his devisee, and it is sufficient to allege for damage, that thereby the lands are of less value to the devisee, and that he is prevented from selling them so advantageously. Kingdon *v.* Noble, 4 M. &

*Coolidge *et al.* v. Payson *et al.*

Acceptance of bill.

A letter, written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise.[1]

Payson *v.* Coolidge, 2 Gallis. 233, affirmed.

Error to the Circuit Court for the district of Massachusetts. This cause was argued by *Swann*, for the plaintiff in error, and by *Winder*, for the defendant.

February 21st, 1817. Marshall, Ch. J., delivered the opinion of the court.—This suit was instituted by Payson & Co., as indorsers of a bill of exchange, drawn by Cornthwaite & Cary, payable to the order of John Randall, against Coolidge & Co., as the acceptors.

At the trial, the holders of the bill, on which the name of John Randall was indorsed, offered, for the purpose of proving the indorsement, an affidavit made by one of the defendants in the cause, in order to obtain a continuance, in which he referred to the bill in terms which, they supposed, implied a knowledge on his part that the plaintiffs were the rightful holders. The defendants objected to the bill's going to the jury, without further proof of the indorsement; but the court determined, that it should go, with the affidavit, to the jury, who might be at liberty to infer from thence, that the indorsement was made by Randall. To this opinion, the counsel for the defendants *in the circuit court excepted, and this court is divided on the question, whether the exception ought to be sustained? [*67

On the trial, it appeared, that Coolidge & Co. held the proceeds of part of the cargo of the Hiram, claimed by Cornthwaite & Cary, which had been captured and libelled as lawful prize.[3] The cargo had been acquitted in the district and circuit courts, but from the sentence of acquittal, the captors had appealed to this court. Pending the appeal, Cornthwaite & Co. trans-

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S. 53. And see s. c. Id. 355; Chamberlain *v.* Williamson, 2 Id. 408; King *v.* Jones, 5 Taunt. 418; s. c. 1 Marsh. 107.[2]

By the Roman law, and the codes which have been derived from it, in case the vendee is evicted, he has a right to demand of the vendor, 1st. The restitution of the price. 2d. That of the fruits, or mesne profits, in case the vendee has been obliged to account for them to the owner. 3d. The costs and expenses incurred both in the suit on the warranty, and the prior suit of the owner, by whom the vendee has been evicted. 4th. Damages and interest, with the expenses legally incurred. Pothier, *De Vente*, Nos. 118, 123, 128, 130; Code Napoleon, liv. 3, tit. 6, art. 1630, *De la Vente*. The vendee has likewise a right to recover from the vendor, not only the value of all improvements made by the former, but also the increased value, if any, which the property may have acquired, independently of the acts of the purchaser. 1 Domat 77, § 15, 16; Pothier, *De la Vente*, Nos. 132, 133; Code Napoleon, liv. 3, tit. 6, art. 1633, 1634, *De la Vente;* Digest of the Civil Laws of Louisiana 355.

[1] Schimmelpennich *v.* Bayard, 1 Pet. 264; Boyce *v.* Edwards, 4 Id. 111; Wildes *v.* Savage, 1 Story 22; Cassel *v.* Dows, 1 Bl. C. C. 335; Ogden *v.* Gillingham, Bald. 38; Bayard *v.* Lathy, 2 McLean 462. And see McCullough *v.* Taylor, 1 W. N. C. 391; Allentown Bank *v.* Kimes, 35 Leg. Int. 298.

[2] Peters v. Bowman, 98 U. S. 59.

[3] See The Hiram, 8 Cranch 444.

mitted to Coolidge & Co., a bond of indemnity, executed at Baltimore, with scrolls in the place of seals, and drew on them for $2700. This bill was also payable to the order of Randall, and indorsed by him to Payson & Co. It was presented to Coolidge & Co., and protested for non-acceptance. After its protest, Coolidge & Co. wrote to Cornthwaite & Cary, a letter, in which, after acknowledging the receipt of a letter from them, with the bond of indemnity, they say, "This bond, conformable to our laws, is not executed as it ought to be; but it may be otherwise in your state. It will, therefor, be necessary to satisfy us, that the scroll is usual and legal with you, instead of a seal. We notice no seal to any of the signatures." "We shall write our friend Williams, by this mail, and will state to him our ideas respecting the bond, which he will probably determine. If Mr. W. feels satisfied on this point, he will inform you, and in that case your draft for $2000 will be honored."

*68] On the same day, Coolidge & Co. addressed a letter *to Mr. Williams, in which, after referring to him the question respecting the legal obligation of the scroll, they say, "You know the object of the bond, and of course, see the propriety of our having one not only legal, but signed by sureties of unquestionable responsibility, respecting which, we shall wholly rely on your judgment. You mention the last surety as being responsible; what think you of the others?"

In his answer to this letter, Williams says, "I am assured, that the bond transmitted in my last is sufficient for the purpose for which it was given, provided the parties possess the means; and of the last signer, I have no hesitation in expressing my firm belief of his being able to meet the whole amount himself. Of the principals, I cannot speak with so much confidence, not being well acquainted with their resources. Under all circumstances, I should not feel inclined to withhold from them any portion of the funds for which the bond was given."

On the day on which this letter was written, Cornthwaite & Cary called on Williams, to inquire whether he had satisfied Coolidge & Co., respecting the bond. Williams stated the substance of the letter he had written, and read to him a part of it. One of the firm of Payson & Co., also called on him, to make the same inquiry, to whom he gave the same information, and also read from his letter-book the letter he had written. Two days after this, the bill in the declaration mentioned, was drawn by Cornthwaite & Cary,

*69] and paid to Payson & Co., in part of the protested bill of *$2700, by whom it was presented to Coolidge & Co., who refused to accept it, on which it was protested, and this action brought by the holders.

On this testimony, the counsel for the defendants insisted, that the plaintiffs were not entitled to a verdict; but the court instructed the jury, that if they were satisfied, that Williams, on the application of the plaintiffs, made after seeing the letter from Coolidge & Co., to Cornthwaite & Cary, did declare, that he was satisfied with the bond referred to in that letter, as well with respect to its execution, as to the sufficiency of the obligors to pay the same; and that the plaintiffs, upon the faith and credit of the said declaration, and also of the letter to Cornthwaite & Cary, and without having seen or known the contents of the letter from Coolidge & Co., to Williams, did receive and take the bill in the declaration mentioned, they were entitled to recover in the present action; and that it was no legal objection to such recovery, that the promise to accept the present bill was made to the drawers

thereof, previous to the existence of such bill, or that the bill had been taken in part payment of a pre-existing debt, or that the said Williams, in making the declarations aforesaid, did exceed the private instructions given to him by Coolidge & Co., in their letter to him. To this charge, the defendants excepted; a verdict was given for the plaintiffs, and judgment rendered thereon, which judgment is now before this court on a writ of error.

The letter from Coolidge & Co., to Cornthwaite & Cary, contains no reference to their letter to Williams, *which might suggest the necessity of seeing that letter, or of obtaining information respecting its [*70 contents. They refer Cornthwaite & Cary to Williams, not for the instructions they had given him, but for his judgment and decision on the bond of indemnity. Under such circumstances, neither the drawers nor the holders of the bill could be required to know, or could be affected by, the private instructions given to Williams. It was enough for them, after seeing the letter from Coolidge & Co., to Cornthwaite & Cary, to know, that Williams was satisfied with the execution of the bond, and the sufficiency of the obligors, and had informed Coolidge & Co., that he was so satisfied.

This difficulty being removed, the question of law which arises from the charge given by the court to the jury is this: Does a promise to accept a bill amount to an acceptance, to a person who has taken it on the credit of that promise, although the promise was made before the existence of the bill, and although it is drawn in favor of a person who takes it for a pre-existing debt?

In the case of *Pillans & Rose* v. *Van Mierop & Hopkins*, 3 Burr. 1663, the credit on which the bill was drawn was given before the promise to accept was made, and the promise was made previous to the existence of the bill. Yet, in that case, after two arguments, and much consideration, the court of king's bench (all the judges being present and concurring in opinion) considered the promise to accept, as an acceptance. Between this case and that under the consideration *of the court, no essential distinction is [*71 perceived.

But it is contended, that the authority in the case of *Pillans & Rose* v. *Van Mierop & Hopkins* is impaired by subsequent decisions.[1] In the case of *Pierson* v. *Dunlop*, Cowp. 571, the bill was drawn and presented, before the conditional promise was made on which the suit was instituted. Although, in that case, the holder of the bill recovered, as on an acceptance, it is supposed, that the principles laid down by Lord MANSFIELD, in delivering his opinion, contradict those laid down in *Pillans & Rose* v. *Van Mierop & Hopkins*. His Lordship observes, "It has been truly said, as a general rule, that the mere answer of a merchant to the drawer of a bill, saying, 'he will duly honor it,' is no acceptance, unless accompanied with circumstances which may induce a third person to take the bill by indorsement; but if there are any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer." If the case of *Pillans & Rose* v. *Van Mierop & Hopkins* had been understood to lay down the broad principle, that a naked promise to accept amounts to an acceptance, the case of *Pierson* v. *Dunlop* certainly narrows that principle so far as to require additional circumstances, proving that the person on whom the bill was drawn, was bound by his promise, either because he had funds of the

[1] Bank of Ireland *v.* Archer, 11 M. & W. 383.

drawer in his hands, or because his letter had given credit to the bill, and induced a third person to take it.

It has been argued, that those circumstances to which Lord MANSFIELD alludes, must be apparent on *the face of the letter. But the court *72] can perceive no reason for this opinion. It is neither warranted by the words of Lord MANSFIELD, nor by the circumstances of the case in which he used them. "The mere answer of a merchant to the drawer of a bill, saying he will duly honor it, is no acceptance, unless accompanied with circumstances," &c. The answer must be "accompanied with circumstances;" but it is not said, that the answer must contain those circumstances. In the case of *Pierson* v. *Dunlop*, the answer did not contain those circumstances; they were not found in the letter, but were entirely extrinsic. Nor can the court perceive any reason for distinguishing between circumstances which appear in the letter containing the promise, and those which are derived from other sources. The great motive for construing a promise to accept, as an acceptance, is, that it gives credit to the bill, and may induce a third person to take it. If the letter be not shown, its contents, whatever they may be, can give no credit to the bill; and if it be shown, an absolute promise to accept will give all the credit to the bill, which a full confidence that it will be accepted can give it. A conditional promise becomes absolute, when the condition is performed.

In the case of *Mason* v. *Hunt*, Doug. 296, Lord MANSFIELD said, "there is no doubt, but an agreement to accept may amount to an acceptance; and it may be couched in such words as to put a third person in a better condition than the drawee. If one man, to give credit to another, makes an abso- *73] lute promise to accept his bill, the drawee, or any other person *may show such promise upon the exchange, to get credit, and a third person, who should advance his money upon it, would have nothing to do with the equitable circumstances which might subsist between the drawer and acceptor." What is it that "the drawer, or any other person, may show upon the exchange?" It is the promise to accept—the naked promise. The motive to this promise need not, and cannot be examined. The promise itself, when shown, gives the credit; and the merchant who makes it is bound by it.

The cases cited from Cowper and Douglas are, it is admitted, cases in which the bill is not taken for a pre-existing debt, but is purchased on the credit of the promise to accept. But in the case of *Pillans* v. *Van Mierop*, the credit was given before the promise was received, or the bill drawn; and in all cases, the person who receives such a bill, in payment of a debt, will be prevented thereby from taking other means to obtain the money due to him. Any ingredient of fraud would, unquestionably, affect the whole transaction; but the mere circumstance, that the bill was taken for a pre-existing debt, has not been thought sufficient to do away the effect of a promise to accept.

In the case of *Johnson and another* v. *Collins*, 1 East 98, Lord KENYON shows much dissatisfaction with the previous decisions on this subject; but it is not believed, that the judgment given in that case would, even in England, change the law as previously established. In the case of *Johnson* v. *Collins*, the promise to accept was in a letter to the drawer, and is *74] not stated to have been shown to the indorser. Consequently, the bill does not appear to have been taken on the credit of that promise. It was

a mere naked promise, unaccompanied with circumstances which might give credit to the bill. The counsel contended, that this naked promise amounted to an acceptance; but the court determined otherwise. In giving his opinion, LE BLANC, J., lays down the rule, in the words used by Lord MANSFIELD, in the case of *Pierson* v. *Dunlop;* and Lord KENYON said, that "this was carrying the doctrine of implied acceptances to the utmost verge of the law; and he doubted whether it did not even go beyond it." In *Clark and others* v. *Cock*, 4 East 57, the judges again express their dissatisfaction with the law as established, and their regret that any other act than a written acceptance on the bill had ever been deemed an acceptance. Yet they do not undertake to overrule the decisions which they disapprove. On the contrary, in that case, they unanimously declared a letter to the drawer, promising to accept the bill, which was shown to the person who held it, and took it on the credit of that letter, to be a virtual acceptance. It is true, in the case of *Clark* v. *Cock*, the bill was made before the promise was given, and the judges, in their opinions, use some expressions which indicate a distinction between bills drawn before and after the date of the promise; but no case has been decided on this distinction; and in **Pillans and Rose* v. *Van Mierop and Hopkins*, the letter was written before the [*75 bill was drawn. The court can perceive no substantial reason for this distinction. The prevailing inducement for considering a promise to accept, as an acceptance, is, that credit is thereby given to the bill. Now, this credit is given as entirely by a letter written before the date of the bill, as by one written afterwards.

It is of much importance to merchants, that this question should be at rest. Upon a review of the cases which are reported, this court is of opinion, that a letter written, within a reasonable time before, or after, the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise. This is such a case. There is, therefore, no error in the judgment of the circuit court, and it is affirmed, with costs.

Judgment affirmed.(*a*)

(*a*) By the French law, the acceptance of a bill of exchange must be in writing, and signed by the party accepting it. Ordonnance de 1673, tit. 5, art. 2; Code de Commerce, liv. 3, tit. 8, art. 122. It appears by the discussions in the council of state, in drawing up the new Commercial Code, that no provision requiring the acceptance to be written on the bill itself was inserted, in order to avoid a mistaken inference which might be drawn from it, that the law meant to prohibit the acceptance of a bill by a letter promising to accept (*par lettre missive*). "*L'acceptation est ordinairement donné sur la lettre de change même; mais beaucoup d'auteurs etrangers, et surtout les docteurs Hollandais, Allemands, et Espagnols, pensent qu'elle peut aussi être donné par lettre missive. Cette opinion a été adoptée par le conseil d'état, et se trouve consacrée par *l article qui nous occupe. En effect d'un côté, il a evité de dire dans cet article* [*76 *que l'acceptation serait donneé sur la lettre de change, de peur de paroître établir une règle absolue de laquelle on se serait fait une fin non-recevoir contre l'acceptation par lettres missives. D'un autre côté, le conseil a pensé que, puisque la loi n'exclut pas l'acceptation par lettre missive, on en concluroit naturellement qu'elle la permet.*" Esprit du Code de Commerce, par J. G. Locré, tom. 2, p. 89.

Such is the law of France on this subject. That of England is fully analyzed in the above opinion. In the tribunals of our own country, the first case which occurs

on the subject, is that of M'Kim *v.* Smith, 1 Hall's Law Journal 486, in which the doctrine of the above opinion is fully recognised. The next is that of M'Evers *v.* Mason, 10 Johns. 207, in which a more limited application of the principle may seem to be indicated. But upon an inspection of that case, it will be found, that the supreme court of New York declined expressing any opinion upon the question, whether a promise to accept a bill, not *in esse*, would amount to an acceptance, and whether an indorsee could avail himself of such promise, and maintain an action on a bill against the drawee. The supreme court of Massachusetts also, in the case of Wilson *v.* Clements, 3 Mass. 1, avoided a determination of the question, whether a promise to accept before the bill was drawn, amounted to an acceptance, because the bill was not drawn in due season, after the promise was made. But the above decision in the text may be considered as settling the law of the country on this subject.[1]

[1] See Steman *v.* Harrison, 42 Penn. St. 49; Spaulding *v.* Andrews, 48 Id. 411. The rule is otherwise as to a non-existing bill, subsequently drawn, payable after sight, and not after date. In such case, an action will not lie upon a prior promise to accept. Wildes *v.* Savage, 1 Story 22. This distinction was considered by Chief Justice Sharswood, when President Judge of the District Court of Philadelphia, in the case of Carson *v.* Peacock, in June 1862, in the following opinion:

Sharswood, P. J.—This was an action on a bill of exchange, by the indorsee against the acceptor. On producing a draft of A. Stowell on defendants, payable one day after sight, plaintiff was allowed to prove, under exception, that defendants had written a letter to the drawer, instructing him to draw at one day's sight, and that the letter was shown to plaintiff, and upon the faith of it, he bought the bill for full value. The point reserved is, whether an action can be maintained upon a promise to accept a non-existing bill, payable after sight?

It may certainly be now considered as the settled law in this country, that a letter written within a reasonable time before the date of a bill, intelligibly describing it, and promising to accept it, is, if shown to one who takes it on the credit of the letter, a virtual acceptance. Byles on Bills 146 n., and cases there cited. This course of decisions was under the lead of the supreme court of the United States in Payson *v.* Coolidge, 2 Wheat. 66, which undoubtedly so held, upon the authority of Pillans *v.* Van Mierop, 3 Burr. 1663, C. J. Marshall taking great pains to show, that subsequent cases in England, though they introduced an important qualification into the doctrine of that case, and though opinions were expressed, strongly regretting the rule, yet that it had not been overruled. With this view, he examines and comments upon Pierson *v.* Dunlop, Cowp. 571; Mason *v.* Hunt, Doug. 296; Johnson *v.* Collins, 1 East 98; Clarke *v.* Cock, 4 East 57. Coolidge *v.* Payson was decided in 1817, and one year before Mill *v.* Prest, 1 Holt 181, had expressly affirmed the law to be, in the words of Chief Justice Gibbs, that "a promise to accept, not communicated to the person who takes the bill, does not amount to an acceptance. But if a person be thereby induced to take a bill, he gains a right equivalent to an actual acceptance, against the party who has given the promise to accept." However, in the case of Wildes *v.* Savage, 1 Story 22, the opinions of Sir Frederick Pollock and Mr. Hill, very eminent English lawyers, were taken under commission, and found to be full and direct to the point, that such was not then the law in England. Judge Story remarks, in his opinion, that there is no pretence to say, that, up to that very hour, there had been any formal decision in Westminster Hall against it. This was in 1839. Certain it is, that the latest English elementary writers intimate no doubt upon the subject. Still, however, it is true, that it has been lamented on all hands, that such virtual acceptance should have ever been established, and we ought not to push the doctrine one inch beyond its present limits. The case of Wildes *v.* Savage, 1 Story 22, and Russel *v.* Wiggin, 2 Id. 213, have expressly determined, that a promise to accept a non-existing bill, payable after sight, is not within the rule. The reason which he gives is a very refined one, and therefore, not satisfactory to my mind.

If a promise to pay a non-existing bill, payable after date, inures as an actual acceptance, when the bill comes to be subsequently dated, it is hard to see, why, in the case of a bill payable after sight, it should not likewise so inure, when the bill comes to be subsequently seen. Sight and acceptance are not synonymous terms. The better ground is, what courts have often done before, to yield to the authority of a decided case, but not to follow it out to all its strict consequences. For these reasons, we discharge this rule, and enter judgment for the defendants on the reserved point.

The Dos Hermanos: Green, Claimant.

Evidence in prize causes.—Further proof.—Fraudulent claim.—Domicil.—Non-commissioned captor.

In prize causes, the evidence to acquit or condemn, must come, in the first instance, from the papers and crew of the captured ship.[1]

It is the duty of the captors, to bring the ship's papers into the registry of the district court, and to have the examination of the principal officers and seamen of the captured ship taken on the standing interrogatories.[2]

*It is exclusively upon these papers and examinations, that the cause is to be heard in the first instance; if, from this evidence, the property clearly appears to be hostile or neutral, condemnation or restitution immediately follows: if the property appears to be doubtful, or the case suspicious, further proof may be granted, according to the rules which govern the legal discretion of the court. [*77

If the parties have been guilty of gross fraud or misconduct, or illegality, further proof is not allowed, and condemnation follows.

Although some apology may be found in the state of peace which had so long existed previous to the late war, for the irregularities which had crept into the prize practice, that apology no longer exists; and if such irregularities should hereafter occur, it may be proper to withhold condemnation, even in the clearest cases, unless the irregularities are avoided or explained.

If a party attempts to impose upon the court, by knowingly or fraudulently claiming as his own, property belonging in part to others, he will not be entitled to restitution of that portion which he may ultimately establish as his own.

It seems, that where a native citizen of the United States emigrated, before a declaration of war, to a neutral country, there acquired a domicil, and afterwards returned to the United States, during the war, and re-acquired his native domicil, he became a redintegrated American citizen; and could not afterwards, *flagrante bello*, acquire a neutral domicil, by again emigrating to his adopted country.

The claimants have no right to litigate the question, whether the captors were duly commissioned; the claimants have no *persona standi in judicio*, to assert the rights of the United States.

But if the capture be made by a non-commissioned captor, the prize will be condemned to the United States.[3]

Appeal from the District Court for the Louisiana district. This was the case of a Spanish schooner, captured on the 18th of October 1814, by Mr. Shields, a purser in the navy, commanding an armed barge, in the service of the United States, ostensibly bound with a cargo of crates and dry-goods, on a voyage from Jamaica to Pensacola, but, in fact, in pursuance *of an asserted change of destination, then in prosecution of a voyage to New Orleans. The schooner was delivered up, and prize proceedings were instituted against the cargo, in the district court for Louisiana district. Upon the return of the monition, various claims were interposed for small adventures or parts of the cargo; but the only questions before the court arose upon the claim of Mr. Basil Green, calling himself a citizen of the Republic of Carthagena, who, by his agents, Mr. John F. Miller and Messrs. Lewis & Lee, asserted an ownership to nearly the whole of the cargo. Mr. Miller, in his affidavit annexed to the claim, stated, "that he purchased the goods so claimed, with moneys in his hands, belonging to the claimant; that at the time of the purchase, he expected to have had an interest therein, but that, on his arrival at New Orleans, the attorney in fact of the said claimant (meaning Mr. Lewis) refused to allow any such interest, and the [*78

[1] The Pizarro, *post*, p. 227; The Amiable Isabella, 6 Wheat. 1; The Sally Magee, 3 Wall. 452; The Sir William Peel, 5 Id. 517.

[2] The Diana, 2 Gallis. 93; The Jane Campbell, Blatch. Pr. Cas. 101.

[3] The Siren, 13 Wall. 393.

deponent is, therefore, obliged to give up the same ; and this deponent further saith, that the facts contained in the said claim are true, to the best of his knowledge, information and belief." At the hearing in the district court, the claim was rejected, and the goods were condemned as the property of enemies, or of citizens trading with the enemies of the United States.

February 11th. *Harper*, for the appellant and claimant, argued, upon the facts, that the proprietary interest in the cargo was in the claimant, and that he (though a native citizen) had a right to change his domicil, and did
*79] change it *bonâ fide* to Carthagena, in South America, *where he was a resident merchant, and in his neutral character, had a right to trade with the enemy of his native country.(*a*) He further suggested, that the captor was not duly authorized to capture, there being no evidence that the armed barge, which made the capture, was duly incorporated into the navy. *The Melomasne*, 5 Rob. 41*; *The Charlotte*, Ibid. 252; *The Island of Curaçoa*, Ibid. note *a*.

Key, contrà, argued, that the residence of the claimant at Carthagena was temporary only, and that the whole transaction was infected with fraud and falsehood.

March 30th, 1817. STORY, Justice, delivered the opinion of the court.— Before we consider the merits of this claim, it may not be unfit to advert to some of the principles applicable to proceedings in prize causes, which seem to have been wholly neglected in the progress of this cause.

It is the established rule in courts of prize, that the evidence to acquit or condemn must, in the first instance, come from the papers and crew of the captured ship. On this account, it is the duty of the captors, as soon as practicable, to bring the ship's papers into the registry of the district court,
*80] and to have the examinations of the principal officers and *seamen of the captured ship taken before the district judge, or commissioners appointed by him, upon the standing interrogatories. It is exclusively upon these papers and the examinations, taken *in præparatorio*, that the cause is to be heard before the district court. If, from the whole evidence, the property clearly appear to be hostile or neutral, condemnation or acquittal immediately follows. If, on the other hand, the property appear doubtful, or the case be clouded with suspicions or inconsistencies, it then becomes a case of further proof, which the court will direct or deny, according to the rules which govern its legal discretion on this subject. Further proof is not a matter of course ; it is granted in cases of honest mistake or ignorance, or to clear away any doubts or defects consistent with good faith. But if the parties have been guilty of gross fraud or misconduct, or illegality, further proof is not allowed ; and under such circumstances, the parties are visited with all the fatal consequences of an original hostile character. It is essential, therefore, to the correct administration of prize law, that the regular modes of proceeding should be observed with the utmost strictness ; and it is a great mistake, to allow common-law notions in respect to evidence or practice, to prevail, in proceedings which have very little analogy to those at common law.

(*a*) 1 Wheat. 65, note.

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These remarks have been drawn forth by an examination of the present record. The court could not but observe with regret, that great irregularities had attended the cause in the court below. Neither were the ship's papers produced by the captors, nor *the captured crew examined upon the standing interrogatories. Witnesses were produced by the [*81 libellants and the claimant, indiscriminately, at the trial, and their testimony was taken in open court, upon any and all points to which the parties chose to interrogate them, and upon this testimony and the documentary proofs offered by the witnesses, the cause was heard and finally adjudged. In fact, there was nothing to distinguish the cause from an ordinary proceeding in a mere revenue cause *in rem.*

This court cannot but watch with considerable solicitude irregularities, which so materially impair the simplicity of prize proceedings, and the rights and duties of the parties. Some apology for them may be found in the fact, that from our having been long at peace, no opportunity was afforded to learn the correct practice in prize causes. But that apology no longer exists; and if such irregularities should hereafter occur, it may be proper to adopt a more rigorous course, and to withhold condemnation, in the clearest cases, unless such irregularities are avoided or explained. In the present case, the first fault was that of the captors; and if the claimant had suffered any prejudice from it, this court would certainly restore to him every practicable benefit. But in fact no such prejudice has arisen; the claimant has had, in the court below, the indulgence and benefit of further proof and of collateral aids to verify the the truth of his claim; and he stands, at least, upon as favorable a ground to sustain it, as if the cause had been conducted with the most scrupulous form.

Two questions have been argued at the bar. 1st. *Whether Mr. [*82 Basil Green, the asserted owner, has established his proprietary interest in the goods in question? and 2d. Supposing this point decided in his favor, whether he has proved himself a neutral merchant, entitled by his domicil and national character to a restitution of the property?

It appears by the evidence in the case, that Mr. Green was born in Maryland, and resided in that state, and principally at Baltimore, until the year 1809, when he went aboard. In 1811, he resided in Carthagena; and in the spring of 1813, he came to New Orleans from Carthagena, in a schooner under Carthagenian colors, and being unable to sell her, he determined, in connection with Messrs. John F. Miller, Lewis & Lee, and others, inhabitants of New Orleans, who became jointly interested with him, to fit her out as an American privateer. Accordingly, on or about the 13th of March 1813, Mr. Green applied to the collector of the customs at New Orlearns for a commission; and in his petition, he described her as the private armed schooner Hornet, of New Orleans, owned by Basil Green. The commission was granted, and soon afterwards, Mr. Green sailed in the privateer, on her destined cruise. In June 1813, he was, as he alleges, compelled by a mutiny of the crew to go to Carthagena, where they deserted, and the cruise was broken up, and the privateer was finally sold; of all which he gave information to the other owners at New Orleans, and promised to remit their peoportions of the proceeds. While at New Orleans, in April 1813, Mr. Green executed a letter of attorney, appointing Messrs. Lewis [*83 & Lee, *of that city, his general attorneys and agents, and in this

power he described himself, as "Basil Green, of Baltimore, merchant." He does not appear, since that period, to have returned to the United States. In July 1814, he was a resident at Carthagena, and is described by one other witness, as having a house and store. Such are the most material facts respecting Mr. Green's domicil, apparent on the record.

In respect to the proprietary interest in the goods claimed by him, the evidence is more complicated. The whole adventure was conducted by Mr. John F. Miller, of New Orleans (one of the proprietors of the Hornet), from whose testimony, it appears, that the owners of the Hornet, resident at New Orleans, having received information of her sale, and being desirous of receiving their funds, he, Miller, on his own account, and as their agent, determined to make a voyage to Carthagena for this purpose. He, accordingly, in June 1814, went from New Orleans to St. Jago de Cuba, and from thence to Jamaica (as the only practicable route), and from thence to Carthagena. When he left New Orleans, he took a draft from Messrs. Lewis & Lee on Mr. Green, for $2500 and a letter from the same gentlemen to Messrs, O'Hara & Offley, merchants, at Jamaica, authorizing them to pay him the balance of their accounts, whatever it might be. At Carthagena, in August 1814, he received from Mr. Green, the sum of $1500.50, in part of the draft of Messrs. Lewis & Lee. He also received from Mr.
*84] Green, the whole of the net proceeds *of the sale of the Hornet, amounting to the sum of $11,636, of which his own share amounted to $1500, and that of Mr. Green, to $4129.02 ; and he gave a receipt to Mr. Green for this amount, promising, on his arrival at New Orleans (sea-risks and captures excepted), to pay over to the stockholders their respective proportions, deducting all necessary charges. Mr. Green directed his share to be remitted to his nephew, at Baltimore, by written instructions, contained in a letter directed to Mr. Millller, as follows :

"Carthagena, August 12, 1814.

"Mr. John F. Miller.

"My dear sir : On your safe arrival in the New Orleans, sea-risks and captures excepted, you are authorized and appointed, at my wish, in which you will please to remit on to my nephew, Mr. George A. Stamp, of Baltimore, the sum of $4129.02, after deducting the charges thereon, and you will much oblige your friend, respectfully, B. Green."

On the 29th of August, Mr. Green addressed a letter to his nephew, in the following paragraph :

"Mr. John F. Miller, a particular friend of mine, will remit on to you, in good bills, after his safe arrival in New Orleans, the sum of $4129.02, agreeable to his receipt on the same, now in my possession. Perhaps, he may remit a $1000 or $1500 more, if fortune favors his prospects."

At what period Mr. Miller left Carthagena, does not precisely appear, but he says, that he thinks it was before the 20th of August, and that the letter of the 29th of August, was sent to him at Jamaica. Previous
*85] *to his departure, he further asserts, that Mr. Green gave him verbal instructions to lay out his share of the money, in goods, at Jamaica, instead of remitting it to his nephew, and also, by a written authority, under date of the 12th of August, authorized him, if he thought proper, to draw

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on him for the further sum of $2500, at five days' sight. From Carthagena, Mr. Miller went to Jamaica, where he endeavored to purchase a small vessel; but failing in his object, he, on the 9th of September 1814, chartered the Spanish schooner Dos Hermanos, Captain Delgado, master and owner, then lying at Kingston. By the charter-party, which was made by Messrs. O'Hara & Offley, on behalf of the owner, of the one part, and Mr. Miller, of the other part, it was agreed, that the sum of $1500 should be given for the charter of the vessel, for a voyage from Kingston to Pensacola, in West Florida, and back again to Kingston. That after her arrival at Pensacola, Mr. Miller should put on board, within eighteen days, a return-cargo of the produce of the country, to be consigned to Messrs. O'Hara & Offley, for sale; and should further invest the amount of the freight in cotton or tobacco, on account of Mr. Delgado, and ship it on the return-voyage, freight free, unless it occupied more than a stipulated portion of the room of the vessel. Mr. Miller was further to pay all port-charges, and in case of detention beyond eighteen days, demurrage also, at the rate of $16 per day. And it was further agreed, that if the situation of that part of the world should be such as to preclude any communication between New Orleans and Pensacola, *and prevent Mr. Miller from procuring a full return-cargo, or as much cotton and tobacco as should be required for the amount of [*86
the charter, then the said amount of $1500 was to be paid over on account of the said O'Hara & Offley, to Mr. John K. West, of New Orleans; and in that event, and payment of all port-charges, Miller was to be at liberty to decline loading the vessel on her return-voyage. Immediately after the execution of this charter-party, Mr. Miller loaded on board of the schooner, the goods in question, through the agency of Messrs. O'Hara & Offley; and drew a bill for $2500 in their favor, on Mr. Green, and received from them, for the account of Messrs Lewis & Lee, the sum of $900. The whole cargo, with an inconsiderable exception, was documented as the property of a Don Juan Lesado, of Pensacola, and purported to be the proceeds of the sales of a former cargo, consigned by him to Messrs. O'Hara & Offley. Among these documents, which are asserted by the claimant to be merely colorable, there is an invoice account-current of the sales of a supposed former cargo; and a letter of advice, stating that the schooner was chartered for the voyage, on account of Don Juan Lesado, and that the cargo, consisting of dry-goods, was a return-cargo purchased by his orders. There is also, a bill of lading, consigning the cargo to the same person. Mr. Miller alleges this artifice to have been resorted to, to preserve the shipment from British and Spanish capture. The schooner sailed on the voyage, about the 13th of September, with Mr. Miller on board, *and having been driven by currents considerably to the westward of Pensacola, and being in the [*87
Bay of St. Bernard, Mr. Miller left the schooner, about the first of October, in a boat, which he had purchased at Jamaica, for the purpose, and proceeded for New Orleans, leaving the property under the control and directions of a Mr. Bassett, who was a passenger on board. On the 13th of October, Mr. Miller arrived at New Orleans.

In the meantime, the schooner proceeded to Dauphin Island, and there Mr. Bassett undertook (as he alleges) to change the destination, and determined to proceed to New Orleans; and for this purpose, on the 14th of October 1814, he entered into a new charter-party in behalf of Mr. Miller,

by which it was agreed between Mr. Bassett, as agent of Mr. Miller, and Captain Delgado, for himself and Messrs. O'Hara & Offley, that for the additional sum of $1100, the vessel should immediately proceed from Dauphin Island for the Bayou St. John, near the city of New Orleans, and there deliver the said cargo to Mr. Miller, his agents or assigns. The schooner was soon afterwards captured by the libellants, detained in the Bay of St. Lewis, and subsequently brought to Petit Coquille. After his arrival at New Orleans, and before knowledge of the capture, Mr. Miller wrote the following letter to Mr. Bassett:

"New Orleans, 15th of October 1814.

"Dear Sir: I arrived here on the 15th in the morning; after twelve days' suffering, and found all my family as well as could be expected from the situation of this place and Pensacola. I have thought proper to remain,
*88] *without doing anything, until I hear of your arrival, and news from you. I would advise, by all means, to fetch the vessel and cargo to Mobile point, if no farther, if possible. I believe it can be done, without much or no danger. I believe also, it is practicable to procure a permission from the English commander to come to New Orleans, with the schooner, provided you promise to return with provisions that they stand in need of. Try every means in your power to effect the arrival here of yourself and schooner. Should you get the schooner here, I shall meet a ready sale for the crockery-ware, and the schooner a ready dispatch. Blankets sell ready at nine dollars per pair. Try and make arrangements with Delgado to fetch the schooner here, as it is certainly greatly to his advantage as well as ours. I depend upon your known activity, and remain your friend. In haste, the vessel is about to sail. (Signed) JOHN F. MILLER.

"P. S. All those pirates are destroyed at Barataria. Tobacco, best quality, six cents, dull. (Signed) MILLER.

"I had not time to write to Delgado, but will, next opportunity. Should you not have consigned the schooner and cargo to any person, you may place any confidence in Mr. Joseph Moreiga, as I know him well."

Mr. Miller asserts, that he brought a considerable sum of money, in dollars and doubloons, from Jamaica, of which he took $4500, when he left the schooner, in the boat, for New Orleans, and the residue, amounting to about
*89] $1800 or $1900, which was stored away in several crates of *goods, he afterwards contrived to obtain from the schooner, in the night-time, while she lay at Petit Coquille. All the letters brought in the schooner from Jamaica were taken by Mr. Miller, and all the documents respecting the cargo came from his hands, during his several examinations in court.

Such is the general outline of the case, as to the question of proprietary interest in the goods claimed in behalf of Mr. Green. An examination of some other minute, though important particulars, will properly arise in the subsequent discussion of this question.

The first thing that strikes us, on the slightest survey of this cause, is the total absence of all documentary proof to establish the claim of Mr. Green. The shipment was made in the enemy's country, in the name of an enemy, and ultimately destined for sale at Mobile or New Orleans, if the parties should be able to accomplish the voyage. The property was clothed

with a Spanish character, as Mr. Miller asserts, to protect it from British and Spanish capture. It is certainly the duty of neutrals, to put on board of their ships sufficient papers to show the real character of the property, and if their conduct be fair and honest, there can rarely occur an occasion to use disguise or false documents. At all events, when false or colorable documents are used, the necessity or reasonableness of the excuse ought to be very clear and unequivocal, to induce a court of prize to rest satisfied with it. To say the least of it, the excuse is not, in this case, satisfactory; for the disguise is as strongly pointed to elude American, as *British or [*90
Spanish capture. It is not pretended, that any genuine papers were put on board, or are now in existence, which would explain the circumstances; for Mr. Miller himself, in an answer to an interrogatory on this point, says, he had from Mr. Green no written instructions, nor did he enter into a written contract with Mr. Green, respecting the goods to be purchased at Jamaica; that Mr. Green would have given written instructions, but he, Mr. Miller, objected to it, as in case of capture, it would have been insecure. He adds, that there are no letters or papers at Carthagena that can throw any light on the subject, and that not having received any, he was unwilling to leave any.

In the next place, there is not, with the exception of Mr. Miller's, the slightest testimony from the ship's crew, that the property belonged to Mr. Green. The master and mate of the schooner, and Mr. Bassett also, the agent of Mr. Miller, expressly state, that they always believed Mr. Miller to be the real owner, and that he never named any other person to them as the owner, though he sometimes alluded darkly to a possible ownership in others. It is a general rule of the prize law, not to admit claims which stand in entire opposition to the ship's papers, and to the preparatory examinations, where the voyages have originated after the war. The rule is founded upon this simple reason, that it would open a door to fraud in an incalculable extent, if persons were not required to describe their property with perfect fairness. The rule, however, is not inflexible; it yields to cases of necessity, or where, *by the course of the trade, simulated papers become indis- [*91
pensable, as in a trade licensed by the state with the public enemy. It may be said, that the rule cannot be applied in the present case, because Mr. Miller is to be deemed one of the ship's crew, although he had, some time before the capture, left the vessel, and was, at the time of capture, at New Orleans; and that his examinations (for he was examined several times) established the interest of Mr. Green, and so the claim is consistent with what ought to have been the evidence *in præparatorio*. Assuming this argument to be correct, on which we give no opinion, the circumstances of this case call for the most plenary explanations, to dissipate the doubts which cannot fail to be awakened.

These explanations come altogether from Mr. Miller, and are unsupported by any corrobative documents, or facts asserted upon independent testimony. All that the other principal witnesses have testified to, which bears directly on the cause, consists of declarations or confessions, or acts of Mr. Miller, after his return to New Orleans. Mr. Miller himself certainly stands in a predicament which does not lend additional credit to his assertions. He was the projector of the voyage, and the conductor of all its operations. He chartered the vessel in his own name; and if he was acting for Mr. Green,

and not for himself, what motive could there be for him to conceal his agency from Messrs. O'Hara & Offley, or from Captain Delgado? The voyage itself was illegal in an American citizen. The charter-party *stipulated for a return-cargo to Jamaica, which was to be furnished by Mr. Miller, and he does not pretend that this cargo was to have been shipped on Mr. Green's account. It must have been a traffic on his own account, or a joint concern with Messrs. O'Hara & Offley; and in either view, was a surrender of all the obligations which he owed to his country. These considerations cannot certainly increase our confidence in the integrity of the conduct of Mr. Miller.

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On examining his testimony, there are many circumstances which cannot fail to create unfavorable doubts. The test-affidavit itself is couched in very equivocal language. Mr. Miller there asserts, that at the time of the purchase, he expected to have an interest in the goods, but that, on his arrival at New Orleans, the attorney in fact of the claimants refused to allow any such interest, and the deponent was obliged to give up the same. What authority could Mr. Lewis, the attorney here alluded to, have, to intermeddle with Mr. Miller's interest in the shipment? He was not the consignee of the property, nor was he confidentially acquainted with any agreement or instructions of Mr. Green relative to the voyage. It is scarcely credible, that the real consignee of the goods, having an interest in them, should, under such circumstances, yield it up to a mere intruder. In his examination in chief, Mr. Miller states, that it was his original intention to have invested his own funds, as well as Mr. Green's, at Jamaica; but he was induced to abandon it, by reports that the British intended to occupy Pensacola *and Mobile Point; and he explains his interest in the shipment, to have been only a right to one-third of the profits, in lieu of commissions.

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This representation is not consistent with the language held by Mr. Miller on other occasions. After the capture, Mr. Miller stated to Captain Delgado, that "he had got himself into a difficulty, in consequence of his (Delgado's) coming here; that the greater part of the funds invested in the goods belonged to Mr. Green; that he (Miller) was acting for others, and that he feared he should get himself into difficulty." Upon an inquiry from the same person, during the voyage from Kingston, whether he was the owner, Mr. Miller answered, "that he did not know—that he had funds from Carthagena." On another occasion, Mr. Miller gave another witness (Mr. McIlvaine) to understand, "that the cargo was purchased on his (Miller's) and Green's account." And in a conversation with a Mr. West, who was the confidential agent of Messrs. O'Hara and Offley, and received a letter by the schooner, advising him of the voyage, he left the impression on Mr. West's mind, that the cargo was his own. The language, too, that Miller held with Mr. Heins (the mate of the schooner), after the capture, is very significant. He said, "it was a hard case, that he should lose his property in that way; that it was the earnings of many years."

There are some other discrepancies in the declarations of Mr. Miller, which are not easily to be accounted for. Mr. Miller, in his examination, states, that Mr. Green authorized him to invest in goods, *the money belonging to him; and that after he chartered the schooner, it was his intention to lay out Mr. Green's funds, as well as his own, in the pur-

*94]

chase of goods ; but that subsequent events induced him not to lay out his own funds, and that he laid out for Mr. Green about $6000 only. In his conversation with Mr. Lewis, he stated, that there was an arrangement between Mr. Green and himself ; that if he thought proper, upon his arrival at Jamaica, he might invest in goods, the whole of the $11,686, and more (for which he was authorized to draw on Mr. Green, if necessary), on the joint account of himself and Mr. Green ; that after his arrival at Jamaica, he thought he would enter into this speculation ; and thereupon, he drew upon Mr. Green for $2500 ; and that after the draft was made, he discovered that he had not any right to make this disposition of the funds of the stockholders in the Hornet, and accordingly, he laid out $6000 of Mr. Green's money, supposing he ought to have an interest in it himself, as a compensation for his trouble.

In determining the real character of this whole transaction, it becomes material to ascertain the true value of the cargo shipped by Mr. Miller. He asserts it to be about $6000 ; but no original invoice, nor other genuine paper, is produced, to prove its cost at Jamaica. According to Mr. Bassett, it was worth about $7000 or $8000 ; and Captain Delgado says, that while lading it, Mr. Miller told him it would amount to about $8000 or $10,000. If the cargo cost but $6000, it may be asked, what became of the residue of the money in the *hands of Mr. Miller ? According to his own account, [*95
he received for the sales of the Hornet $11,636 ; from O'Hara & Offley, $900 ; and he drew a bill on Mr. Green, in part payment of the goods, for $2500, making, in the whole, the aggregate sum of $14,000. There remained, therefore, after the purchase of the goods, in the hands of Mr. Miller, about $8000. What has become of this fund, belonging to himself and the stockholders in the Hornet ? Here, as indeed in every other material part of the cause, the explanation comes exclusively from Mr. Miller. He says, that when he left the schooner in St. Bernard's Bay, he took away with him in the boat the sum of $4500 ; and that while the schooner lay at Petit Coquille, he took away from some crates on board of the schooner, in which it was concealed, the further sum of $1800 or $1900. It is true, that Captain Delgado says, that when Miller left the schooner, he took away with him a bag, which, he supposes, contained dollars, but he does not pretend even to guess at the amount ; and it is remarkable, that none of the passengers are interrogated on this subject. But the statement in relation to the $1800 or $1900 is wholly incredible. The mate flatly denies that it could have been taken out of the crates in the manner which Miller asserts ; and Mr. Bassett manifestly considers it almost impossible. What adds to the incredibility of the statement is, that when Mr. Miller left the schooner, he never informed Mr. Bassett, that there was any money concealed in any of the crates, although he expressly constituted him his agent to dispose of the cargo, without any reserve.

If the funds were brought to New Orleans in money, as Mr. Miller [*96
pretends, nothing could have been more easy of proof, than the fact, considering that a large proportion of it belonged to the other stockholders in the Hornet. By the very terms of his receipt, he was bound to pay over to them their respective proportions, on his arrival at New Orleans. Has he done so ? There is not the slightest proof to this effect in the case ; on the contrary, several of the stockholders, or their agents, have been examined,

and not one of them admits his proportion to have been paid. Indeed, Mr. Miller himself admits, that he has never paid any; and gives this extraordinary excuse, that he had orders from Mr. Green not to pay over the money, until three months after his arrival at New Orleans. This excuse is entirely at variance with the receipt given by Mr. Miller, and is as little reconcilable with the letter of Mr. Green to his nephew, respecting his own remittance. It may be added, that the statement itself has very little intrinsic probability to support it.

It is, therefore, no harshness to declare, that the declarations of Mr. Miller, that he brought home so very considerable a sum, are not, of themselves, entitled to much credit, and, under the circumstances, cannot be received as satisfactory evidence of the fact by this court; and if so, then every suspicion that the whole funds were invested in the cargo is greatly inflamed, and every doubt of the good faith of the present claim materially strengthened.

There are many other circumstances in the case, which tend to a discredit
*97] of the claim; but it would *occupy too much time to discuss them minutely. One circumstance, however, deserves particular notice. It is the letter of Mr. Miller, written to Mr. Bassett, after his arrival at New Orleans, which may almost be said to carry, in every line of it, the language and feelings of an owner of the goods. And it adds no inconsiderable force to these observations, that the only documents on board, pointing to Mr. Green, are inconsistent with the supposition that the goods were purchased on his account; and the only doubtful expression in them may well be satisfied, as referring to money to be obtained by Mr. Miller, from a Mr. Hardy, of Jamaica, who was indebted to Mr. Green..

Considering, then, that the present claim rests altogether upon the testimony of Mr. Miller, given by him, after he well knew the form and pressure of the cause, and liable, as it must be, to the strongest doubts, both from the predicament in which he stands, and the circumstances which have been already stated, the court cannot admit, that it is supported by any reasonable evidence. It is not material, in our view, whether the property belonged wholly to Mr. Miller, or to him jointly with Green, or was purchased with the funds of the stockholders of the Hornet, on his own account, as an unauthorized speculation, or on joint account, with their authority; for in either case, it is liable to the same judgment. It is a settled rule of this court, that if a party will attempt to impose upon the court, by knowingly or fraudulently claiming as his own, property belonging in part to others, he shall not be entitled to a restitution of that portion which he may ulti-
*98] mately establish *as his own. This rule is founded in the purest principles of morality and justice, and would bear upon the claim of Mr. Green, supposing his domicil, as a neutral, were ever so clearly established.

In respect to the domicil of Mr. Green, there is certainly much reason to doubt, if it would be sufficient to protect him, even if he could show himself, at the time of the capture, a citizen of Carthagena. For, if, upon his return to New Orleans, after the war, he acquired a domicil there (of which, the circumstances of his becoming the owner of a privateer in that port, affords a strong presumption), he became a redintegrated American citizen,

and he could not, by an emigration afterwards, *flagrante bello*, acquire a neutral character, so as to separate himself from that of his native country.

The counsel for the claimant, aware of the pressure of his case upon the present evidence, has prayed to be admitted to make further proof, which he states to be now in his possession. If this cause turned upon the question of domicil, the court would feel little hesitation in admitting it. But considering the manner in which the cause was conducted in the court below, and that the claimant there had the benefit of further proof, and that it appears to us, that upon the question of proprietary interest, the cause now admits of no fair and reasonable explanation, consistent with an exclusive interest in Mr. Green, we do not feel at liberty to make an order for further proof. We are not satisfied, that it would be a safe or convenient rule, unless, under very special circumstances, to allow parties who have had the benefit *of plenary proof in the court below, to have an order for further proof in this court, upon the same points. Much less should we incline to allow it in a case of pregnant suspicion, where the evidence must come from sources tainted with so many unwholesome personal interests, and so many infusions of doubtful credit. The claim of Mr. Green must, therefore, be rejected, and the goods be condemned as good and lawful prize. [*99

It has been urged, that there is no evidence upon the record, that the captors were duly commissioned, and that further proof ought to be required on this point. This, however, is a question which the claimant has no right to litigate. He has no legal standing before the court, to assert the rights of the United States. If the capture was without a commission, the condemnation must be to the United States, generally; if with a commission, as a national vessel, it must still be to the United States, but the proceeds are to be distributed by the court among the captors, according to law. It will be time enough to require the commission to be produced, when the proceeds are to be distributed by the court, if the United States shall then insist upon any exclusive claim.[1]

Decree affirmed, with costs. (*a*)

(*a*) *Vide* APPENDIX, note I.

[1] For a further decision on the distribution of the proceeds, see 10 Wheat. 306.

*Beverly *v.* Brooke.

Hirer of slaves.

Where the owner of certain slaves, and also part-owner of a vessel, hired the slaves to the master of the vessel, to proceed as mariners on board, on a voyage, at the usual wages, and without any special contract of hiring; *held*, that the master, having acted with good faith, was not responsible for the escape of the slaves, in a foreign port, which was one of the contingent *termini* of the voyage, and consequently, within the hazards to which the owner knew his property might be exposed; although it was doubtful, whether the master had strictly pursued his orders, in going to such port.[1]

Error to the Circuit Court for the district of Columbia. This suit was instituted by the plaintiff, in the circuit court for the county of Alexandria, to recover the value of three slaves, hired by the plaintiff to the defendant, for a voyage to some part of Europe, in the brig Sophila, of which the defendant was master, which slaves escaped from the vessel, and were lost to the owner. The claim was founded on the allegation, that the master pursued a different voyage from that for which the slaves were hired, and that to this cause was to be ascribed the loss that had been sustained.

February 11th. The cause was argued by *Swann*, for the plaintiff, and by *Taylor*, for the defendant. The latter cited Pothier on Obligations, part
*101] 1, c. 2, art. 3, *to show that the party was only responsible for the ordinary results of his fault, unaccompanied with fraud,(*a*) and contended, that the loss of the slaves was not a necessary consequence of the ship-master's supposed misconduct, but was remote and unforeseen.

February 19th, 1817. Marshall, Ch. J., delivered the opinion of the court.—The declaration in this cause states, that the defendant "was master of the brig Sophila, then in the county of Alexandria, and bound on a voyage from thence to Savannah, in the state of Georgia, and from Savannah to New York, in the state of New York, and from thence to such other place or places, as he, the said defendant, might be directed to go to by the owners of the said brig," of whom the plaintiff was one. That believing and expecting the defendant would pursue the orders he should receive, as was his duty, he hired to him, for the voyage, the slaves in the declaration mentioned. It appeared in evidence, that these slaves were received on board the vessel, as mariners, on the usual wages, and without any special contract.

*102] *On the 23d of May 1809, after the Sophila had sailed from Alexandria to Savannah, a letter of instructions was addressed to the master, which contains the following directions: "I hope this will find you arrived at Savannah, and ready to proceed on your voyage to Amsterdam, where you are to proceed with all dispatch; and when you arrive off the Texel, should you not have received information, either from Messrs. Willinks,

(*a*) So also, the Napoleon Code, liv. 3, tit. 3, *Des Contrats et Obligations Conventionnelles.* "Le debiteur n'est tenu que des dommages et intérets qui ont été prévus ou qu'os a pu prévoir lors du contrat, lorsque ce n'est point par son dol que l'obligation n'est point exécutée." Art. 1150. "Dans le cas même où l'inexécution de la convention résulte du dol du débiteur, les dommages et intérets ne doivent comprendre, à l'égard de la perte éprouvée par le creancier et du gain dont ila été privé, que ce qui est une suite immédiate et directe de l'inexecution de la convention." Art. 1151.

[1] See The Constitution, Gilp. 579, 585; Millon *v.* Salisbury, 13 Johns. 211.

or from some source that you can depend upon, that you can enter Holland with safety, you are to proceed to Tonningen, and from thence communicate with Messrs. Willinks, and follow their instructions. If they say, they cannot get you admitted to the continent, or can do nothing for you, you are then at liberty to take upon yourself the disposal of the cargo, in any way that may be practicable, and the investment of the proceeds in any German goods that may answer our market. Should no opportunity offer for a sale at Tonningen, or on the coast of Holland, or Denmark, or in the Baltic, you must then, as a last resort, proceed to Liverpool," &c.

On the 6th of July 1809, a letter, containing additional instructions, was written, of which the following is an extract: "Nothing decisive has yet occurred, whereby to judge of the ultimate result of the pending negotiations between this country and the powers of the continent. But hoping, by the time you arrive in the British channel, all difficulties will be settled between us and the continent, your owners are still desirous, and direct, that you may prosecute your voyage, as before directed, for *Amsterdam. [*103 They are, however, desirous, that before you attempt to enter the Texel, you inform yourself whether the port be blockaded, and whether there be any danger of confiscation, after entering. And should you not be able to get satisfactory information on these heads, at sea, or going up the British channel, you will proceed, as before directed, for Tonningen, and from thence communicate with Messrs. Willinks, of Amsterdam, and Messrs. Parish & Co., Hamburg, and abide by their instructions. Should it so turn out that you cannot, with safety, proceed to Amsterdam, and that you can get admittance at Tonningen or Hamburg, you will deliver your cargo at either place to Messrs. Parish & Co., as they may instruct you," &c. "If no admittance can be had either at Amsterdam, Hamburg or Tonningen, you are then at liberty to do the best you can with the cargo, as before directed."

Under these instructions, the Sophila proceeded on her voyage, until visited by one of the squadron which blockaded Amsterdam. Information was there received, showing the danger, from the local government, of entering the Texel, and also, that Hamburg and Bremen were shut, and that Tonningen had been shut and opened to American vessels several times. The Sophila continued to ply off and on the mouth of the Texel, for four or five days, with her signals displayed, when the master concluded to run into the Texel, the blockade of which, it would seem, was not then intended to exclude neutral commerce. In executing this design, he was met by the schooner Enterprise, an American man *of war, beating out abreast [*104 the first buoy of the Hacks. The commander of the schooner sent his boat to the Sophila, with the request that her master would come on board the Enterprise. The defendant went on board, and continued there near two hours. On his return, the commander of the Enterprise sent on board the Sophila, a Captain Swaine, master of an American vessel which had been captured by a Danish cruiser on a voyage to St. Petersburg, and condemned. Captain Swaine gave to Captain Brooke, the defendant, a written statement, containing all the information he possessed respecting the dangers of those seas. He stated, that his vessel was captured on the 4th, and condemned on the 19th of June. That on the 20th, himself and his men were turned on shore, without assigning to them any cause of cap-

ture or condemnation, and without making any provision for them. His men were compelled to go on board Danish privateers to avoid starving. He remained himself at Alborg, until the 17th of July, when he travelled by land to Amsterdam, and passed within four miles of Tonningen. The information of Captain Swaine showed that the seas, about the mouths of the Eider, the Elbe and the Weser, swarmed with Danish privateers, who respected no flag, and brought in every American vessel they could capture. On the 28th of July, he passed through Hamburg, and waited on ths American consul for a passport, where he was informed by the chancellor, that there were several American vessels at Tonningen petitioning for liberty to land their cargoes, which they could *not obtain, nor was any attention paid to their petitions. He received the same information, afterwards, at Amsterdam. By the consulate at Hamburg, he was also informed, that there had been, a few days before, some American vessels at Cuxhaven, which had been ordered by the consul to leave that place immediately. After receiving this information, the Sophila proceeded to Liverpool, where the slaves of the plaintiff escaped, and have been totally lost.

*105]

Upon this testimony, the counsel for the plaintiff prayed the court to instruct the jury, that if they believed the evidence, the plaintiff was entitled to recover of the defendant the value of the slaves in the declaration mentioned. The court refused to give this instruction, to which refusal the plaintiff excepted. A verdict was found for the defendant, and a judgment rendered thereon by the court, which judgment is now before this court on writ of error.

The plaintiff in error contends, that the circuit court ought to have given the instruction prayed for, because: 1st. The defendant has violated the instructions by which he was bound. 2d. Any violation of those instructions subjects him to every loss sustained in consequence thereof.

1. Captain Brooke is supposed to have violated his orders, in not proceeding to Tonningen, and waiting there for the directions of Messrs. Willinks. In considering the instructions given by the owners of the Sophila, there are extrinsic circumstances, which ought not to be entirely overlooked. The state of the whole commercial world was without *example; the then Emperor of France exercised the most absolute despotism over nearly the whole continent of Europe, and at his capricious will, destroyed the commerce and seized the property of neutrals, in the ports of those who were compelled to submit to his influence. Under such circumstances, it is reasonable to suppose, that, in commercial expeditions planned from so distant a place as the United States, some confidence is placed in the master of the voyage, and that much must be left to his discretion. Although this consideration will not excuse a disobedience of orders, it is entitled to weight, in expounding orders not entirely decisive. The primary object of the owners was, obviously, that the Sophila should go to Amsterdam. Yet this primary object was to be relinquished, if not to be attained with safety; and of this, the master was the judge.

*106]

But the orders are said to direct the master absolutely to proceed to Tonningen, should he decline entering the Texel.. In the first letter of the 23d of May, this direction does appear to be positive, but it also appears to have been given, in the expectation that the voyage from the mouth of the Texel to Tonningen might be prosecuted without imminent danger, and with

the probability of entering some port on the continent. Of this probability the Messrs. Willinks were to judge, should it be in the power of Captain Brooke to consult them. The first paragraph of the letter of the 6th of July repeats the order to proceed to Tonningen, *should it be unsafe [*107 to enter the Texel, and there "to communicate with Messrs. Willinks, of Amsterdam, and Messrs. Parish & Co., of Hamburg, and to follow their instructions." The letter then directs the conduct of the master, should he be enabled to get admittance into Tonningen or Hamburg, and proceeds to say, "If no admittance can be had, either at Amsterdam, Tonningen or Hamburg, you are then at liberty to do the best you can with the cargo as before directed." It is on this last clause in the letter, that the difficulty arises.

The plaintiff contends, that the master had no right to determine, at the mouth of the Texel, the practicability of getting into Tonningen or Hamburg, but was bound to proceed for the former place, and when there, to govern himself by the directions of Messrs. Willinks, or of Messrs. Parish & Co. If this be not the true construction of the letter, he then contends, that the intelligence received off the mouth of the Texel did not excuse the master for sailing from that place for Liverpool.

As the first paragraph of that letter contains an unconditional order to proceed to Tonningen, should it be unsafe to go to Amsterdam, it is probable, that the owners might found their subsequent orders on the state of things which might be found to exist, when the vessel should arrive at Tonningen, and on the expectation that the voyage would be prosecuted to that place. But this expectation is not so clearly expressed, as to be free from doubt; the writer does not say, "if, on arriving at Tonningen, *no [*108 admittance can be had," &c.; but, "if no admittance can be had," &c. These expressions might well be understood to apply to the fact, although it should be communicated, before arriving at the place, and to dispense with the necessity of a useless voyage to Tonningen. There is the more reason for coming to this conclusion, from the consideration, that the vessel could not arrive at a place, admittance into which was forbidden. Whether this be the true construction of the letter or not, the phraseology is deemed too ambiguous, to subject the master to remote damages, not certainly produced by his omitting to proceed to Tonningen, if, in omitting so to do, he acted with good faith and a sincere desire to obey his orders.

This brings us to the information under which he acted. That information was, that Hamburg was shut; that Tonningen had been occasionally shut, and occasionally opened, to American vessels; that, at the time, the cargoes of those which had been admitted, were not allowed to be sold; and that the voyage to Tonningen would be attended with very serious hazards, which were probably not contemplated by his owners, when they gave their instructions. If, in such a state of things, the master should be thought to have misconstrued his instructions, and should be deemed responsible for exercising his own discretion, the action, founded on such misconstruction, would certainly be a harsh one. The court will not decide this question, because its decision is rendered unnecessary by the view taken of the second point.

*2. Admitting that the true construction of his orders required the master to proceed to Tonningen, on finding it unsafe to go to Amsterdam, is he liable in this action? The court thinks he is not. No special contract is proved, and the slaves of the plaintiff were put on board the vessel, generally, as seamen. The court is not satisfied, that the danger of their escaping might not be as great on the continent as in England. But at any rate, Liverpool was one of the contingent *termini* of the voyage, and was, consequently, within the hazards to which the plaintiff knew his property might be exposed. The danger of losing them, should the Sophila proceed to Liverpool, did not deter him from placing the slaves on board the vessel, nor from directing the master to go to Liverpool, or from giving full discretion respecting his port, in an event which was far from being improbable. There is no error, and the judgment is to be affirmed, with costs.

Judgment affirmed.(*a*)

(*a*) It will be perceived, that the above case was determined upon the ground, that, whether the master misconstrued his orders or not, no special contract of hiring being proved, and the slaves, being put on board, generally, as mariners, having escaped at a port which was one of the contingent *termini* of the voyage, and was, consequently, within the hazards to which the owner knew his property might be exposed, was not liable for the loss. In general, as to his obligations to the ship-owner, the master being a letter to hire of his care and attention, *conductor operis faciendi*, and the contract being reciprocally beneficial to both parties, nothing more is required of him than ordinary diligence; and he is only responsible *for ordinary neglect. But this must be understood, with the exception of his responsibility as a common carrier, and also that he is responsible like any other *conductor operis*, or even a mandatory, for a degree of skill in his profession, adequate to the performance of what he undertakes: *Imperitia culpæ adnumeratur.* Straccha, de Nauis, part 3, No. 32; Casaregis, Disc. 23, No. 65; Disc. 122, Nos. 1. and 12; Emerigon, tom. 1, p. 373. These principles have been recognised by the tribunals of our own country. In the case of Purviance *v.* Angus, the high court of errors and appeals of Pennsylvania said, "It is a wrong position, that a master of a ship is not answerable for an error in judgment, but only for the fault of the heart, in civil matters. Reasonable care, attention, prudence and fidelity are expected from the master of a ship, and if any misfortune or mischief ensues from the want of them, either in himself or his mariners, he is responsible in a civil action." *Per* Chief Justice McKean, 1 Dall. 184. But it is difficult, if not impossible, to lay down many general rules to enforce the performance of all the duties of the master. Targa sarcastically remarks, that it is as difficult to detect the misfeasance of ship-masters as that of physicians. *Son questi errori, come quelli che commettono bene spesso i medici, nel curare li poveri infermi.* Ch. 70. By the French Code de Commerce, it is provided, that the responsibility of the master shall not be discharged, but by proof of the intervention of the *vis major* or irresistible force. *La responsabilité du capitaine ne cesse pas que par la preuve d'obstacles de force majeure.* Liv. 2, tit. 4, Du Capitaine, art. 230. This provision, may, at first sight, appear to extend unduly the responsibility of ship-masters, which (except in their capacity of common carriers) ought not to be enlarged beyond that of other persons who undertake, for a reward, to perform any work. Its insertion in the code was objected to, upon this ground, by the tribunal of commerce of Paimpol, who remarked, that no ship-master would be found willing to incur a responsibility so tremendous as that which a rigorous application of the literal expressions of the law might incur. That many accidents happen in navigation, which no human skill can avert, but which are not to be considered as the effects of the *vis major*, and many misfortunes which are not to be attributed to the want of knowledge, the negligence or the fault of the master. The tribu-

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*McCoul *v.* Lekamp's Administratrix.

Revival.—Abatement.—Book-entries.

A. L. brought an action of *æssumpsit* in the circuit court, and after issue joined, the plaintiff died and the suit was revived by *scire facias* in the name of his administratrix; while the suit was still depending, the administratrix intermarried with F. A., which marriage was pleaded *puis darrein continuance: Held*, that the *scire facias* was thereupon abated, and a new *scire facias* might be issued to revive the original suit, in the name of F. A. and wife, as the personal representative of A. L., in order to enable her to prosecute the suit, until a final judgment under the judiciary act of 1789, § 31.

Where a witness, a clerk to the plaintiff, swore that the several articles of merchandise contained in the account annexed to his deposition, were sold to the defendant by the plaintiff, and were charged in the plaintiff's day-book, by the deponent and another person who was dead, and that the deponent delivered; and further swore, that he had referred to the original entries in the day-book: *held*, that this was sufficient evidence to prove the sale and delivery of the goods.

Error to the Circuit Court for the district of Virginia. This cause was argued by *Lee*, for the plaintiff in error, and by *Swann*, for the defendant in error.

*February 12th, 1817. Marshall, Ch. J., delivered the opinion of the court.—Albert Lekamp brought this suit in the circuit court [*112 for the district of Virginia, for the recovery of money claimed to be due to him from Neil McCoul, the defendant below. After issue joined, the plaintiff died, and the suit was revived in the name of his administratrix. While the suit was still depending, the administratrix intermarried with Frederick L. E. Amelung, which marriage was pleaded *puis darrein continuance;* the *scire facias* was thereupon abated, and a new *scire facias* issued to revive the original action, in the names of Amelung and wife, as the personal representatives of Albert Lekamp.

At a subsequent term, the cause was tried on the original issue, and a verdict found for the plaintiff, on which the defendant prayed that the judgment might be arrested, for the following reasons: "Because he saith, that after the plea pleaded, the original plaintiff, Albert Lekamp, departed this life, and Sophia Lekamp, his administratrix, sued forth a *scire facias* to revive the suit, on the 4th of July 1811; that while the suit stood revived in her name, as administratrix, the said Sophia Lekamp intermarried with Frederick L. E. Amelung, and on the 4th of December 1812, this defendant having pleaded the intermarriage aforesaid, it was ordered, that the *scire facias* be abated; whereupon, the said Frederick L. E. Amelung and Sophia, his wife, as administratrix aforesaid, sued out a new *scire facias* to revive the suit, and there being no new plea pleaded, nor any consent that the cause should be revived in any *other manner than the law would direct, [*113 the jury was empanneled, and a verdict found as aforesaid; and the said defendant saith, that the act of congress, in that case made and pro-

nal, therefore, proposed, as an amendment to the article, the addition of the following words: *ou par l'effet des accidens qui tiennent au hasard et à l'imprévoyance inséparable de la navigation et du chomage dans les ports.* But this amendment was rejected, upon the ground, that it would be dangerous to insert in the code a general provision of this nature, which, though it might be required, in some cases, would, in others, be perverted to the protection of fraud and negligence, and the principle of which ought, therefore, be applied by judicial discretion, in every particular case, according to its own peculiar circumstances. Esprit du Code de Commerce, par J. G. Locré, tom. 3, p. 101.

vided, doth not warrant the revival of the suit in the name of the said Amelung and wife, under the circumstances aforesaid." These errors were overruled, and a judgment rendered conforming to the verdict of the jury.

At the trial of this cause, the plaintiff offered in evidence the deposition of Zachariah Roberts, with the accounts thereunto annexed. The deponent states, that he was clerk of Albert Lekamp, from the 10th day of January 1804, to the 9th day of June 1809. That the account B, annexed to his deposition, is a just and true acccount-current taken from the books. That on the 8th day of November 1805, Neil McCoul paid up the balance for goods purchased previous to the 26th of April 1805, with the interest due thereon as stated. He then recapitulates in his deposition, the several items on the debit side of the account-current, which is composed of the sums total of goods delivered on particular days, and "states most positively, that the said items are taken from the account-current of the said Neil McCoul on the said Lekamp's books, which books he kept and has had reference thereto. That viewing and referring to the other paper-writing annexed, marked also with the letter B, beginning with the words, 'a statement of merchandise sold and delivered to Neil McCoul,' he saith, that the several articles of merchandise therein enumerated, specified, described,
*114] and at large set forth and *charged and contained also in the before-mentioned account-current, marked B, were sold by said Albert Lekamp, in his lifetime, and at the respective times at which they are charged to the defendant, Neil McCoul, and were charged in the day-book of the said Albert Lekamp, by the deponent and Mr. Vithake, who is now deceased, and the deponent delivered them," &c. The deposition then proceeds to state, that the prices are correctly stated; that all due credits, so far as he knows, are given; and that the balance is truly struck: and adds, that the deponent, before giving in his deposition, had reference to the original entries on the day-books of Lekamp, which entries were made by Mr. Vithake himself.

The first account, marked B, is, as is stated in the deposition, the account-current. The second account, also marked B, is a particular and detailed enumeration of the articles sold and delivered, with their prices, and agrees in amount with the account-current.

The counsel for the defendant moved the court not to allow the said accounts to go in evidence to the jury, as not being copies of the original entries in the day-books or original books of the plaintiff's intestate; but the court was of opinion, that the account B, beginning with the words "statement," &c., was substantially stated by the witness to be a copy from the day-books, or original books of entries, and that the same was sufficiently proved to go in evidence to the jury, together with the said deposition. The defendants excepted to this opinion.

*115] *Two errors are assigned in the proceedings of the court below: 1st. In reviving this suit, after the abatement of the first *scire facias*, which error ought to have arrested the judgment. 2d. In permitting the account marked B, to go in evidence to the jury.

The first error assigned is of some consequence, as the decision upon it furnishes a rule of practice for all the circuit courts of the United States. The argument for the plaintiff in error is briefly this: At common law, all

suits abate by the death or marriage of the plaintiff, if a *feme sole;* and such suit could not be prosecuted, in the name of the representative, or of the husband and wife, unless enabled so to do by statute. The act of congress provides for the case of death, but not for the case of marriage; consequently, the suit of a *feme sole*, who marries, abates as at common law.

This argument, if applied to an original suit instituted by a *feme sole*, would certainly be conclusive: but this suit was not instituted by a *feme sole*. It was instituted by Albert Lekamp, who died while it was depending. The law says, "that where any suit shall be depending in any court of the United States, and either of the parties shall die before final judgment, the executor or administrator of such deceased party, who was plaintiff, petitioner or defendant, in case the cause of action doth, by law, survive, shall have full power to prosecute or defend any such suit or action until final judgment."

When, therefore, Albert Lekamp died, his administratrix, *since the cause of action survived, had full power given her by the statute [*116 to prosecute this suit until final judgment. The suit did not abate, but continued on the docket, as the suit of Albert Lekamp. It did not become the suit of the administratrix, but remained the suit of the intestate, to be prosecuted by his representative. The marriage of this representative would abate her own suit, but could not abate the suit of her intestate. That still remained on the docket, to be prosecuted by her, according to the letter of the law, as well as its spirit, "until final judgment." If her marriage abated her *scire facias*, and the original suit still remained on the docket, was still depending, then its state was the same as if a *scire facias* had never issued; in which case, all will admit a *scire facias* ought to issue in the name of husband and wife.

This court is unanimously of opinion, that as the original suit did not abate, the *scire facias* in the name of the administratrix, while a *feme sole*, constituted no bar to a *scire facias* in the name of the husband and wife, after her marriage, to enable her still "to prosecute that suit, until a final judgment."

The question which grows out of the bill of exceptions is entirely a question of construction. All admit, that in this action, the delivery of the goods sold must be proved, and that the entries to which the witness may refer must be the original entries made in the day-book. The doubt is, whether, upon right construction, the deposition of Zachariah Roberts amounts to this. He says, that the several articles of merchandise contained in the account *annexed to his deposition, were sold to the defendant, by Albert Lekamp, and were charged in the day-book, by the depon- [*117 ent and another person, who is dead, and that the deponent delivered them. He further swears, that he had referred to the original entries in the day-book. He could not swear more positively to the delivery of the goods than he does; but as it is clear, that he could not, even for a week, recollect each article which is enumerated, he accounts for his recollection, by saying that they were entered in the day-book partly by himself, and partly by another clerk, who is dead, and that he has referred to this day-book. This is an account taken from the original entries, made at the time of delivery, and is, therefore, admissible. The account-current, though agreeing with the

account taken from the day-book, appears not to have gone to the jury.

Judgment affirmed.(*a*)

(*a*) Whatever might have been the doctrine of the civil or Roman law, on this subject, it is certain, that by the codes of the nations of the European continent, which are founded on that law, the books of merchants and traders are, under certain regulations, evidence against those with whom they deal. Thus, by the law of France, the books of traders, regularly kept, may be admitted as evidence, in commercial matters, between persons engaged in trade. Code de Commerce, liv. 1, tit. 2, *Des Livres de Commerce*, art. 12. So also, the books of tradesmen make a semi-proof against all persons dealing with them, the oath of the party being added to this imperfect evidence afforded by the books. To which Pothier adds, that the tradesman must enjoy the reputation of probity; that the books must be regularly kept; that the action must be commenced within a year from the time the articles are delivered; that the amount be not too great; and that there is *nothing improbable in the demand arising from the circumstances and wants of the debtor. *Des Obligations*, Nos. 719, 721.

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By the common law of England, books of account, or shop-books, are not allowed, of themselves, to be given in evidence for the owner; but a clerk or servant, who made the original entries, may have recourse to them to refresh his memory, as to other written *memoranda*, made at the time of the transaction. So, if the clerk or servant, who made the entries, be dead, the books may be admitted in evidence, to show the delivery of the articles, on producing proof of his handwriting. Bull. N. P. 282; Price *v.* Torrington, 1 Salk. 285; s. c. 2 Ld. Raym. 873; Pitman *v.* Madox, 2 Salk. 690. But if the clerk be living, though absent without the jurisdiction of the court, the entries are inadmissible. Cooper *v.* Marsden, 1 Esp. 1.

In most of the United States, the English law on this subject is adhered to as the rule of practice. But in others, it has been changed, either by usage and decisions of the courts founded thereon, or by positive statutes.

Thus, it has been held, by the supreme court of New York (Mr. Justice PLATT dissenting), that where there are regular dealings between the plaintiff and defendant, and it is proved, that the plaintiff keeps fair and honest books of account; that some of the articles charged to the defendant have been delivered to him; and that the plaintiff keeps no clerk, his books of account are, under these restrictions, and from the necessity of the case, admissible evidence for the consideration of the jury. Vosburgh *v.* Thayer, 12 Johns. 461.

In Pennsylvania, and in the eastern states generally, the plaintiff's books of account, together with his suppletory oath, proving the original entries, and the sale and delivery of the articles, are evidence to prove such sale and delivery. Poulteney *v.* Ross, 1 Dall. 238; Sterett *v.* Bull, 1 Binn. 234; Cogswell *v.* Dolliver, 2 Mass. 217; Prime *v.* Smith, 4 Id. 455.

*United States v. Sheldon.

Contraband.

Under the act of the 6th July 1812, "to prohibit American vessels from proceeding to or trading with the enemies of the United States, and for other purposes," *held*, that living fat oxen, &c., are articles of provision and munitions of war, within the true intent and meaning of the act.
Also *held*, that driving living fat oxen, &c., on foot, is not a transportation thereof, within the true intent and meaning of the same act.

February 12th, 1817. This cause was argued by the *Attorney-General*, for the United States, and by *Hopkinson*, for the defendant.

February 26th. Washington, Justice, delivered the opinion of the court.—The defendant, George Sheldon, was indicted in the Circuit Court for the district of Vermont, for transporting, overland, in November 1813, a certain number of fat oxen, cows, steers and heifers, from a place in the United States to the province of Lower Canada. A special verdict was found, which submitted to the court the questions, whether, living fat oxen, cows, steers and heifers, are articles of provision and munitions of war? and whether driving living fat oxen, cows, steers and heifers, on foot, is a transportation thereof, within the true intent and meaning of the act of congress then in force? The judges being opposed in opinion upon both these questions, the cause comes before this court upon a certificate of such disagreement.

*This indictment was founded on the act of the 6th of July 1812; the 2d section of which declares, "that if any citizen of the United [*120 States, or person inhabiting the same, shall transport, or attempt to transport, overland or otherwise, in any wagon, cart, sleigh, boat or otherwise, naval or military stores, arms or munitions of war, or any articles of provision, from the United States to Canada, &c., the wagon, cart, sleigh, boat, or the thing by which the said articles are transported, or attempted to be transported, together with the articles themselves, shall be forfeited; and the person aiding, or privy to the same, shall forfeit to the United States a sum equal in value to the wagon, &c., or thing by which the said articles were transported, and shall moreover be considered as guilty of a misdemeanor, and liable to fine and imprisonment."

In answer to the first question submitted to this court, we are unanimously of opinion, that living fat oxen, &c., are articles of provision and munitions of war, within the true intent and meaning of the above-recited act.

The second question is attended with much more difficulty: Is the driving of living fat oxen, &c., a transportation of them, within the true intent and meaning of the law? There is no doubt, but that the word transport, correctly interpreted, as well as in its ordinary acceptation, means to carry, to convey; and in this sense, it seems to a majority of the court, the legislature intended to use it. The offence is made to consist in transporting in any wagon, cart, sleigh, boat, or *otherwise, the prohibited articles. [*121 Had the words "or otherwise" been omitted, it would scarcely admit of a doubt, that unless the prohibited articles had been conveyed on some one of the enumerated vehicles, no offence would have been committed, within the words or the meaning of the law. What then is the correct interpretation of these expressions, taken in connection with the other parts of the section?

To transport an article in a wagon, or otherwise, would seem necessarily to mean to carry or convey it in that or in some other vehicle, by whatever name it might be distinguished. If these words are construed to mean, a removal of the article from one place to another, otherwise than in a vehicle, it might well admit of a doubt, whether a removal in a vehicle, other than one of those which are enumerated, would be a case within the law. But so far from this matter being left a doubt by the law, we find, that when the punishment by way of forfeiture is prescribed, the words "or otherwise" are very plainly construed to mean the thing by which the articles are transported; thus distinguishing between the thing which transports, and the thing which is transported.

It may be admitted, that the mischief is the same, whether the enemy be supplied with provisions in the one way or the other; but this affords no good reason for construing a penal law by equity, so as to extend it to cases not within the correct and ordinary meaning of the expressions of the law, particularly, when it is confirmed by the interpretation which the legislature
*122] has given to the same expressions in the *same law. If it were impossible, to satisfy the words "or otherwise," except in the way contended for on the part of the United States, there would be some reason for giving that interpretation to them. But it has been shown, that this is not the case.

It was contended by the attorney-general, that these questions were in effect settled in the case of the *United States* v. *Barber*, 9 Cr. 243. But this is clearly a mistake. The only question in that case which was referred to this court, was, "whether fat cattle are provisions or munitions of war?" The decision of this court was in the affirmative. But whether the fat cattle were dead or alive, and if the latter was to be intended, whether they were driven or transported in some vehicle, did not appear, and of course, the law arising out of that state of facts was not, and could not be decided.

Upon the whole, it is the opinion of a majority of this court, that driving living fat oxen, &c., on foot, is not a transportation thereof, within the true intent and meaning of the above-recited act of congress.

Judgment for the defendant.

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*123] *The Mary.

Prize.—Rights of captors.

Where an enemy's vessel was captured by a private armed vessel of the United States, and subsequently dispossessed by the force or terror of another; the prize was, under the circumstances of the case, adjudged to the first captor, with costs and damages.

Appeal from the Circuit Court for the district of Massachusetts. The British schooner Mary, whereof Charles Thomas, jr., a British subject, domiciled at St. Johns, New Brunswick, was late owner and master, sailed under convoy from St. Johns, New Brunswick, bound to Castine, then in the military occupation of the British, laden with a cargo, the growth, produce and manufacture of British possessions, shipped by British merchants domiciled in St. Johns, New Brunswick, to merchants resident in Castine.

The schooner Mary was captured by the private armed schooner Cadet,

between Duck Island and Mount Desert, on the night of the 25th of December 1814, between the hours of 11 and 12; the convoy under which the Mary sailed was in sight of the Mary, at the time of her capture; but no other vessel was in sight at that time. The Cadet came up with the Mary so suddenly, that she had no opportunity to make resistance, or give notice to the convoy of her danger. After the capture of the Mary, the principal part *of her cargo was taken on board the Cadet, carried into the [*124
district of Massachusetts, and in the district court of said district, condemned to the Cadet as prize of war.

On the morning of the 26th of December, after sunrise, the Cadet and Mary being then in company, an armed brig, the Paul Jones, was discovered by them, under such suspicious circumstances, as to induce them to believe her to be a British cruiser, and in consequence, to part and steer different courses. The sails of the Paul Jones were of English canvas. She pursued the Mary, firing at her, until between 4 and 5 o'clock, P. M. of the 26th of December; the Mary had then arrived in a bay of the United States, to wit, Wheeler's bay, a bay frequented by American vessels. The Mary being within half a mile of the shore, and within the same distance of the Paul Jones, and being in such a situation as rendered it certain, that she must be intercepted by the Paul Jones, the prize-master and crew, considering it certain, from her appearance and actions, that the Paul Jones was an English cruiser, left the Mary for the shore, after having thrown over her anchor, and ordered the British master, and his son of twelve years of age, who were left on board, to pay away the cable. After the prize-crew left the Mary, the British master hoisted English colors, and steered the schooner towards the Paul Jones.

Ten minutes after the prize-crew left the Mary, she was boarded by a boat from the Paul Jones, when the English master informed them that the *Mary was an English vessel, prize to the Cadet, when the Paul [*125
Jones immediately stood off from the land, with the Mary in company, with English colors still flying. A boat, then out to the windward of the Mary, and within musket-shot, or a quarter of a mile distant from her (the crew then lying on their oars, the sea smooth, and the wind light), repeatedly hailed the Mary, both and after she was boarded by the Paul Jones, and received no answer.

The prize-master of the Mary, immediately on his getting on shore, dispatched a boat on board her, to ascertain the national character of the vessel by whom she was boarded, and claim her, if the boarding vessel should prove American; but before the boat could get off, the Paul Jones had sailed, with the Mary in company.

Libels against the Mary and cargo were filed in the district court for the district of Maine, by David Elwell, in behalf of himself, and the owners, officers and crew of the private armed schooner Cadet, and by John Thomson Hilton, in behalf of himself, and the owners, officers and crew of the private armed brigantine Paul Jones. The Mary and cargo were condemned in the district court for the district of Maine, to John Thomson Hilton, and the owners, officers and crew of the Paul Jones. An appeal was entered from said decree, by David Elwell, and the owners, officers and crew of the Cadet, in the circuit court of Massachusetts. In consequence of the affinity of the judges to the parties, the decree of the district court

of Maine was, *by consent of parties, affirmed *pro formâ*, and the cause brought, by appeal, to this court.

Jones, for the appellants.—This is a case of novel impression as to the circumstances, but long since settled in principle. The prize-crew of the Cadet were driven out of the Mary by the terror of the force of the Paul Jones. It is not the case of a prize abandoned and taken as *res nullius*, nor retaken by the original British crew, and re-captured by the Paul Jones. The prize was in a place of safety, *infra præsidia;* not constructively, as of a fleet, or a neutral port, but of a port of the captor's country. In order to constitute a dereliction of the property acquired in the thing captured, the abandonment must be voluntary, and with intent to relinquish the right acquired. The origin of this principle is to be found in the Roman code, which distinguishes between a voluntary and compulsory abandonment of possession; the first changing the right of property, whilst the latter has no
*127] such effect.(*a*) It is applied to *the law of prize, by the different elementary writers.(*b*) It was practically enforced in the case of *The Lord Nelson*, Edw. 79, and by this court in the case of *The Mary Ford*, 3 Dall. 198. Striking the colors is to be deemed the real *deditio*, and the consummation of the capture. *The Rebeckah*, 1 Rob. 195. So also, the capture is held to be consummated, where the prize is completely under the dominion of the captor, has no ability to resist, and no prospect of escape. *The Edward and Mary*, 3 Rob. 246. Here was no re-capture by

(*a*) Just. Inst. lib. 2, tit. 1, § 46, 47. *Alia sane causa est earum rerum, quæ in tempestate levandæ navis causa ejiciuntur. Hæ enim dominorum permanent: quia palam est, eas non eo animo ejici, quod quis eas habere nolit, sed quo magis cum ipsa navi maris periculum effugiat. Qua de causa, si quis eas fluctibus expulsas, vel etiam in ipso mari nactus, lucrandi animo abstulerit, furtum committit.* So also, D'Habreu, in commenting on the 9th article of the French prize ordinance (which prescribes, that if a captured vessel, not having been re-captured, is abandoned by the enemy, or if, by storms or other accidents, it returns into the possession of French subjects, before having been carried into any enemy's port, it shall be restored to the former owner, if claimed within a year and a day, although the possession of the enemy may have continued more than twenty-four hours), makes the following observation: "*Quoique l'article de l'ordonnance ne paroisse pas faire la différence entre un vaisseau abandonné par les ennemis, et elui qui l'a été par l'effet d'une tempête ou de quelque autre accident imprévu; il est néanmoins certain qu'il y en à quelqu'une. Nous n'entreprendrons point ici de la faire sentir: outre que cela nous écarterait de notre objet, il n'est personne, tant soit peu versé dans la jurisprudence, qui ignore que l'abandon volontaire fait perdre la propriété, tout au contraire de celui qui est forcée.*" D'Habreu on Prizes, ch. 5, § 10, tom. 2, p. 95, of M. Bonnemant's Translation.

(*b*) Bynkershoek, Q. J. Pub. ch. 4, p. 35, of Du Ponceau's Translation; Id. ch. 5, p. 36; 2 Azuni, part 2, ch. 4, art. 5, § 1, 3, 7; 2 Wooddeson, 454; see also, Goss *v.* Withers, 2 Burr. 693. In that case, the true distinction on this subject is alluded to by Lord MANSFIELD, that by whatever length of time, or other circumstance, the property in prizes is vested, so as to bar the former owner, in case of re-capture or sale, "the instant the captor has got possession, no friend, no fellow-soldier, or ally, can take it from him; because it would be a violation of his property." And it is in this sense must be understood what is repeated by so many writers from the civil law. *Quæ ex hostibus capiuntur, statim captentium fiunt.* An inchoate title immediately accrues, as against any cruiser of the same nation, or its allies in the war, which title cannot be divested but by a voluntary abandonment on the part of the first captor. 2 Wooddes. 455.

the enemy *crew, because no resistance nor escape; and the British master could clearly not have maintained a claim for salvage, in the courts of his own country, had the Paul Jones turned out to be a British privateer.

Webster, contrà.—This is a case of voluntary relinquishment of the prize; and even if it was produced by terror of a supposed enemy, that will not make it involuntary. The case of *The Lord Nelson* does not determine the present case; but Sir WILLIAM SCOTT there puts the very case now before the court, and decides it by asking, "Suppose, therefore, that after this voluntary abandonment, the ship had been met with by some French cruiser, and that by means of jury-masts, they had succeeded in carrying her into a French port; can there be any doubt, that she would have been prize to the second captor?" In the case of *The Ann*, which was a question of jurisdiction in a revenue cause, the seizure being abandoned before adjudication, this court illustrate their opinion, by analogy to the prize law, holding, that capture gives no authority to proceed to adjudication, if abandoned before judicial proceedings are commenced. 9 Cranch 289. So also, in the case of *The Astrea*, it was determined, that an interest acquired by possession is divested by the loss of possession, from the very nature of a title acquired in war. 1 Wheat. 125. The case of *The Adventure* is likewise in point. (Ibid. note.) There was no fraud on the part of Paul Jones. She had a right to chase under any colors; *but she neither chased nor fired under enemy's colors; whilst the prize showed no colors, and therefore, invited pursuit; and was found in the possession of her original British master, and therefore, authorized detention. She was not *infra præsidia*, whilst lying in Wheeler's Bay; but even supposing she had been, if she was afterwards abandoned by her original captor, the Paul Jones had a right to take possession. The prize-master did not think it worth while to risk being taken prisoner, and therefore, abandoned his prize. [*129

Jones, in reply.—The case supposed by Sir WILLIAM SCOTT, in delivering his judgment in *The Lord Nelson*, is of a voluntary abandonment, and not one produced by the application of force or terror. In the case of *The Ann*, this court, though incidentally describing the general doctrine, adhere to their accustomed accuracy and precision of language. "A voluntary abandonment," is the phrase used by the learned judge, who delivered the opinion of the court; and he proceeds to state, "It is not meant to assert, that a tortious ouster of possession, or fraudulent rescue, or relinquishment after seizure, will divest the jurisdiction." The precedent of *The Astrea* does not apply. In that case, there was a capture and re-capture, and a second re-capture; but no question whether the abandonment by the first captors was voluntary or not. The case of *The Adventure* was not a question of derelict; but whether the belligerent may invest a neutral with his rights at sea, in fraud of the contingent right of re-capture by the *other belligerent. The question here is not whether fraud was used, but whether force was used. The prize-crew supposed they were surrendering to British captors: but the Mary was not in a situation to be captured by a cruiser of the United States; she was not derelict, but lying in a road-stead, which is a *præsidium*, though not guarded by forts and castles. [*130

The Mary.

February 14th, 1817. JOHNSON, Justice, delivered the opinion of the court.—We are of opinion, that the facts stated in this appeal, make a clear case of tortious dispossession on the part of the Paul Jones. The privateer Cadet had, with great gallantry, captured the Mary, and been in possession of her, part of a night and day. The prize was close in upon the American coast, and making for a port which was open before her. It was not until the superior sailing of the Paul Jones made it manifest, that the prize must be cut off from this port, and until she had been repeatedly fired upon, that the prize-crew abandoned her. There exists not a pretext in the case, that this abandonment was voluntary, or would have taken place, but for the hostile approach of the Paul Jones. Whether the *vis major* acted upon the force or the fears of the prize-crew is immaterial, since actual dispossession ensued.

But it is argued, that the Paul Jones showed American colors; the Mary ought not, therefore, to have feared her: the Mary showed no colors, she, therefore, invited pursuit; and finally, that the Paul Jones found her
*131] in the actual possession of her *original master, and therefore, could not have done otherwise than detain her. We think otherwise. It was more probable, that an enemy would show false than true colors. The circumstance of the Mary standing in for a friendly shore, was less equivocal evidence of her character, than the exhibition of colors; and after boarding the Mary, and learning that she was a prize to the Cadet, it was the duty of the captor, to have repaired the injury he had done, and either by making signals, sending a boat on shore, or a message by the boat that did come off, to have recalled the prize-crew of the Cadet. But instead of this, she instantly mans the prize, bears away from the harbor, which was close under their lee, and, by carrying English colors, until out of sight, completes the conviction of the prize-crew that the re-capture was by an enemy.

We are of opinion, that the decision of the circuit and district courts should be reversed; that the prize should be adjudged to the Cadet; and the case remanded for the assessment of reasonable damages in favor of the Cadet. But, considering that the prize arrived in safety, and probably in a more secure harbor than that for which she was sailing, when seized by the Paul Jones (although it is certainly a case for damages), we are of opinion, the damages should be moderate.[1]

Sentence reversed.(*a*)

(*a*) Mr. Justice STORY did not sit in this cause.

[1] For a further decision in this case, see 1 Mason 365.

*The San Pedro: Valverde, Claimant.

Appeal in admiralty.

Under the judiciary act of the 24th of September 1789, ch. 20, and the act of the 3d of March 1803, ch. 93, causes of admiralty aud maritime jurisdiction, or in equity, cannot be removed by writ of error from the circuit court, for re-examination in the supreme court.[1]

The appropriate mode of removing such causes, is by appeal; and the rules, regulations and restrictions contained in the 22d and 23d sections of the judiciary act, respecting the time within which a writ of error shall be brought, and in what instances it shall operate as a *supersedeas;* the citation to the adverse party, the security to be given by the plaintiffs in error for prosecuting his suit, and the restrictions upon the appellate court as to reversals in certatn enumerated cases, are applicable to appeals under the act of 1803, and are to be substantially observed; except that where the appeal is prayed at the same term when the decree or sentence is pronounced, a citation is not necessary.

Error to the Superior Court of the Mississippi territory. This was a libel of information filed in that court, against the schooner San Pedro and cargo, alleging, 1st. That the San Pedro departed, on the 1st of February 1813, from Mobile, for the island of Jamaica, a colony of Great Britain, in violation of the embargo act of the 22d December 1807, and the several acts supplementary thereto; of the non-intercourse act of the 1st of March 1809; and of the laws of the United States. 2d. That sundry goods, wares and merchandise were imported in the San Pedro, into *the district of Mobile, on the first day of May 1813, from the said island of Jamaica, [*133 in violation of the non-intercourse act. 3d. That sundry goods, wares and merchandise "were intended to be imported in the San Pedro, from the said island of Jamaica, into the United States, and into the district of Mobile, contrary to the provisions of the non-intercourse act," &c.

The San Pedro was originally a vessel of the United States, called the Atlas, and the property of Philip A. Lay, of New Orleans; but had given up her register, and (as alleged) was transferred to Mr. Valverde, a Spanish subject, resident at Pensacola. On the 1st of February 1813, she sailed from Mobile, with a cargo of cotton and tobacco, for Jamaica, which was disposed of there; and on the 10th of April 1813, she sailed from Jamaica, with a cargo, on her return-voyage for the coast of Florida. On the 23d of April, she was captured and brought into Mobile, by an American gun-boat, and on the 29th of the same month, was liberated by the commander of the flotilla, and seized by the collector of the port, in whose name the libel was filed. It was contended by the libellants, that the transfer of the vessel was collusive and fraudulent, and that she, together with the cargo, belonged to citizens of the United States.

A claim was interposed on behalf of Mr. Valverde, and the vessel and cargo were decreed to be restored, in the court below; from which decree, the cause was brought, by writ of error, to this court.

February 13th. The *Attorney-General*, for the United States, argued *in support of the first count in the libel, that the non-intercourse act [*134 was to be considered as in force, after the declaration of war, being cumulated upon the law of war, as administered in the prize court, by which all trade and intercourse with the enemy is prohibited, under the penalty of confiscation. It, therefore, became immaterial, whether the property was

[1] McCollum *v.* Eager, 2 How. 61; Minor *v.* Tillotson, Id. 392.

Spanish, or belonged to citizens of the United States. If Spanish, it was confiscable, as the property of neutrals, trading with a British colony, from the United States, contrary to the non-intercourse act. If the property of citizens of the United States, it was liable to seizure and condemnation, being taken in trade with the public enemy. The general allegation in this count, of a breach of the laws of the United States, was sufficient to cover the latter offence. Mobile was, at the time of this transaction, a port in possession of the United States, having been annexed to their territories by the acts of congress of the 14th of May 1812, and the 12th of February 1813.

Harper, contrà.—1. The embargo laws had ceased to exist, at the time of this transaction, and therefore, the first count in the libel, alleging a breach of those laws, cannot be supported. 2. The non-intercourse laws had merged in the act declaring war. By the law of war, all commercial intercourse with the enemy is prohibited, and the court has considered the laws restricting trade, as superseded by the law of war.

*135] *Marshall, Ch. J.—The court has never considered the non-intercourse law as merged in the law of war, as to *neutrals*.

Harper.—3. But supposing the non-intercourse laws to be in force, they can only apply in two cases, 1st. To British goods put on board, with an intention to import the same into the United States. 2d. To British goods actually imported. The third count of the libel is fatally defective in alleging, not that they were put on board, with intention to import, &c., but that they were intended to be imported ; and under the second count, there is no proof of the growth, produce or manufacture of the goods. If a presumption arises of their British origin, from the circumstance of their being laden in a British colony, it is a case of further proof, and the court will not condemn, without first allowing the claimants an opportunity to repel that presumption.

4. The act of congress of the 12th February 1813, did not, *proprio vigore*, make the port and district of Mobile the territory of the United States. The legal right ought to have been asserted by actual possession, in order to consummate the title.(*a*) But possession was not taken, until after the sailing of the vessel from Mobile, although before her return to the coast

*136] of Florida from Jamaica ; and there is no proof, that *this change of dominion was known to the parties when the goods were shipped at Jamaica.

5. The question, whether the ship and cargo are confiscable as a *droit* of admiralty, for the offence of trading with the enemy, depends upon the question of fact, whether they are the property of a citizen or a neutral ; and it being an admiralty cause, the claimants are entitled to the privilege of further proof, if there be doubt upon the fact.

6. There is a fatal irregularity in form, in bringing up the cause by writ

(*a*) See, on this subject, an instructive case in 5 Rob. 97 (The Fama), in which Sir William Scott determined, that the national character of Louisiana, agreed to be surrendered by the treaty of St. Ildefonso, in 1795, by Spain to France, but not actually transferred, continued as it was, under the ceding country.

of error, which is a common-law process, not applicable to admiralty or chancery causes, which are to be brought up by appeal, under the judiciary act of the 24th February 1789, and the act of the 3d March 1803.

The *Attorney-General*, in reply.—The laws of non-intercourse were no further merged in the law of war, than as concerned captors. If the property be that of a citizen, it is confiscable as a *droit* of admiralty, under the law of war.(*a*) If it be neutral, then *the non-intercourse act still [*137 applies to it, and it must be confiscated under the seizure by the revenue officers. If the port of Mobile had become, *de facto*, a possession of the United States, before the offence of importation was committed, it is immaterial, whether the party had a previous knowledge of this transfer of territory or not; and the fact of the goods coming from a British port, is conclusive evidence of their origin, and ought to exclude further proof on this point.

March 1st, 1817. WASHINGTON, Justice, delivered the opinion of the court.—This is an admiralty case, brought into this court from the superior court of the Mississippi territory, by writ of error, and a preliminary question has been made, and is now to be decided, whether this is the proper process for removing a cause of admiralty and maritime jurisdiction into this court for re-examination? A similar objection has been taken in a number of equity cases standing on the docket, removed into this court by similar process from the circuit courts. The questions which these objections have given rise to, resolve themselves into the two following: *1. Whether the decree or sentence of a circuit court, in cases of [*138 equity and of admiralty and maritime jurisdiction, can be removed into the supreme court for re-examination, by writ of error? 2. If they cannot, then, by what rule are appeals in those cases to be governed?

In deciding these questions, our attention is confined to a few sections of the act of the 24th September, 1789, ch. 20, and to the 2d section of the act of March 3d, 1303, ch. 93. The 22d section of the former of these laws declares, that from any final judgment or decree, in civil actions and suits in equity, brought in a circuit court by original process, or removed there from a state court, or by appeal from a district court, a writ of error may be

(*a*) The Sally, 6 Cr. 282. In that case, it was determined, that the municipal forfeiture, under the non-intercourse act, of enemy's property, or of the property of citizens taken in a trade with the enemy, was absorbed in the more general operation of the law of war, and that the prize act of the 26th June 1812, ch. 107, operates as a grant from the United States, of all property rightfully captured by commissioned privateers, as prize of war. The same doctrine had been before settled by Sir William Scott, in the case of The Nelly (1 Rob. 219, in a note to The Hoop), where the court held, that the same course of decisions, which had established, that the property of a subject, taken trading with the enemy, is forfeited, has decided also, that it is forfeited as prize. The ground of the forfeiture is, that it is taken adhering to the enemy, and therefore, the proprietor is, *pro hâc vice*, to be considered as an enemy. In the case of The Etrusco, the Lords of Appeal had reserved the question, whether the property claimed by a British subject should be condemned by the crown or the captors: but the illegality of trade in that case was of a different nature, that being a trade in violation of the charter of the East India Company. It was finally determined by the Lords, in The Etrusco, that the property should be condemned, not to the individual captor, but to the king. 4 Rob. 256, The Caroline, in a note.

brought to the supreme court, at any time within five years, the citation being signed by a judge of such circuit court, or by a justice of the supreme court, and the adverse party having at least thirty days' notice. This section then provides, that the judge who signs the citation shall take sufficient security that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs, if he fail to do so. The 23d section declares, under what circumstances a writ of error shall operate as a *supersedeas.*

The act of 1803 declares, that from all final judgments or decrees in a circuit court, in cases of equity, of admiralty and maritime jurisdiction, and prize or no prize, an appeal shall be allowed to the supreme court; that a transcript of the libel, bill, answers, depositions, and all other proceedings
*139] in the cause, *shall be transmitted to the supreme court, and that no new evidence shall be admitted on such appeal, except, in admiralty and prize causes. The act then provides, that such appeals shall be subject to the same rules, regulations and restrictions as are prescribed by law in in cases of writs of error, and it repeals so much of the 19th and 22d sections of the act of 1789 as comes within the purview of this act.

1. The first question depends upon the meaning attached by the legislature to the word "purview." It is contended by the plaintiff in error, that it ought to be confined to such parts of the 19th and 22d sections as are inconsistent with the provisions of the act of 1803. If this be the correct interpretation of the term, it is then insisted, that there is no incongruity between the two remedies, by appeal and writ of error, even in admiralty and equity cases, and consequently, that the former remedy is to be considered as merely cumulative. But the court does not yield its assent to that interpretation. Wherever this term is used, it is manifestly intended to designate the enacting part or body of the act, in contradistinction to the other parts of it, such as the preamble, the saving and the proviso. And an attentive consideration of the subject-matter of the two laws, to which our inquiries are confined, will lead very strongly to the conclusion, that congress meant to use the term in this sense.

It is obvious, that the 22d section of the act of 1789, was so intimately connected with the 19th section, so far as it respected the appellate jurisdiction of the supreme court, in admiralty and equity cases, that the remedy
*140] *provided by the former would have been, in most cases, inoperative, without the aid of the latter. Had the law merely provided the remedy by writ of error in those cases, nothing but the proceedings, together with the sentence or decree, would have been open to the inspection and re-examination of the supreme court. But, as in a great majority of those cases, the correctness or incorrectness of the decision of the inferior court could depend upon the evidence given in the cause, the remedy by writ of error, without some further legislative provision for carrying before the appellate court the facts or the evidence, would have been altogether defective and illusory. We find, accordingly, that the 19th section provides, that the circuit courts, in cases of equity and of admiralty and maritime jurisdiction, shall cause the facts on which they found their sentence or decree, fully to appear upon the record, either from the pleadings and decree itself, or a case agreed by the parties, or their counsel, or, if they disagree, by a stating of the case by the court. Thus, upon a writ of error

in equity and admiralty cases, the supreme court was furnished with the facts upon which the inferior court decided, though not with the evidence, and might, therefore, correct the errors of that court, so far as they existed in wrong conclusions of law, from the facts stated.

Now the 19th section contains but the single provision which has been just mentioned, and consequently, if any part of it be repealed by the act of 1803, the whole must be; and if the whole, then the writ of error provided by the 22d section in admiralty *and equity cases would be rendered, as before observed, altogether ineffectual for the purpose for which [*141 it was intended, in every case where the error complained of in the sentence or decree, existed in wrong conclusions from the evidence or the facts.

Even the provisions of the 29th section were, in the view of congress, defective, and must appear so to every person conversant with the practice of courts proceeding according to forms of the civil law. The error of the inferior court may frequently consist, not in wrong conclusions of law from the facts, but in wrong conclusions of fact from the evidence. We are warranted in saying, that this defect in the former law was perceived by the legislature, and was intended to be remedied by the provision in the act of 1803, that the evidence (instead of the facts) should accompany the record into the appelllate court.

Upon the whole, it is manifest, that the subject of the two laws is the same, namely, the appellate jurisdiction of the supreme court, and the manner of exercising it. The manner of exercising it, as prescribed by the act of 1789, is essentially changed by the act of 1803, and is, consequently, repealed by it, because it is within the purview of the latter law, being provided for in a different way. By this construction, the appellate jurisdiction of the supreme court is made to conform with the ancient and well-established principles of judicial proceedings. The writ of error, in cases of common law, remains in force, and submits to the revision of the supreme *court only the law. The remedy by appeal is confined to admiralty and equity cases, and brings before the supreme court the facts as [*142 well as the law.

2. The second question is attended with much less difficulty. The act of 1803, after requiring that the libel, bill, answers, depositions, and all other proceedings in the cause, shall be transmitted to the supreme court, and that no new evidence shall be admitted on such appeal, except in admiralty and prize causes, provides, that such appeals shall be subject to the same rules, regulations and restrictions, as prescribed in cases of writs of error. These rules, regulations and restrictions are contained in the 22d and 23d sections of the act of 1789, and respect the time within which a writ of error may be brought, and in what instances it shall operate as a *supersedeas:* the citation to the adverse party; the security to be given by the plaintiff in error for prosecuting his suit; and the restrictions upon the appellate court as to reversals, in certain enumerated cases. All these are, in the opinion of a majority of the court, applicable to appeals under the act of 1803, and are to be substantially observed, except that where the appeal is prayed at the same term when the decree or sentence is made, a citation is not neeessary. (*Reily* v. *Lamar and others*, 2 Cranch 349.) It follows, that an appeal, in admiralty, equity and prize causes, may be taken at any time within five years from the final decree, or sentence being pronounced, subject to the

saving contained in the 22d section of the act of 1789, which is one of the points that was discussed at the bar.

*143] *This opinion is consistent with the case of the *United States* v. *Hooe* (3 Cranch 73), although from the report of that case it would seem to be otherwise. The record has been examined, from which it appears that that case came up upon an appeal, and not upon a writ of error.

The writ of error, in this case, must, therefore, be dismissed. (*a*)

The Ariadne: Goddard *et al.*, Claimants.

Enemy's license.

The sailing under the enemy's license constitutes, of itself, an act of illegality, which subjects the property to confiscation, without regard to the object of the voyage or the port of destination.

Appeal from the Circuit Court for the district of Pennsylvania. This vessel, belonging to citizens of the United States, and laden with a cargo of flour, also belonging to citizens of the same, was captured, on the 15th day of October 1812, on a voyage from Alexandria to Cadiz, with a license or passport of protection from the British admiral Sawyer. The vessel and

*144] cargo were restored in the district court; *but on appeal, sentence of condemnation was pronounced by the circuit court, from which sentence an appeal was entered to this court.

February 14th. *G. Sullivan*, for the appellants and claimants, offered to read further proof, taken under the standing rule of the court (25th rule, Feb. term 1816).

Woodward, and *C. J. Ingersoll*, for the captors, denied the authority of the rule under which the further proof was taken. They argued, that the act of congress did not provide for taking depositions, to be used as further proof in prize causes, except where the course of prize practice authorizes it; that further proof is never admissible, until the cause is heard on the original evidence.

Marshall, Ch. J., called on the claimants' counsel to show what facts the further proof tended to establish, and stated, that if the case could be distinguised from the former determinations respecting licenses, a foundation would be laid for the admission of the depositions as further proof.

Webster, for the appellants and claimants, contended, that this case could be distinguished from those which had been decided. In the case of *The Julia*, 9 Cr. 181, the court had said, "We hold, that the sailing on a voyage, under the license and passport of protection of the enemy, in furtherance of his

*145] *views or interests, constitutes such an act of illegality, as subjects the ship and cargo to confiscation as prize of war; and that the facts of the present case afford irrefragable evidence of such an act of illegality." This proposition, as a doctrine of law, would be equally true, leaving out all that it contains relative to a license. A voyage prosecuted in furtherance

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(*a*) The cause was afterwards re-entered, by consent of parties, and continued for further proof, as if it had been removed by appeal.

of the enemy's interests is undoubtedly illegal, and it was on this illegality of the voyage itself that the judgment of the court proceeded. The court say, they are satisfied from the facts, that the voyage was illegal. In the case now before the court, the captors insist, that the court shall shut out the facts connected with the voyage, and go merely on presumption. *The Julia* cannot be an authority for such a decision. *The Aurora*, 8 Cr. 283, was decided expressly on the grounds which had been before stated in *The Julia*, and carries the doctrine no further. In the case of *The Hiram*, 8 Cr. 444, 1 Wheat. 440, no evidence was offered on the part of the claimants, to repel the presumption arising from the license. That case then only decides, that from the possession of the license, the court may presume, until the contrary appears, that the voyage was in furtherance of the enemy's objects.

In all these cases, the court seems to have rested its decision on the ground, that the voyages, in which the vessels were engaged, were, of themselves, illegal voyages, undertaken and prosecuted for the promotion of the enemy's interests; and that *this illegality was shown by the facts which the cases disclosed. But it is not understood to have decided, [*146 that it would hear no proof to make out the innocence of the voyage, notwithstanding the unfavorable inferences which might be drawn from the possession of the license. In the present case, such proof is offered, and the claimants are ready to show, that the voyage originated in no intention to further, and from its nature could not further, the objects of the enemy. It was a voyage from Baltimore to Cadiz, with flour, at a time when neither the British nor the Spanish armies drew supplies from that city. They expect to prove it to have been, in all respects, as innocent as a voyage from Baltimore to Boston with a similar cargo. Upon this application for permission to give proof, and until the court should hear the proof, the only question will be, whether, in the most innocent voyage which can be imagined, the having such a license is, *per se*, cause of confiscation; and cannot, in any case, by any evidence, admit of explanation or excuse. On this point, the claimants' counsel wish to be heard, unless the court considers itself as having recently solemnly decided the precise question. We will contend, that although the possession of such a license might create a presumption of unlawful trade, yet, like presumptions in other cases, it is capable of being repelled by proof; and that the judgment of the court must rest, after all, on the real nature and object of the voyage, as disclosed by the facts connected with it, and not on the mere terms of the passport. In a case of this sort, the court will *not incline to hold herself bound by former decisions, [*147 beyond their clear and manifest extent. No case appears to have gone so far as to prevent the court from hearing proof of the lawfulness of the voyage, independent of the license, or to have decided that such proof, when full and satisfactory, should not avoid confiscation.

Woodward and *Ingersoll*, on the other side, were stopped by the court.

Washington, Justice, delivered the opinion of the court.—The view of the court is, that this case cannot be distinguished from those already decided. It is alleged, that the flour was not actually destined to the use of the enemy; but whether any part of it went to his use or not, is immaterial. It is, indeed, possible, that Cadiz might have fallen, without the aid of these

supplies ; and therefore, in fact, Great Britain and her ally may have been relieved, by these supplies, from the pressure of the war in that quarter. The court, however, in the cases alluded to, proceeded on a broader ground : all the judges who concurred in those decisions, were of opinion, that the mere sailing under an enemy's license, without regard to the object of the voyage, or the port of destination, constituted, of itself, an act of illegality, which subjected the property to confiscation. It was an attempt by one individual of a belligerent country to clothe himself with a neutral character
*148] *by the license of the belligerent, and thus to separate himself from the common character of his own country.

Sentence affirmed.

The William King : Davis *et al.*, Claimants.

Embargo.

Under the embargo act of the 22d December 1807, the words "an embargo shall be laid," not only imposed upon the public officers the duty of preventing the departure of registered or sea-letter vessels, on a foreign voyage, but consequently, rendered them liable to forfeiture, under the supplementary act of the 9th of January 1808.

In such case, if the vessel be actually and *bonâ fide* carried by force to a foreign port, she is not liable to forfeiture.

The court being of opinion, under the facts and circumstances of the case, that the capture under which it was alleged the vessel was compelled to go to a foreign port, was fictitious and collusive, the decree of condemnation in the court below was affirmed.

Appeal from the Circuit Court for the district of New York. A libel was filed against this vessel, in the district court of New York, March 1809, for a breach of the act of the 22d of December 1807, laying an embargo, and the several acts supplementary thereto, alleging, that she proceeded
*149] from Baltimore, without any clearance or permit, bound on a voyage *to Exuma, one of the Bahama islands, where she took in a cargo of 6000 bushels of salt, with which she returned to New York.

The claimants admitted the fact of going to Exuma, and bringing away the salt, but alleged that it was from necessity ; that the brig was regularly bound to Boston, but, being captured soon after she left Hampton Roads, by a British privateer, was sent to Jamaica, where she sold the cargo of flour which she had on board, the government of that colony not allowing it to be brought off ; that she then went to Exuma.

The testimony in the case exhibited the following summary : About the middle of October 1808, the vessel arrived at Baltimore from Boston. At Baltimore, she took on board a cargo of upwards of 1600 barrels of flour, and sailed again, ostensibly for Boston, about the first of November. On reaching Hampton Roads, she stopped a few days, being, as was asserted, wind-bound. While there, a British privateer, of ten guns and twelve men, called the Ino, arrived in the Roads. On the eighth of the month, the brig put to sea, the Ino following her. On the afternoon of the same day, the Ino captured her, within ten leagues of the shore, putting a prize-master and one man on board ; the vessels then proceeded to the West Indies. During the voyage, no attempt was made by the crew either to retake the brig or to escape, though favorable opportunities were not wanting ; her crew consisted of nine persons. After a short separation from the privateer,

the brig arrived off St. Nichola Mole; *here the privateer joined her, and thence the two went to Kingston. No prize proceedings were instituted against the brig; but on the contrary, the supposed captors relinquished all claim to their prize, on reaching Kingston. From Kingston, she went to Exuma, as above stated. The district court, on the hearing, pronounced a sentence of condemnation; a decree of affirmance, *pro formâ*, was entered in the circuit court, from which the cause was brought, by appeal, to this court.

Hoffman, for the appellants and claimants, stated, that this case was governed by the authority of *The Short Staple*, 9 Cr. 55; the William King having sailed from Hampton Roads in company with that vessel, and both were seized by the British privateer Ino, and compelled to go to the West Indies. The two cases are perfectly coincident in their circumstances, and restitution having been decreed in the case of *The Short Staple*, the same judgment must, consequently, be pronounced in the present case. He argued, that the whole plan and system of the revenue laws indicated that it was not the legislative intention to cumulate a forfeiture of the ship (being a registered vessel) upon the penalty of the bond which had been given for re-landing the cargo in the United States.

The *Attorney-General* and *Hopkinson*, contrà.—The court expressly overruled the point made as to *the construction of the embargo laws, [*151
in the case of *The Short Staple*,(a) although that case was determined, on its peculiar circumstances, by a majority of the court, in favor of the claimants. But the restitution of the Short Staple, on the facts of her case, forms no ground for the acquittal of the William King, even should the facts be precisely similar. Principles of law form precedents. But an inference from evidence is not conclusive as to facts, in another cause, whether the testimony be the same, or different; certainly not, if it be different.

Hoffman, in reply, argued, that the court could not, without judicial inconsistency, decide this case differently from that of *The Short Staple*, unless there was some substantial and important difference in the facts of the two cases; that the opinion of a majority of the court, was the opinion of the court, and a rule of conduct, whether formed upon an abstract point of law, or upon a mixed question of fact and law; and that, to maintain the contrary position, would be to assent to an assertion, which had been hazarded in another place, that the decisions of this court are not binding as legal precedents on themselves and on others.

*February 14th, 1817. JOHNSON, Justice, delivered the opinion [*152
of the court.—This case comes comes up on appeal from the circuit court of New York. The vessel is the same which makes her appearance in the case of *The Short Staple*, decided in this court at February term

(a) In delivering the opinion of the court in that case, Mr. Chief Justice MARSHALL stated, that this point had "been pressed with great earnestness by the counsel for the claimants; 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." 9 Cranch 60.

1815; and it has been contended, that the acquittal in that case is conclusive upon this. But we think otherwise. It might with more propriety be contended, that had the hearing of this cause come on together with that of *The Short Staple*, the latter would have found much more difficulty in escaping. As it was, the division of the court, and the acknowledgment of the judge who delivered the opinion show, that the vessel in that case was "hardly saved." In the present cause, there is very material evidence, which did not appear in, and could not affect the former. We shall, therefore, dispose of this case altogether upon the evidence that is peculiar to it.

It will be recollected, that this vessel, as well as the Short Staple, were libelled for a violation of the embargo act of the 22d of December 1807, and the supplementary act of the 9th of January 1808, the former of which enacts, "that an embargo shall be laid on all ships and vessels in the ports of the United States, bound on a foreign voyage," and the latter forfeits the vessel that shall proceed to any foreign port or place, "contrary to the provisions of this act, or of the act to which this is a supplement." As the majority of the court were of opinion, that no offence was committed in the
*153] case of *The Short Staple*, *it was unnecessary to express any opinion on the application of the law. They, therefore, waived it.

But in this case, it becomes necessary to lay down the following principles. There can be no doubt, that if the William King was carried off to Jamaica, by actual force, it was an act which wanted the concurrence of the will, and therefore, innocent. But whatever is done in fraud of a law, is done in violation of it;[1] and if a vessel, with an original intention to go to a foreign port, complied with the requisition necessary to obtain a clearance on a voyage coastwise, this is but the device by which she eludes the force that would otherwise have prevented her departure from the port.

Was, then, the sailing to a foreign port a prohibited act, under the embargo law, to a registered or sea-letter vessel? If so, the commision of such an act was a cause of forfeiture under the act of January 9th, 1808. And here, the only doubt is, whether the words, "an embargo shall be laid," operate any furthar than to impose a duty upon the public officers, to prevent the departure of a registered or sea-letter vessel on a foreign voyage. The language of the act is certainly not very happily chosen; but when we look into the definition of the word embargo, we find it to mean "a prohibition to sail." Substituting this *periphrasis* for the word embargo, it reads "a prohibition to sail shall be imposed," &c., or, in other words, "such vessels shall be prohibited to sail;" which words, had they been used in the act, would have left no scope for doubt.

*154] The only facts which it will be necessary to notice *in this case, in order to show the grounds of our decision, are these: The Ino, the supposed capturing vessel, sailed from Guernsey, for Boston, in September 1808. She bore an English commission, and is commonly called a British privateer. But as there exists no distinction, that we know of, between a privateer and letter of marque, but what results from their equipments and habits; and as, although she mounted ten guns, she had but twelve men, and confessedly came to Boston for a cargo, we are induced to think, that

[1] Lee *v.* Lee, 8 Pet. 44.

her habits were rather commercial than roving. These three vessels lay in Boston harbor, some time, together; the two brigs sailed, within a few days of each other, bound to Baltimore, for a cargo of flour, and the Ino sailed soon after. As the embargo prevented her taking in a cargo, as such, the master cleared out for the Cape of Good Hope, and was permitted to take in a large stock of provisions as for a long voyage; but the master admits, that he was, in fact, bound to Jamaica, and sailed for that port, and affected to be destined to the Cape, in order to get permission to take in a large stock of provisions, because he knew provisions in the West Indies to be dear. In the mean time, the two brigs had taken in a cargo at Baltimore, and cleared out for Boston; but, as they allege, on account of contrary winds, they put into Hampton Roads, where they remained from the 1st of November to the 8th of the same month. Whilst the two brigs lay in Hampton Roads, the Ino also put into the same port and the reason alleged for doing so *is, that after leaving the port of Boston, she encountered high winds, which carried away her main-boom, and finding herself [*155 in the latitute of the Capes of Virginia, she put in, to obtain a spar for a boom. But it is not a little remarkable, here, that both Betts, the lieutenant of the Ino, and Southcote, the owner, who was on board, agree that the prevailing winds were north and west; and how a vessel bound from Boston to Jamaica, a course nearly south-east, should, after several days under high north-westerly winds, find herself in the latitude of the Capes of Virginia, seems unaccountable, unless we suppose that she was beating up, with intent to touch at Norfolk, instead of bearing away for her port of destination.

Three days after the arrival of the Ino, the two brigs sailed; the Ino immediately pursued, overhauled them before night, put a prize-master and one man on board the William King, a prize-master and two men in the other, and ordered them for Jamaica, with instructions to rendezvous at St. Nicholas Mole, if separated. Being overhauled, on this voyage, by the Garland frigate, the Ino fled, and the brigs were examined. But being liberated, they proceeded to Cape Nicholas Mole, where the Ino joined them, and leaving the Short Staple there, the Ino and this vessel proceeded to Jamaica. Off that place, the Ino restored a man which she had taken from the William King, and putting also the owner, Southcote, into her, she bore away, whilst the William King entered the harbor of Kingston. There she was given up to the master, who, as it is *alleged, was refused permission by the government to sail with his cargo, was obliged to sell it, and [*156 obtained about $20 clear per barrel, for what had cost five or six dollars at Baltimore.

So far the evidence stands unimpeached; it constituted, in fact, the defence of the claimant. But at the trial below, in this cause, a witness was produced in behalf of the prosecution, of the name of Gustaff Forsberg, who went out mate of the William King, and who, among a variety of facts, testifies to the following: That when the William King sailed from Boston, she carried off a Vineyard pilot, not having been able to land him; and that previous to her leaving Baltimore, this pilot was put on board the Federal George, Captain Field, then taking in a cargo of flour for Boston, with a request from the master of the William King, to return him to Boston, and the brig then sailed, without a Boston pilot. That, after putting into Hampton Roads, the masters of the two brigs went up to Norfolk, and did not

return, until the evening before they sailed ; that this was the true cause of their detention in that port, as vessels went to sea, whilst they lay there, and the winds would have admitted of their doing the same. That, after the capture by the Ino, this witness intimated his intention to do no more duty, as he was then a prisoner ; and was prevailed upon by the master to return to duty, by having his wages raised from $9 to $20, which alteration was entered on the shipping articles. *That the man put on board with the prize-master was called Colonel Kirkland, was not a seaman, and that Captain R. Daniel, of the William King, still navigated the vessel, the prize-master exercising no authority, and this witness keeping the log-book, under the directions of the master. That at sea, in calm weather, the master and owner of the Ino, and the masters of the two brigs, met and amused themselves, in each other's vessels ; that on their sailing from Jamaica, they took on board a number of articles, some of which were marked Ino ; that Southcote, the owner of the Ino, came out with them as passenger.; that the day after they left Kingston, they fell in with the Ino, and put on board of her, her owner, and the articles taken on board at Kingston, with the exception of certain parcels of bagging, which they took out with them to Exuma, for the purpose of taking in salt. And lastly, that after their arrival in New York, the master decoyed him on board a packet, and hurried him off, without his clothes, to Boston, and particularly cautioned him to be on his guard to say nothing to any one, but what had been entered on the log-book, and informing him, that if he remained in New York, he would be put in jail.

*157]

It is evident, that these circumstances, taken together, afford very ample ground for condemnation. There could be no reason urged, for putting the Vineyard pilot on board another vessel, which was not yet ready for sea, if the master of this vessel had really intended to return to Boston ; and abandoning their vessels for five or six days in Hampton *Roads, locks too much like waiting for the expected convoy ; whilst leaving the navigation of this vessel, and the keeping of the log-book, to the original master and mate, presents a state of confidence inconsistent with all idea of hostility. And this confidence is further conspicuous in all the subsequent occurrences to which this witness testifies. Independently of his testimony, the case is loaded with suspicious circumstances, but his testimony leads to conviction.

*158]

Aware of this, the counsel for the claimants have contented themselves with attacking his credibility. But after duly weighing all the circumstances insisted on in the argument, we are of opinion, that as to several material facts, his testimony pointed out the means of detection, if it was not consistent with the truth. If the Vineyard pilot, for instance, was not put on board the Federal George, the pilot and the master of the George might both have been resorted to, to detect the falsehood. Or if the change of wages, from $9 to $20, did not take place, nothing was easier than to refer to the shipping articles themselves, to disprove the fact. On settling his account with the owners (the present claimants), that document, or a copy of it, or a charge founded on it, would necessarily have been put in their possession. If the brig was not converted from the prize into the handmaid of the Ino, after leaving Jamaica, the owner and officers of the Ino, who appear to have been "nothing loath" to appear in behalf of this claim, could have been resorted to to deny it. And if there was no foundation for the

*charge of hurrying the witness off from New York in the manner he has sworn to, it would have been easy for Captain Daniel to have resorted to witnesses, to prove that he left that place under other, and what, circumstances, or, if in a packet, to prove, by some one on board the packet, that there was no foundation for the story.

Admitting this last fact to be true, it casts suspicion over the whole conduct of Captain Daniel, and lessens the weight of his testimony, so far as it stands contradicted by this witness. This point was much considered, and admitted by this court in the case of *The General Blake*, which I find is omitted from the reports of the last term.

Yet it cannot be denied, that the claimants have one very just ground for attacking the credibility of Forsberg. We do not attach much importance to his having omitted most of the facts sworn to on his last examination, because it does not appear that he was ever interrogated to them, and he might well have been unconscious of their having any material bearing on the case. But, both in the protest at Jamaica, and on his examination in the district court, he swears that the detention in Hampton Roads was produced by contrary winds. Whatever objections may be made to the protest in this case, that he gave this evidence in the district court, there could be no doubt. It is a feeble excuse for a witness to allege that he swore incautiously, or under the influence or instruction of any one, in whatever relation they may have stood to each other. The court, therefore, have hesitated upon the question, whether they should *not, on this ground, reject altogether the testimony of this witness. And nothing [*160 has induced them to sustain it, but the consideration that, on all other points, the testimony itself pointed to the means of its own detection, and on this point, it is not very material, if it be true, as he swears, that the master was all the time at Norfolk, without the ship's boat, instead of being on board to take advantage of the first wind that offered.

This circumstance shows but little anxiety on the subject of the wind, and leads to the supposition, that some other object sanctioned this detention, in the eyes of his owner. If this fact, also, had not been true, although the course of the winds could not, with much facility, have been proven, there could have been but little difficulty in proving the falsehood of such a charge, relative to a voyage which was so much a subject of conversation at that time.

Upon the whole, the court are of opinion, that the capture was fictitious, and that the decision below must be affirmed.

Decree affirmed.

*The Fortuna: Krause *et al.*, Claimants.

Prize.—Further proof.

A question of proprietary interest and concealment of papers. Further proof ordered, open to both parties.

Appeal from the Circuit Court for the district of North Carolina. (Reported below, 1 Brock. 299.)

This ship, sailing under Russian colors, left Riga on the 2d of September 1813, for London, where she arrived; and from thence sailed, on the 18th of November 1813, in ballast, on a voyage to the West Indies; took a British convoy, at Portsmouth, in England, and proceeded with it to Barbadoes, and thence to Jamaica. From thence she sailed to the Havana, where she arrived on the 12th of February 1814; took in a cargo, of the produce of Cuba, and left the port of the Havana, on the 25th March 1814, under protection of a British convoy, bound to Bermuda. After parting with the convoy, she was captured, on the 19th of April 1815, in N. lat. 38°, W. long. 60°, by the private armed schooner Roger, and brought into Wilmington, North Carolina, for adjudication. The master and all the crew, except the mate and two seamen, were taken out and kept on board the privateer, until the 14th of August, when they were sent in to be examined.

A claim was interposed by the master, for the ship, as the property of Martin Krause, of Riga, one of the house of trade of M. & I. Krause, of
*162] that place; *for 1520 boxes of sugar and 144 quintals of Campeachy wood, as the property of M. & I. Krause; for 160 boxes of sugar, as the property of J. F. Muhlenbruck, as the master understood, "a native of Germany, and of late, usual abode at Hamburg," and who went out in the vessel, and purchased and shipped the whole of the cargo; and for small portions of the cargo, as the property of the master, and of a Swedish captain, Steinmeitz.

There were found on board, a certificate of the build of the ship in Finland; a passport or sea-brief to proceed to London, granted at Riga, by the harbor-master and commander of that place; a bill of sale of the ship, from P. A. Severnon & Son, of Riga, to Martin Krause; and certificates of naturalization of the crew. The cargo was documented in the usual formal manner.

The prize-master, in his affidavit, on delivering up the ship's papers, sworn to on the 7th of July 1814, stated, "that the said papers were found in said ship, at three different periods, and that, on coming into his possession, or on discovery thereof, he proceeded with them forthwith, and without delay, to the admiralty office, &c., and that the last parcel of papers were, on the 8th of June last, being a considerable time after the arrival of the said ship, found concealed in a tin box, carefully let into an old piece of timber, to wit, part of the frame or belfry of a vessel, by means of a mortice hole, which said mortice hole was covered with a piece of wood, in a way calculated to elude observation, and which said piece of timber was stowed away
*163] among the ship's fire-wood," &c. *Certain papers were also found in the master's trunk, after the ship's arrival.

In his examination, on the standing interrogatories, the master swore, that he was employed and appointed by a Mr. Hoffengartner, who gave him possession of the vessel, in London, in 1812; that the said Hoffengartner

was then travelling; and died about March 1813; but his place of abode, birth and country, the master did not know. That Messrs. Bennet & Co., of London, gave him his instructions, and informed him that Martin Krause had directed them to fit out the ship, and order her to the Havana. That the ship had before gone by some other name, which he did not recollect. That a bill of sale of the ship was made to Martin Krause, by the person from whom the said Krause purchased, but whose name he did not recollect, nor the time when it was made, nor in the presence of what witnesses; and there was no engagement different from, nor in addition to, the bill of sale. He assigned as his reasons for placing the papers in the piece of wood, that they were partly papers not belonging to the vessel, and partly private letters, and he did not wish to have them mixed with the ship's papers, as it might possibly create confusion, and that they might be put aside, when boarded by any private armed vessels, and if there should be a necessity, produced, when called for.

The ship and cargo were condemned in the courts below, and the cause was brought by appeal to this court.

*Gaston, for the appellants and claimants, argued, that the character of the vessel and cargo, as manifested by the original evidence, [*164 apart from the papers found concealed on board, was strictly neutral, and entitled the claimants to restitution; and that the national character was not altered by the papers thus found. That a concealment of papers is not cause of condemnation, when accounted for on reasonable grounds; and that even actual spoliation of papers is not conclusive, but only presumptive evidence of hostile interests. *Presumptio stabitur donec contraria probetur*, *i. e.*, until the concealed papers are produced; the case of *The Concordia*, 1 Rob. 102, 103, shows in what light the wise man, who presides in the English court of admiralty (although in general, sufficiently austere towards neutrals) considered a temporary concealment even of material papers; that he viewed it, not as authorizing further proof merely, but as entitling the party to immediate restitution. Still less, is the master's fault, in this respect, to be visited, vindictively, on the owners, where there has been such gross misconduct on the part of the captors as in the present instance. They have violated the positive text of the president's instructions, in taking the master, and a great majority of the crew, out of the captured vessel, and keeping them on board the privateer, and in not delivering up the papers found on board, until long after the vessel had reached the port where she was carried for adjudication.(*a*) The court can only animadvert upon such *misconduct, by depriving the captors of their spoil: at all events, [*165 this, together with the other circumstances of the case, entitles the claimants to the privilege of further proof.

Wirt, contrà, accounted for taking out the captured crew, by the circumstance of the weakness of the privateer. The instructions require, not merely that the captors should send in the master and one or more of the principal persons belonging to the captured vessel, for examination on the standing interrogatories, but they imply, that the master should deliver up all papers; and his failing, in this case, to deliver up all the documents

(*a*) See the President's Instructions: Appendix, Note II.

which were necessary to support the national character of the vessel and cargo, is sufficient to excuse the captors for a slight departure from the letter of instructions, whose spirit they have obeyed. But supposing it to be an irregularity, it is now become immaterial; and the only questions are, whether the property appears to be hostile, on the original evidence; or, if its character be doubtful, whether the claimants have forfeited their privilege of further proof. The rules of prize practice are, that if the captured property appears to be hostile, condemnation follows; but if it does not appear to be clearly neutral, restitution does not follow, of course, but the burden of proof is thrown upon the claimants to show it to be entitled to restitution: if they are unable to do this, from the original evidence, further proof may be ordered, unless excluded by the misconduct of the claimants.

*166] It is not sufficient, that the ship and cargo *are documented by formal papers; the other circumstances, and the nature of the case, may show that these are merely the cloaks of fraud; and the necessary simplicity of the prize proceedings forbids the court from seeking for evidence *aliunde*, unless there be reasonable grounds for doubt. Still less can a resort be had to extraneous testimony, where the documents are neither regular nor supported by the examinations *in præparatorio*. Nor is a formal support of the documents by oath sufficient, if the oral testimony is outweighed by the circumstances of the transaction. *The Eenroom*, 2 Rob. 1; *The Calypso*, Ibid. 154; *The Rosalie and Betty*, Ibid. 343; *The Odin*, 1 Ibid. 248; *The Vigilantia*, Ibid. 6, 7. A fraudulent concealment of papers is a substantive ground of condemnation. Neutrals are bound to show belligerent cruisers all their papers; and a court of prize is authorized to presume the worst, if there be two constructions, one of which accounts for the concealment, and the other does not. The case is deficient in nearly every one of the documents which the writers on public law, and the law of insurance, require to show the neutral character of the ship and cargo. 1 Marsh. on Ins. 406, *a* (Condy's ed.). Mere formal papers are a dead letter, unless supported by oral testimony. *The Juno*, 2 Rob. 101; *The Odin*, 1 Ibid. 248. But the master is an insufficient witness to support even the imperfect documents found on board this ship, as his testimony is falsified, and is nullified by his fraudulent concealment of the papers. Nor is this a case of further

*167] proof, which is *the privilege of honest ignorance, mistake or negligence.(*a*) In such a case of concealment as the present, where the papers are extracted from the *latebræ* of the ship, there can be no certainty but what some of the documents are still suppressed, or have been spoliated; and the reason of the rule which refuses further proof, applies with full force, where the parties have shown themselves, by their misconduct, unfit to be trusted with an order for further proof. The case is infected throughout with falsehood, and is analogous to that of *The St. Nicholas*, 1 Wheat. 417, in all the machinery of fraud.

Hopkinson, in reply.—The instructions are imperative, and cannot be dispensed with by the captors. The excuse for the depriving the captured vessel of her crew, is unfounded in fact; and, if true, is not sufficient to

(*a*) 1 Wheat. Appendix, Note II., p. 504, and the authorities there cited. Livingston *v.* Maryland Ins. Co., 7 Cranch 545.

justify the captors, because the master might have been left, and there is no authority to support the supposed discretion of the captors in this particular. The *dictum* of Marshall, as to the papers which ought to be found on board a neutral ship, is not in point; he shows, in a treatise on a branch of municipal law, what papers the insured are bound to have on board, to prevent not merely condemnation, but even detention, capture or carrying in for adjudication; all of which are perils within the policy, and under some circumstances, *may entitle the assured to abandon. But the law of nations only reqnires a neutral ship to be navigated with [*168 such documents as are required by the local law of the country to which she belongs, and the property of the cargo to be proved by the usual papers, which the general usage of the commercial world has made necessary: even the want of these is not a substantive ground of condemnation, but may be explained by the claimants, if susceptible of explanation. But the burden of proof is not thrown on them, in the case of a lawful voyage, in a ship, and with a cargo, documented as neutral. In such a case, every favorable presumption is to be indulged; and even the unfavorable presumption arising from spoliation or concealment of papers ceases, when the nature of the documents destroyed or concealed is made to appear. There may be a concealment in fact, which is not a concealment in law. There may be an innocent concealment; and here, is no evidence of a fraudulent concealment, or of spoliation. The papers, when discovered, must answer for themselves. If an immoral play, or a meretricious novel, had been found concealed on board, it would, indeed, have argued bad taste and want of morals in the master, but could no more inure to condemnation than a volume of Plutarch or the "British Spy."

Johnson, Justice, delivered the opinion of the court, ordering this cause to further proof, open to both parties.

Order.—It is ordered, in this cause, that both *parties have liberty [*169 to produce further proof; that all examinations of witnesses be taken under commission, according to the rule of this court; that original letters and documents be, in all cases, produced, or a sufficient reason assigned for not producing such originals. And that the captors have leave to inspect letter-books and books of account relative to this adventure, wherever they require it.[1]

[1] For a decision on the merits, see 3 Wheat. 236.

The Bothnea, and The Jahnstoff.

Prize.—Collusive capture.

Unless it appears affirmatively, that the capture was collusive, the property will be condemned to the captors.
The Bothnea, 2 Gallis. 78, reversed.

Appeal from the Circuit Court for the district of Massachusetts. From the papers found on board these vessels, and the preparatory examinations in the court below, it appeared, that they were foreign vessels, having on board, as was admitted on all sides, false and simulated Swedish papers. They both sailed from Halifax, Nova Scotia, about the 24th of November 1813, laden with cargoes of British manufactured goods, destined for the United States; and on the same day, were captured, near the Ragged Islands, either really or collusively, by the privateer Washington, of $24\frac{30}{95}$ tons,
*170] one gun and fifteen men, belonging to Portland, *in the district of Maine, and commanded by William Malcomb. They were taken in sight of each other; the Jahnstoff, first, within about three hours, and the Bothnea, within about nine hours, after leaving Halifax. At the time of the capture, there were on board the Bothnea, seven persons, and on board of the Jahnstoff, five persons, composing their respective crews, and one American passenger. The whole of the crews were taken from each vessel, and landed in a boat at Ragged Islands. The American passengers were retained on board, and under the superintendence of prize-master and crews.

The Bothnea was conducted into Salem, and the Jahnstoff into Plymouth, in the district of Massachusetts. Immediately on their arrival, they were seized by the collectors of those ports, for an alleged violation of the non-importation act. Prize proceedings were also commenced by the captors against both vessels, before the district court of Massachusetts. The American passengers were examined on the standing interrogatories, and the papers found on board deposited in court by the prize-masters. The papers found on board the Bothnea were the Swedish simulated papers. Two bills of lading of the cargo, dated the 23d of November 1813, purporting that the whole cargo was shipped by John Moody & Company, merchants, of Halifax, for New London, consigned to order. A clearance from Halifax, dated on the same day. A British license from Sir John Sherbrooke, governor, &c., dated on the 9th of November 1813, authorizing John Moody and others to export in any vessel, not belonging to France, to any port in
*171] the *United States, any British goods, on British or American account, which license was to continue in force for two months. And two letters, dated at Halifax, on the 23d November 1813; one purporting to be addressed to the consignee of the cargo, the other to be addressed to the master of the Bothnea. These letters are as follows:

"Halifax, November 23d, 1813.

"Dear sir: We now only inclose you a bill of lading of the cargo shipped on our joint account *per* the Bothnea, agreeable to the memorandum left with us by Vandervelt, when last here. The invoices we forwarded in duplicate, one by P. Jones, and the other by Schonesburg, which you will have received before this. Z. has our particular instructions how to proceed, when in with the squadron. We have settled for A.'s share of the

compensatian. B. 2, will pay his. We have fixed on $200, exclusive of the freight, which we have also arranged for. Most sincerely do we wish this speculation to succeed, at the same time, request your earliest advice how to proceed with the next. Do not trust too much paper. We have directed Z., in case of meeting with an American cruiser, to destroy all. We are, very truly, your friends and obedient servants,

JOHN MOODY & COMPANY."

"Halifax, Nov. 23d, 1813.

"Captain J*. K*., Schooner Bothnea.

"Sir: We hand you herewith sundry inclosures respecting the cargo of the Bothnea, to your most particular care. You will perceive the necessity of using every possible caution. We are only apprehensive of Shaving Mills. You will, of course, secrete everything respecting the transaction. *In case of British interruption, we must recommend your being well assured that there is no deception, as you must be aware of the facility [*172 with which American cruisers may pass for English. The invoices of the goods are already forwarded. You will make the best of your way to N.**. When in with any of the B. B. squadron, come forward with your Ex. Li., which will safely pass you, and then nothing will remain but activity and dispatch in getting the goods on shore. We should not have embarked ourselves so largely in this concern, but from the ease with which dry-goods can be smuggled into those places, if properly managed. The bill of lading is to order, you will, therefore, receive instructions from our friends A. 1, and B. 2. We expect your best place will be to lay off, under the protection of H.M. ships, and deliver the cargo in boats and lighters, without proceeding further; and as our friends are already advised on the subject, no doubt every necessary step will be taken. Should, however, any unexpected casualty happen, we recommend your getting out of the way, as we would rather the whole should be sacrificed than any mischief happen to ———. But, above all, keep out of sight your Ex. Li. clearance and this letter. Do not confide too much. If you have any suspicions, destroy all at once, and after committing this to memory, be sure to put it perfectly out of danger. As to the return-cargo, we need not say anything on the subject, having the fullest confidence that a voyage to St. Barts. may be profitably effected with certain articles; flour out of the question, unless rye. *B. No. 2, will pay you the compensation agreed, exclusive of the freight we [*173 have allowed. A.'s proportion we will settle with our own. If it is possible to obtain convoy, we will, but it is doubtful. We are your friends and humble servants, JOHN MOODY & Co."

"P. S. Do not write, for fear of accidents. Let your communications be verbal."

The papers on board of the Jahnstoff, were the Swedish simulated papers; a British license, and clearance of the same date and purport as in the Bothnea; two bills of lading of the cargo, dated the 23d November 1813, on the same account, destination and consignment as in the case of the Bothnea; and two letters, dated at Halifax, on the same day, one addressed to Messrs. B. 2, and A. 1, at New London; and the other to the master of the Jahnstoff. The first of these letters is as follows:

"Halifax, Nov. 23d, 1813.

Dear sir: We now inclose you a bill of lading of the cargo shipped on our joint account *per* the brig Jahnstoff, agreeable to the memorandum left with us by Vandervelt, when last here. The invoice we forwarded in duplicate, one by P. Jones, and the other by Schonesburg, which you will have received before this. Z. has our particular instructions how to proceed, when in with the Squad. We have settled for A.'s share of the compensation; B. No. 2, will pay his. We have fixed 200 dollars, exclusive of the freight, which we have also arranged for. Most sincerely do we wish this speculation to succeed. At same time, request your earliest advice how to
*174] proceed with the next. Do not trust too much paper. We have directed Z., in case of meeting *with an American cruiser, to destroy all."

The other letter is an exact transcript of that addressed to the master of the Bothnea, except that the direction was varied.

At the hearing in the district court, a claim was interposed by the district-attorney in behalf of the United States, and of the collector, praying a condemnation to them, upon the ground of a collusive capture, and fraudulent breach of the non-importation act. That court dismissed the captor's libel, and condemned the vessels and their cargoes to the United States; from which sentence, an appeal was interposed to the circuit court, which court affirmed the condemnation, and the causes were brought to this court by apppeal.

Further proof was ordered, at the last term, and the causes again came on for hearing, at present term, upon the farther proof exhibited by both parties, and directed to explain the several points indicated by the court as grounds of doubt on the original evidence.(*a*) Under the commissions taken out to examine witnesses, the following interrogatories were exhibited on the part of the captors. Have not some of the privateers, fitted out in the eastern ports, during the war of the revolution and the late war, been of very small burden? Was it not usual for these privateers, armed sometimes with one carriage-gun only, to proceed coastwise, upon short cruises, and did they not capture prizes of great value? Was it not their practice, to frequent the ports of the district of Maine and of the province of
*175] *Nova Scotia, for the purpose of running out occasionally, capturing the British commerce bound in and out of Halifax and other enemy's ports, and were they not often successful? Did it not often happen, that the crews of the vessels, captured by them, were put ashore by the privateers, instead of being brought in as prisoners? Has it not been the practice, for sea-faring persons in the district of Maine to become owners of such privateers, and to go in them on short cruises? Did it frequently happen, during the late war, that unarmed vessels, under neutral or British colors, sailed without convoy from the port of Halifax, either to New London, Long Island Sound, or elsewhere? And on the part of the United States, the following: Was it not the usual custom, during the late war, for the owners of privateers, to stipulate with the officers and crew, that the latter should receive one moiety or some other definite proportion of the

(*a*) See 1 Wheat. 408.

proceeds of all prizes? Were there any cases where the crews were engaged to serve on monthly wages, without participating in the prizes? Was it not usual, for privateers to bring in the prisoners captured by them? What was the usual and adequate crew and armament of a privateer of about 25 tons burden, intended for a cruise from the eastern ports, in the Bay of Fundy and along the coasts of Nova Scotia? Together with other interrogatories tending to show, or to negative, collusion between the owners of the captured vessels and the privateer by which the capture was made. The answers to these interrogatories, by the various witnesses examined, were contradictory and inconsistent, *and it would be [*176 obviously impossible to present any intelligible abstract of their testimony, without extending the case to an inconvenient length. But among other circumstances, it was proved, that nine out of fifteen of the prize-crew, were joint owners.

The causes were argued on the further proof, by *Harper* and *Winder*, for the appellants and captors, and by the *Attorney-General*, for the United States.

Johnson, Justice, delivered the opinion of the court.—After duly weighing the evidence in these cases, a majority of the court are of opinion, that the vessel and cargo must be adjudged to the owners, officers and crew of the capturing privateer. Independently of the act of landing the entire crews of the captured vessels, there was nothing in the case which necessarily led to suspicion. And this is explained, on a ground that is very plausible, to wit, that having a course to run, which swarmed with enemy's vessels, their intention was to personate the original crew, and pass off the prizes, on the approach of an enemy, under their original character. It is not at all impossible, that nothing but this *ruse de guerre* may have been in contemplaation of the crew. There is, indeed, something in it peculiarly characteristic, when we consider the spirit of adventure, and great mental resources which distinguish the people of whom the crew was composed. It is to *be regretted, that this talent for enterprise had not been [*177 always more happily applied than it was in the adventure of the Jahnstoff and Bothnea. These vessels had both been employed in transporting provisions from New Haven to Halifax, and were now returning with cargoes of dry-goods, to be smuggled into the United States, in the vicinity of the same place. The documentary evidence shows an intimate correspondence between the shippers at Halifax and some persons resident in the United States; but who they were must remain unknown, as the merchants in Halifax have, in their examination, refused to betray them. That the voyages of these vessels was loaded with infamy, no one pretends to deny; the reasoning of the courts below is unanswerable on this point. But the majority of this court are of opinion, that the evidence is not sufficient to fasten on the captors a participation in the fraud. The whole may have been, for aught we know, a combination of machinery, the result of the most consummate art. It is certainly true, that, in one view of the case, everything may be attributed to artifice, in another, to natural conduct. Scarcely a feature of it may not be indifferently pronounced the lineament of guilt or innocence. In such a case, a court of justice has no alternative; it must pronounce in favor of innocence.

The decrees below will, therefore, be reversed, and the vessels and cargoes adjudged to the captors.

Sentence reversed.

Mr. Justice STORY gave no opinion.

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*178] *LAIDLAW *et al. v.* ORGAN.

Sale.—Fraud.

A vendor of goods is not bound to communicate to his vendee, intelligence of extrinsic circumstances, which might influence the price, and which were exclusively within his own knowledge, when the means of intelligence are equally described to both parties.[1]

ERROR to the District Court for the Louisiana district. The defendant in error, filed his petition or libel, in the court below, stating, that on the 18th day of February 1815, he purchased of the plaintiffs in error one hundred and eleven hogsheads of tobacco, as appeared by the copy of a bill of parcels annexed, and that the same were delivered to him by the said Laidlaw & Co., and that he was in the lawful and quiet possession of the said tobacco, when, on the 20th day of the said month, the said Laidlaw & Co., by force, and of their own wrong, took possession of the same, and unlawfully withheld the same from the petitioner, notwithstanding he was, all times, and still was, ready to do, and perform all things on his part stipulated to be done and performed in relation to said purchase, and had actually tendered to the said Laidlaw & Co., bills of exchange for the amount of the purchase-money, agreeable to the said contract; to his damage, &c. Wherefore, the petition prayed, that the said Laidlaw & Co. might be cited to appear and answer to his plaint, and that judgment might be rendered against them for his damages, &c. And inasmuch as the petitioner did verily believe, that the said one hundred and eleven hogsheads of tobacco would be removed,
*179] concealed or disposed of by the *said Laidlaw & Co., he prayed that a writ of sequestration might issue, and that the same might be sequestered in the hands of the marshal, to abide the judgment of the court, and that the said one hundred and eleven hogsheads of tobacco might be

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[1] Blydenburgh *v.* Welsh, Bald. 331. In Lapish *v.* Wells, 6 Maine 189, it is said, that this case seems "to go as far as moral principles will justify, even in cases of that description depending on public intelligence;" and further than the court seemed inclined to go in Etting *v.* United States Bank, 11 Wheat. 59. It was reviewed and criticised by Mr. Gulian C. Verplanck, in an Essay on the Doctrine of Contracts, in which he shows it to be at variance with the principles of the civil law; in regard to which, however, Chief Justice GIBSON says, in Bayard *v.* Shunk, 1 W. & S. 100, "the civil law principle of equality, however practicable, in an age when the operations of commerce were few, simple and circumspect, would be entirely unfit for the rapid transactions of modern times; it would put a stop to them altogether. No man can withhold his praise of the civil law, as a wonderful fabrick of wisdom for its day, or deny that it has contributed largely to the bests parts of our jurisprudence; but all its materials of superior value, have already been worked up in our more commodious modern edifice; and if the cultivation of an acquaintance with it, is to beget a desire to substitute its abstract principles for the maxims of the common law (the accumulative wisdom of a thousand years' experience), it were better that our jurists should die innocent of a knowledge of it." For an exhaustive review of the influence of the Roman law upon our institutions, from a use of it, in Great Britain, for a period of 500 years, see the introductory chapter to Finlason's edition of Reeves' History of the English Law.

finally adjudged to the petitioner, together with his damages, &c., and costs of suit; and that the petitioner might have such other and further relief as to the court should deem meet, &c.

The bill of parcels referred to in the petition was in the following words and figures, to wit:

"Mr. Organ, Bo't of Peter Laidlaw & Co., 111 hhds. Tobacco, weighing 120,715 pounds, n't fr. $7544.69. New-Orleans, 18th February 1815."

On the 21st of February 1815, a citation to the said Laidlaw & Co. was issued, and a writ of sequestration, by order of the court, to the marshal, commanding him to sequester 111 hogsheads of tobacco, in their possession, and the same, so sequestered, to take into his (the marshal's) possession, and safely keep, until the further order of the court; which was duly executed by the marshal. And on the 2d of March 1815, counsel having been heard in the case, it was ordered, that the petitioner enter into a bond or stipulation, with sufficient sureties, in the sum of $1000, to the said Laidlaw & Co., to indemnify them for the damages which they might sustain in consequence of prosecuting the writ of sequestration granted in the case. (*a*)

*On the 22d of March 1815, the plaintiffs in error filed their answer, [*180
stating that they had no property in the said tobacco claimed by the said petitioner, or ownership whatever in the same, nor had they, at any time previous to the bringing of said suit; but disclaimed all right, title, interest and claim to said tobacco, the subject of the suit. And on the same day, Messrs. Boorman & Johnston filed their bill of interpleader or intervention, stating that the petitioner having brought his suit, and filed his petition, claiming of the said Laidlaw & Co., 111 hogsheads of tobacco, for which he had obtained a writ of sequestration, when, in truth, the said tobacco belonged to the said Boorman & Johnston, *and was not the property [*181
of the said Laidlaw & Co., and praying that they, the said Boorman & Johnston, might be admitted to defend their right, title and claim, to the said tobacco, against the claim and pretensions of the petitioner, the justice of whose claim, under the sale as stated in his petition, was wholly denied, and that the said tobacco might be restored to them, &c.

(*a*) Sequestration, in the practice of the civil law, is a process to take judicial custody of the *res* or *persona* in controversy, to abide the event of the suit. It may be applied to real or personal property, the right to which is litigated between the parties, or even to persons, as to a married woman, in a cause of divorce, in order to preserve her from ill-treatment on the part of her husband, or to a minor, in order to secure him from ill-treatment by his parents. Clerke's Prax. tit. 43; Pothier, *de la Procédure Civile*, partie 1, ch. 3, art. 2, § 1; Code Napoleon, liv. 3, tit. 11, *Des Dépôts et du Séquestre*, art. 1961; Digest of the Civil Laws of Louisiana, 419. The sequestration may be demanded, either in the original petition, or, in the progress of the cause, at any time before it is set down for hearing, by a petition from the party demanding it, with notice to the opposite party, on which the judge, after hearing counsel, pronounces his interlocutory sentence or decree. This sentence is to be provisionally executed, notwithstanding an appeal. The sequestration is usually ordered, in possessory actions, where the preliminary proofs of the parties appear to be nearly balanced; where an inheritance, consisting of personal effects of great value, is in controversy; where there is ground to apprehend, that the parties may resort to personal violence, in contesting the enjoyment of the mesne profits; in actions of partition, where the property in litigation cannot be quietly enjoyed by the respective owners; and sometimes, in cases where the suit is likely to be of long duration. Pothier, Ib., and § 2.

On the 20th of April 1815, the cause was tried by a jury, who returned the following verdict, to wit: "The jury find for the plaintiff, for the tobacco named in the petition, without damages, payable as *per* contract." Whereupon, the court rendered judgment "that the plaintiff recover of the said defendants the said 111 hogsheads of tobacco, mentioned in the plaintiff's petition, and sequestered in this suit, with his costs of suit, to be taxed; and ordered, that the marshal deliver the said tobacco to the said plaintiff, and that he have execution for his costs aforesaid, upon the said plaintiff's depositing in this court his bills of exchange for the amount of the purchase-money, indorsed, &c., for the use of the defendants, agreeable to the verdict of the jury." On the 29th of April 1815, the plaintiffs in error filed the following bill of exceptions, to wit:

"Be it remembered, that on the 20th day of April, in the year of our Lord 1815, the above cause came on for trial before a jury, duly sworn and impannelled, the said Peter Laidlaw & Co. having filed a disclaimer, and Boorman & Johnston, of the city of New York, having filed their claim. *182] And now, the said Hector M. Organ *having closed his testimony, the said claimants, by their counsel, offered Francis Girault, one of the above firm of Peter Laidlaw & Co., as their witness; whereupon, the counsel for the plaintiff objected to his being sworn, on the ground of his incompetency. The claimants proved, that Peter Laidlaw & Co., before named, were, at the date of the transaction which gave rise to the above suit, commission-merchants, and were then known in the city of New Orleans as such, and that it is invariably the course of trade in said city, for commission-merchants to make purchases and sales, in their own names, for the use of their employers; upon which, the claimants again urged the propriety of suffering the said Francis Girault to be sworn, it appearing in evidence that the contract was made by Organ, the plaintiff, with said Girault, one of the said firm of Peter Laidlaw & Co., in their own name; and there being evidence that factors and commission-merchants do business on their own account, as well as for others, and there being no evidence that the plaintiff, at the time of the contract, had any knowledge of the existence of any other interest in the said tobacco, except that of the defendants Peter Laidlaw & Co., the court sustained the objection, and rejected the said witness. To which decision of the court, the counsel for the claimants aforesaid begged leave to except, and prayed that this bill of exceptions might be signed and allowed.

"And it appearing in evidence in the said cause, that on the night of the 18th of February 1815, Messrs. Livingston, White, and Shepherd brought *183] from the *British fleet the news, that a treaty of peace had been signed at Ghent, by the American and British commissioners, contained in a letter from Lord Bathurst to the Lord Mayor of London, published in the British newspapers, and that Mr. White caused the same to be made public, in a handbill, on Sunday morning, 8 o'clock, the 19th of February 1815, and that the brother of Mr. Shepherd, one of these gentlemen, and who was interested in one-third of the profits of the purchase set forth in said plaintiff's petition, had on Sunday morning, the 19th of February 1815, communicated said news to the plaintiff; that the said plaintiff, on receiving said news, called on Francis Girault (with whom he had been bargaining for the tobacco mentioned in the petition, the evening previous),

said Francis Girault being one of the said house of trade of Peter Laidlaw & Co., soon after sunrise on the morning of Sunday, the 19th of February 1815, before he had heard said news. Said Girault asked, if there was any news which was calculated to enhance the price or value of the article about to be purchased; and that the said purchase was then and there made, and the bill of parcels annexed to the plaintiff's petition, delivered to the plaintiff, between 8 and 9 o'clock in the morning of that day; and that, in consequence of said news, the value of said article had risen from 30 to 50 per cent. There being no evidence that the plaintiff had asserted or suggested anything to the said Girault, calculated to impose upon him with respect to said news, and to induce him to think or believe that it did not exist; and it appearing that *the said Girault, when applied to, on the next day, Monday, the 20th of February 1815, on behalf of the plaintiff, for [*184 an invoice of said tobacco, did not then object to the said sale, but promised to deliver the invoice to the said plaintiff, in the course of the forenoon of that day; the court charged the jury, to find for the plaintiff. Wherefore, that justice, by due course of law, may be done in this case, the counsel of said defendants, for them, and on their behalf, prays the court that this bill of exceptions be filed, allowed and certified as the law directs.

(Signed) DOMINICK A. HALL, District Judge."

"New Orleans, the 3d day of May 1815."

On the 29th of April 1815, a writ of error was allowed to this court, and on the 3d of May 1815, the defendant in error deposited in the court below, for the use of the plaintiffs in error, the bills of exchange mentioned in the pleadings, according to the verdict of the jury and the judgment of the court thereon, which bills were thereupon taken out of court by the plaintiffs in error.

February 20th. *C. J. Ingersoll*, for the plaintiffs in error.—1. The first question is, whether the sale, under the circumstances of the case, was a valid sale; whether fraud, which vitiates every contract, must be proved, by the communication of positive misinformation, or by withholding information when asked. Suppression of material circumstances, within the knowledge of the vendee, and not accessible *to the vendor, is equiv- [*185 alent to fraud, and vitiates the contract.(a) Pothier, in discussing this subject, adopts the distinction of the *forum* of conscience, and the forum of law; but he admits that *fides est servanda.*(b) The parties treated

(a) 1 Comyn on Cont. 38, and the authorities there cited.

(b) Pothier, *de Vente*, Nos. 233 to 241. He considers this question under the four following heads. 1st. Whether good faith obliges the vendor, at least, *in foro conscientiæ*, not only to refrain from practising any deception, but also from using any mental reservation? 2d. What reservation binds the party in the civil *forum*, and to what obligations? 3d. Whether the vendor is bound, at least, *in foro conscientiæ*, not to conceal any circumstances, even extrinsic, which the vendee has interest in knowing? 4th. Whether the vendor may, *in foro conscientiæ*, sometimes sell at a price above the true value of the article? As Pothier's discussion throws great light on this subject, a translation of this part of his admirable treatise may not be unacceptable to the reader.

"Art. I. 233. Although, in many transactions of civil society, the rules of good faith only require us to refrain from falsehood, and permit us to conceal from others

on an unequal footing, as the one *party had received intelligence of
*187] the peace of Ghent, at the time of the contract, and the other had not. *This news was unexpected, even at Washington, much more

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that which they have an interest in knowing, if we have an equal interest in concealing it from them; yet, in interested contracts, among which is the contract of sale, good faith not only forbids the assertion of falsehood, but also all reservation concerning that which the person with whom we contract has an interest in knowing, touching the thing which is the object of the contract.

"The reason is, that equity and justice, in these contracts, consists in equality. It is evident, that any reservation, by one of the contracting parties, concerning any circumstance which the other has an interest in knowing, touching the object of the contract, is fatal to this equality: for the moment the one acquires a knowledge of this object, superior to the other, he has an advantage over the other in contracting; he knows better what he is doing than the other; and consequently, equality is no longer found in the contract.

"In applying these principles to the contract of sale, it follows, that the vendor is obliged to disclose every circumstance within his knowledge, touching the thing, which the vendee has an interest in knowing, and that he sins against that good faith which ought to reign in this contract, if he conceals any such circumstance from him.

"This is what Florentinus teaches in the law 43, § 2, Dig., de Contr. Empt. *Dolum malum à se abesse præstare venditor debet, qui non tantum in eo est qui fallendi causâ obscurè loquitur, sed etiam qui insidiosè, obscurè dissimulat.*

"234. According to these principles, the vendor is obliged not to conceal any of the defects of the article sold, which are within his knowledge, although these defects may not be such as fall within an implied warranty, but even such defects as the vendee would have no right to complain of, if the vendor, who had not disclosed them, was ignorant of their existence. *Cùm ex XII. tabulis*, says Cicero (lib. 3, de Off.), *satis esset cautum ea præstare quæ essent linguâ nuncupatâ; à jurisconsultis, etiam reticenciæ pœna constituta, quid-quid enim inest prædio vitii id statuerunt, si venditor sciret, nisi nominatim dictum esset, præstare oportere.* The vendor, in this case, is held *in id quanti (emptoris) intererit scisse;* Dig. l. 4, de Act. Empt.; and this reservation may sometimes authorize a rescinding of the contract. l. 11, § 5, Dig. de tit.

"235. This rule ought to be applied, although the vendor, who has concealed the defects in the thing sold, has not sold it for more than its value with these defects. The reason is, that he who sells me a thing, has no right to require that I should pay the highest price for it, unless I consent to buy it for that price; he has no right to require of me a higher price than that which I voluntarily give, and he ought not to practice any artifice, to induce me to consent to buy it at a higher price than I should have been willing to give, had I known the defects which he had maliciously concealed.

"236. Good faith obliges the vendor, not only not to conceal any of the intrinsic vices of the thing sold, but generally not to dissemble any circumstance concerning it, which might induce the vendee not to buy, or not to buy at so high a price. For example, the vendee may have his action against the vendor, if the latter has concealed the existence of a bad neighborhood to a real estate sold by him, which might have prevented the vendee from purchasing, had he known it: *Si quis in vendendo prædio confinem celaverit, quem emptor si audisset, empturus non esset.* Dig. l. 15, § 8, de Contr. Empt.

"237. These principles of the Roman jurisconsults, are more accurate and more conformable to justice than the decision of St. Thomas, which permits the vendor to conceal the vices of the thing sold, except in two cases: 1. If the vice be of a nature to cause the vendee some injury; and 2. If the vendor availed himself of his reservation, in order to sell the thing at a higher price than it was worth. This decision

at New Orleans, the recent scene of the *most sanguinary operations of the war. In answer to the question, whether there was any news calculated *to enhance the price of the article, the vendee was silent. [*189

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appears to me to be unjust, since, as the vendor is perfectly at liberty to sell, or not to sell, he ought to leave the vendee perfectly at liberty to buy, or not to buy, even for a fair price, if that price does not suit the buyer: it is, therefore, unjust, to lay a snare for this liberty which the vendee ought to enjoy, by concealing from him the vice of the thing, in order to induce him to buy that which he would not have been willing to buy, for the price at which it is sold to him, had he known its defects.

"ART. II. 238. Although it is with respect to the civil *forum*, that the Roman jurisconsults have established the principles which we have stated, touching the obligation of the vendor not to conceal from the vendee any circumstance relative to the thing sold, and although they ought to be exactly followed, in *foro conscientiæ*, yet they are little observed in our tribunals, and the vendee is not easily listened to, who complains of the concealment of some vice in the thing sold, unless it be such a defect as falls within the doctrine of implied warranty. The interest of commerce not permitting parties to set aside their contracts with too much facility, they must impute it to their own fault, in not having better informed themselves of the defects in the commodities they have purchased.

"239. There are, nevertheless, certain reservations touching the thing sold, which have been thought worthy of the attention of the law, and which are obligatory on the vendor, in the civil *forum;* as for instance, when the vendor knows that the thing which he sells does not belong to him, or that it does not irrevocably belong to him, or that it is subject to certain incumbrances, and conceals these facts from the vendee," &c.

"ART. III. 241. Cicero, in the third book of his Offices, has treated this question in the case of a corn-merchant, who being arrived at Rhodes, in a time of scarcity, before a great number of other vessels, loaded with corn, exposes his own for sale: Cicero proposes the question, whether this merchant is obliged to inform the buyers, that there are a great number of other vessels on their voyage, and near the port? He states, upon this question, the sentiments of two stoic philosophers, Diogenes and Antipater; Diogenes thought that the merchant might lawfully withhold the knowledge which he had of the vessels on the point of arriving, and sell his corn at the current price: Antipater, his disciple, whose decision Cicero appears to adopt, thought, on the contrary, that this dissimulation was contrary to good faith. The reason on which he grounds this opinion is, that the concord which ought to exist among men, the affection which we ought to bear to each other, cannot permit us to prefer our private interest to the interest of our neighbor, from whence it follows, that, though we may conceal some things, from prudence, we cannot conceal, for the sake of profit, facts which those with whom we contract have an interest in knowing. *Hoc celandi genus*, says he, *non aperti, non simplicis, non ingenui; non justi, non viri boni: vertuti potius, obscuri, astuti, fallacis, malitiosi, callidi, veteratoris, vafri.*

"The question only concerns the *forum* of conscience; for there can be no doubt, that in the civil *forum*, the demand of a vendee cannot be listened to, who complains that the vendor has not disclosed to him all the extrinsic circumstances relative to the thing sold, whatever interest the vendee might have in knowing them. The decision of Cicero is somewhat difficult to maintain, even in the *forum* of conscience. The greater part of the writers on natural law have considered it as unreasonable.

"These writers are of opinion, that the good faith which ought to govern the contract of sale, only requires that the vendor should represent the thing sold as it is, without dissimulating its defects, and not to sell it above the price which it bears at the time of the contract; that he commits no injustice, in selling it at this price, although he knows that the price must soon fall; that he is not obliged to disclose to the vendee, a knowledge which he may have of the circumstances that may produce a

This reserve, when such a question was *asked, was equivalent to a false answer, and as much calculated to deceive as the communication of the most fabulous intelligence. Though the plaintiffs in error, after

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depression of the price; the vendee having no more right to demand that the vendor should impart this knowledge, than that he should give away his property; that if he should do it, it would be merely an act of benevolence, which we are not obliged to exercise, except towards those who are in distress, which was not the case with the Rhodians, who were only in want of corn, but were not in want of money to buy it. The profit which the merchant makes in selling it for the price it is worth to-day, although he is conscious the price will fall to-morrow, is not iniquitous; it is a just recompense for his diligence in reaching the market first, and for the risk which he ran of losing upon his commodities, if any accident had prevented his arriving so soon. It is no more forbidden to sell at the current price, without disclosing the circumstances which may cause it to fall, than it is to buy, without communicating those which may cause it to rise. And Joseph was never accused of injustice, for profiting of the knowledge which he alone had of the years of famine, to buy the fifth part of the corn of the Egyptians, without warning them of the years of famine that were to follow.

"Notwithstanding these reasons and authorities, I should have some difficulty, in the *forum* of conscience, in excusing the injustice of a profit which the vendor might derive from concealing a fact which would cause a fall in the price of the commodity, when that fall must be very considerable, and must certainly arrive, in a very short period of time, such as that which the merchant knew of the near approach of a fleet to Rhodes, laden with corn. In the contract of sale, as well as in other mutually beneficial contracts, equity requires, that what the one party gives should be the equivalent of what he receives, and that neither party should wish to profit at the expense of the other. But in the case of the merchant, who, by dissembling the knowledge which he has of this fact, sells his corn at one hundred livres the cask, the market-price of the day, can he, without illusion, persuade himself that the article which, in two days, will be worth no more than twenty livres, is the equivalent of one hundred livres which he receives? You will say, that it is sufficient, if, at the time, it be worth the price of one hundred livres, for which he sells it. I answer, that a thing, which has a present and momentary value of one hundred livres, but which he certainly knows will be reduced in two days to the value of twenty, cannot be seriously regarded by him as truly the equivalent of the money which he receives, and which must always be worth one hundred. Does not his conduct imply, that he wishes, by his reservation, to profit and enrich himself at the expense of the buyers, to induce them to purchase a commodity by which he is certain they must lose, in two days, four-fifths of the original cost?"

The merchant will smile at the rigid morality of this deservedly celebrated writer, who proceeds, in a fourth article, to consider whether the vendor may, *in foro conscientiæ*, sometimes, sell at a price above the true value of the commodity. After laying down some general rules on this subject, he remarks, that "they are not adopted in the civil *forum*, where a vendee is not ordinarily admitted to complain, that he has purchased dearer than the true value, it being for the interest of commerce that parties should not be allowed to set aide their contracts with too much facility." No. 242. In a subsequent part of his treatise, he states what is the nature of the frauds that may be committed by the vendee, which he resolves into two classes. 1st. The first consists of any misrepresentation or circumvention which the vendee may employ, in order to induce the vendor to sell, or to sell at a less price. 2d. Where the vendee conceals from the vendor the knowledge which he may have, touching the thing sold, and which the vendor may not possess. The former species of fraud, if sufficiently proved, he considers will invalidate the contract even in the civil *forum*. But the latter, he deems only obligatory *in foro conscientiæ*, both because unduly restricting the freedom of commerce, and because the vendor ought to know best the qualities of the articles he sells,

they heard the news of peace, still went on, in ignorance of their legal rights, to complete the contract, equity will protect them.

*2. Mr. Girault was improperly rejected as a witness, because he and his partner had disclaimed, and Messrs. Boorman & Johnston, the [*191 real owners of the tobacco, had intervened and taken the place of the original defendants. Girault was not obliged to disclose his character of agent, and, as such, he was an admissible witness. *Dixon* v. *Cooper*, 3 Wils. 40; *Benjamin* v. *Porteus*, 2 H. Bl. 590; *Mackey* v. *Rhinelander*, 1 Johns. Cas. 408; *Jones* v. *Hake*, 2 Ibid. 60; *Burlingame* v. *Dyer*, 2 Johns. 189. The tendency of the modern decisions, to let objections go to the credibility, and not to the competency of witnesses, ought to be encouraged, as an improvement in the jurisprudence on this subject. Besides, the proceedings are essentially *in rem*, according to the course of the civil law, and that consideration is conclusive as to the admissibilty of the witness.

3. The court below had no right to charge the jury absolutely to find for the plaintiff. It was a mixed question of fact and law which ought to have been left to the jury to decide.

4. There is error in the judgment of the court, in decreeing a deposit of the bills of exchange by the vendee, for the tobacco, no such agreement being proved.

Key, contrà.—1. Though there be no testimony in the record to show a contract for payment in bills of exchange, still the court may infer that such was the contract, from the petition of the plaintiff below, supported as it is by his oath, and uncontradicted, as to this fact, by the defendant's answer. *The decree was for a specific performance, and the vendors took the [*192 bills out of court.

2. The judge's charge was right, there being no evidence of fraud. The vendee's silence was not legal evidence of fraud, and therefore, there was no conflict of testimony on this point: it was exclusively a question of law; the law was with the plaintiff; and consequently, the court did right to instruct the jury to find for the plaintiff.

3. Mr. Girault was an inadmissible witness. He and his partners were general merchants as well as factors. They sold in their own names, and might call the article their own, or the property of their principals, as it suited them. But they were parties to the suit, and the intervention of their principals did not abate the suit as to them.(*a*) *On every ground, [*193 therefore, Mr. Girault was an inadmissible witness.

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and if he does not, it is his own fault. Nos. 294–98. In the fifth part, ch. 2, he considers the subject of the action which is given by the Code, l. 4, tit. 44, *De rescind. vend.*, to the vendor, for rescinding the contract, on account of enormous lesion, or gross inadequacy of price, which, however, does not extend to merchandise, or other personal property, and therefore, it is unnecessary to trouble the reader, by extending this note to a greater length.

(*a*) Intervention is a proceeding by which a third person petitions to be received as a party in a cause, either with the plaintiff or the defendant, and to prosecute the suit jointly with the party whose interests may be connected with his own. It may take place, either before or after the cause is at issue, and set down for hearing; either in the court below, or upon appeal. But it cannot operate to retard the adjudication of the principal cause; which may either may be determined separately, or the whole contro-

4. The only real question in the cause is, whether the sale was invalid, because the vendee did not communicate information which he received precisely as the vendor might have got it, had he been equally diligent or equally fortunate? And, surely, on this question, there can be no doubt. Even if the vendor had been entitled to the disclosure, he waived it, by not insisting on an answer to his question; and the silence of the vendee might as well have been interpreted into an affirmative as a negative answer. But, on principle, he was not bound to disclose. Even admitting that his conduct was unlawful, *in foro conscientiæ*, does that prove that it was so, in the civil *forum?* Human laws are imperfect in this respect, and the sphere of morality is more extensive than the limits of civil jurisdiction. The maxim of *caveat emptor* could never have crept into the law, if the province of ethics had been co-extensive with it. There was, in the present case, no circumvention or manœuvre practised by the vendee, unless rising earlier in the morning, and obtaining, by superior diligence and alertness, that intelligence by which the price of commodities was regulated, be such. It is a romantic equality that is contended for on the other side. Parties never can be precisely equal in knowledge, either of facts or of the *inferences from such facts, and both must concur, in order to satisfy the rule contended for. The absence of all authority in England and the United States, both great commercial countries, speaks volumes against the reasonableness and practicability of such a rule.

*194]

C. J. Ingersoll, in reply.—Though the record may not show that anything tending to mislead, by positive assertion, was said by the vendee, in answer to the question proposed by Mr. Girault, yet it is a case of manœuvre; of mental reservation; of circumvention. The information was monopolized by the messengers from the British fleet, and not imparted to the public at large, until it was too late for the vendor to save himself. The rule of law and of ethics is the same. It is not a romantic, but a practical and legal rule of equality and good faith, that is proposed to be applied. The answer of Boorman & Johnston denies the whole of the petition, and consequently, denies that payment was to be in bills of exchange; and their taking the bills out of court, ought not to prejudice them. There is nothing in the record, to show that the vendors were general merchants, and they disclosed their principals, when they came to plead. The judge undertook to decide, from the testimony, that there was no fraud; in so doing, he invaded the

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versy may be decided by one and the same judgment. Clerke's Prax. tit. 38, 39; Pothier, *De la Procédure Civile*, part. 1, ch. 2, art. 3, § 3; Code de Procédure Civile, part. 1, liv. 2, tit. 16, *De l'Intervention*, art. 339, 340. It may take place, where the goods of one person are attached as the property or for the debt of another. Clerke's Prax. Ibid. In actions of warranty, Pothier, Ibid. part. 1, ch. 2, art. 2, § 2; Code de Procédure Civile, 1ere partie, liv. 2, tit. 9, *Des Exceptions Dilatoires*, art. 183. So also, in a suit for separation of property between husband and wife, the creditors of the husband may intervene for the preservation of their rights. Ibid. 2 part. liv. 1, tit. 8, *Des Separations de Biens*, art. 871.

Interest in the subject-matter of the suit is a fatal objection to the competency of a witness by the civil law (Pothier, Ibid. part. 2, ch. 3, art. 4, § 3); but according to the above authorities Mr. Girault appears to have been an inadmissible witness, because still a party to the cause, notwithstanding the intervention of his principals.

province of the jury; he should have left it to the jury, expressing his opinion merely.

*Marshall, Ch. J., delivered the opinion of the court.—The question in this case is, whether the intelligence of extrinsic circumstances, [*195 which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor? The court is of opinion, that he was not bound to communicate it. It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties. But at the same time, each party must take care not to say or do anything tending to impose upon the other.

The court thinks that the absolute instruction of the judge was erroneous, and that the question, whether any imposition was practised by the vendee upon the vendor, ought to have been submitted to the jury. For these reasons, the judgment must be reversed, and the cause remanded to the district court of Louisiana, with directions to award a *venire facias de novo*.

Judgment reversed, and *venire de novo* awarded.

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*Rutherford *v.* Greene's Heirs. [*196

Legislative grant.

A question relative to the title of the late Major General Nathaniel Greene, to 25,000 acres of land given to him, within the bounds of the land reserved for the use of the army, by the 10th section of the act of the legislature of North Carolina, passed in 1782, as a mark of the sense entertained by that state of his eminent services.

A statute amounting to a present grant, does not require the formalities required in an ordinary grant of land, to make it effective.

A statute providing that a tract of land shall be allotted to A., for extraordinary military services, is a present grant.

The North Carolina act of 1783 only offered for sale such lands as were then unappropriated.

This was a bill in chancery, filed in the Circuit Court for the district of Tennessee, by the appellant, against the heirs of the late Major General Greene.

The cause was argued by *Campbell* and *Harper*, for the appellant, and by *Law* and *Jones*, for the appellees.

Marshall, Ch. J., delivered the opinion of the court.—As this case depends entirely on the validity of Greene's title, the court will notice only so much of the record as respects that title.

In the year 1777, the state of North Carolina opened a land-office, for the purpose of selling all the vacant lands, east of a line described in the act. In the year 1780, an act passed, reserving a certain tract of country, for the officers and soldiers of the line of that state. This act is lost.

*In the year 1782, an act passed, "for the relief of the officers and [*197 soldiers in the continental line, and for other purposes therein mentioned." This act gives certain specified quantities of land to the officers and soldiers; then, the 7th section commences thus: "And whereas, in May 1780, an act passed at Newburn, reserving a certain tract of country to be

appropriated to the aforesaid purposes, and it being represented to this present assembly, that sundry families had, before the passing the said act, settled on the said tract of country, be it enacted," &c. The section then proceeds to grant 640 acres of land to each family which had so settled. The 8th section appoints commissioners to lay off, in one or more tracts, the land allotted to the officers and soldiers. The 10th section enacts, "that 25,000 acres of land shall be allotted for, and given to, Major General Nathaniel Greene, his heirs and assigns, within the bounds of the lands reserved for the use of the army, to be laid off by the aforesaid commissioners, as a mark of the high sense this state entertains of the extraordinary services of that brave and gallant officer." This is the foundation of the title of the appellees.

On the part of the appellant, it is contended, that these words give nothing. They are in the future, not in the present tense; and indicate an intention to give in future, but create no present obligation on the state, nor present interest in General Greene. The court thinks differently. The words are words of absolute donation, not, indeed, of any specific
*198] *land, but of 25,000 acres in the territory set apart for the officers and soldiers.

"Be it enacted, that 25,000 acres of land shall be alloted for and given to Major General Nathaniel Greene." Persons had been appointed in a previous section to make particular allotments for individuals, out of this large territory reserved; and the words of this section contain a positive mandate to them to set apart 25,000 acres for General Greene. As the act was to be performed in future, the words directing it are necessarily in the future tense. "Twenty-five thousand acres of land shall be allotted for, and given to, Major General Nathaniel Greene." Given, when? The answer is unavoidable—when they shall be allotted. Given, how? Not by any future act—for it is not the practice of legislation to enact, that a law shall be passed by some future legislature—but given by force of this act.

It has been said, that to make this an operative gift, the words "are hereby" should have been inserted, before the word "given;" so as to read, "shall be allotted for, and are hereby given to," &c. Were it even true, that these words would make the gift more explicit, which is not admitted, it surely cannot be necessary now to say, that the validity of a legislative act depends, in no degree, on its containing the technical terms usual in a conveyance. Nothing can be more apparent, than the intention of the legislature, to order their commissioners to make the allotment, and to give the land, when allotted, to General Greene.

*199] The 11th section authorizes the commissioners to *appoint surveyors, for the purpose of surveying the lands given by the preceding sections of the law. In pursuance of the directions of this act, the commissioners allotted 25,000 acres of land to General Greene, and caused the tract to be surveyed. The survey was returned to the office of the legislature, on the 11th of March, in the year 1783. The allotment and survey marked out the land given by the act of 1782, and separated it from the general mass liable to appropriation by others. The general gift of 25,000 acres, lying in the territory reserved for the officers and soldiers of the line of North Carolina, had now become a particular gift of the 25,000 acres, contained in this survey.

Against this conclusion, has been urged that article in the constitution of North Carolina, which directs, that there should be a seal of the state, to be kept by the governor, and affixed to all grants. This legislative act, it is said, cannot amount to a grant, since it wants a formality required by the constitution. This provision of the constitution is so obviously intended for the completion and authentication of an instrument, attesting a title previously created by law, which instrument is so obviously the mere evidence of prior legal appropriation, and not the act of original appropriation itself, that the court would certainly have thought it unnecessary to advert to it, had not the argument been urged, repeatedly, and with much earnestness, by counsel of the highest respectability.

After urging that these lands were not positively *granted to General Greene, the counsel for the appellant proceeded to argue, [*200 that it was in the power of the legislature, to retract its promise, and that the legislature had retracted it. Before attempting the difficult task of describing the limits of the legislative power, in cases where those limits are not fixed by a written constitution, the court will proceed to inquire, whether the government of North Carolina has, in fact, revoked its promise, or recalled its gift.

At a session, begun on the 12th of April 1783, the assembly passed "an act for opening the land-office," thereby extending the line describing the country in which lands might be entered, so far west as to comprehend the territory reserved for the officers and soldiers of the North Carolina line. The 11th section of this act contains a proviso, saving from entry the lands within the bounds reserved for the officers and soldiers. At the same session, an act was passed "to amend the act for the relief of the officers and soldiers of the continental line, and for other purposes." The first six sections of this act prescribe the mode of individual appropriation, and of obtaining titles. The 7th section, "for prevention of disputes," enacts, "that the officers and soldiers aforesaid, shall enter and survey the lands within the following lines, beginning," &c. This section, it is said, changes the place reserved, and marks out a new territory for the officers and soldiers. It is, then, contended, that this act, and *the preceding act for opening the land-office, are to be construed together, and the proviso of the [*201 11th section of that act applied to the 7th section of this; by which operation, the whole territory before reserved for the officers and soldiers, including the land surveyed for General Greene, is opened for entry.

The court does not concur with the counsel for the appellant, in any part of this argument. There is nothing in the law, leading to the opinion, that the place reserved for the officers and soldiers was changed. The fair construction of the acts is, that the reserve was restricted to narrower limits, not transferred to different ground.

It has been contended, that the court is restrained from giving this construction to the acts under consideration, because the bill avers that the place was changed, and the demurrer admits the fact. The court will not inquire whether this averment is founded on an apparent misconstruction of the law, and is, therefore, to be disregarded; or is the averment of a fact compatible with the law; because the fact itself does not essentially affect the case. If the place in which lands were reserved, generally, for the officers and soldiers, but not individually appropriated, was changed; the indi-

vidual appropriation made for General Greene, within their original limits, was not also changed. The act did not profess to remove him with them,
*202] and he consequently *remained on the same ground, protected by his pre-existing title, whatever it might be.

But it is contended, that his title was annulled by the general authority given in the 9th section of the act, to enter all the lands within the enlarged limits then opened to purchasers. To this argument it is answered, 1st. That the 11th section reserves the land allotted to the officers and soldiers, then comprehending the land surveyed for General Greene ; and, 2d. That a general permission to enter land within a given tract of country must, of necessity, be limited to lands not previously appropriated.

The positive exception contained in the 11th section, it is said by the appellant, must be applied to the land reserved to the officers and soldiers, by the subsequent act changing their position ; because the two acts must be taken together ; and if so, there is no exception comprehending the lands of General Greene. The two acts have distinct objects. The first opens a land-office for the purpose of redeeming the public debt, by the sale of lands ; and the second prescribes the manner in which officers and soldiers are to obtain titles for lands given to them by the state, and amends an act passed at a previous session on the same day. The legislature has not considered the reserve in the first act as transferred into the second ; but has, by the 8th section of the second act, re-enacted, in a modified manner, the prohibition intended for the protection of those for whom this reserve was expressly made.

*203] *But let it be conceded, that the proviso of the 11th section was repealed by implication, when the position of the officers and soldiers was changed, and a new prohibition enacted and applied to the new reserve ; still, it would be difficult to maintain, that this silent repeal, implied from the removal of the object for which it was originally and chiefly intended, should apply to another object, originally preserved by the provision, and for which it continues to be necessary.

But the court does not found its opinion on this position, however well it may be supported by justice. The proposition is believed to be perfectly correct, that the act of 1783, which opened the land-office, must be construed as offering for sale those lands only which were then liable to appropriation, not those which had before been individually appropriated. Whatever the legislative power may be, its acts ought never to be so construed, as to subvert the rights of property, unless its intention so to do shall be expressed in such terms as to admit of no doubt, and to show a clear design to effect the object. No general terms, intended for property to which they may be fairly applicable, and not particularly applied by the legislature ; no silent, implied and constructive repeals, ought ever to be so understood as to divest a vested right.

But it is contended, that this construction of the acts of 1783 is forced upon us, because the rights of others, and not the right of General Greene,
*204] are exempted from the operation of that section, which offers *for sale all the land within the described territory ; and the exception of one object excludes others of the same character. Without inquiring what would be the force of this argument, if, in point of fact, rights similar to

those of General Greene were reserved, and his omitted, let the fact be examined.

The first reservation in the act for opening the land-office, related to the lands of the Cherokee Indians. Nothing could be more obvious, than the necessity, as well as propriety, of prohibiting all entries on Indian lands, lying within the boundary offered for sale, if the legislature intended they should not be entered. The Indian title was not derived from the state of North Carolina; and to infer from the recognition of this title, that others, actually derived from the state, if not also recognised, are annulled, is not admitted to be correct reasoning. The only other reserve in this act is of the land within the limits allotted to the officers and soldiers, and within these limits was the land surveyed for General Greene.

Our attention is next directed to the act to amend the act "for the relief of the officers and soldiers," &c. This act narrows the limits within which the military lands shall be surveyed, or changes them, so that, in either case, the lands of General Greene are no longer within them. Nothing can be more obvious, than that provisions relating to lands within this particular territory can have no implied application to *a title previously [*205
acquired by General Greene to lands not lying within it.

The 8th section of the act prohibits all persons from entering lands within the bounds allotted to the officers and soldiers. The 9th section excepts out of this prohibition, the commissioners and surveyors, &c., appointed to lay off the military lands, and prescribes the mode by which they may appropriate and acquire title to lands given to them by the legislature. The 13th section enacts, that Governor Martin and David Wilson be entitled, agreeably to the report of the committee, to two thousand acres of land each, adjacent to lands allotted to officers and soldiers, for which they may receive titles in the same manner as the officers and soldiers.

The insertion of this reservation in this act leads almost necessarily to the opinion, that the lands granted to Martin and Wilson were a part of those to which the act related; and the words of the section show that their title was acquired by this act. By no course of just reasoning, can it be inferred from these permissions to make appropriations within bounds not open to entry generally, that a vested right to lands not lying within the limits to which this act relates, is annulled.

It is clearly and unanimously the opinion of this court, that the act of 1782 vested a title in General Greene to 25,000 acres of land, to be laid off within the bounds allotted to the officers and soldiers, and that the survey made in pursuance of that act, and returned in March 1783, gave precision to that title, *and attached it to the land surveyed. That his rights [*206
are not impaired by the acts of 1783, and the entry of the appellant, all of which are subsequent to his survey; and that it is completed by the grant which issued in pursuance of the act of 1784, and which relates to the inception of his title. The decree of the circuit court, dismissing the bill of the complainant, is affirmed, with costs.

Decree affirmed.

Johnson *v.* Pannel's Heirs.

Land-law of Kentucky.

It is essential to the validity of an entry, that the land intended to be appropriated, should be so described as to give notice of the appropriation to subsequent locators.

In taking the distance from one point to another, on a large river, the measurement is to be with its meanders, and not in a direct line.[1]

In ascertaining a place to be found by its distance from another place, the vague words "about" or "nearly" and the like, are to be rejected, if there are no other words rendering it necessary to retain them; and the distance mentioned is to be taken positively.

Entries made in a wilderness, most generally refer to some prominent and notorious natural object which may direct the attention to the neighborhood in which the land is placed, and then to some particular object exactly describing it: the first of these is denominated the general or descriptive call, and the last, the particular or locative call of the entry. Reasonable certainty is required in both; if the descriptive call will not inform a subsequent locator in what
*207] neighborhood he is to search for the land, the entry is defective, *unless the particular object is one of sufficient notoriety. If, after having reached the neighborhood, the locative object cannot be found within the limits of the descriptive calls, the entry is also defective. A single call may, at the same time, be of such a nature (as, for example, a spring of general notoriety) as to constitute within itself both a call of description and of location; but if this call be accompanied with another, such as a marked tree, at the spring, it seems to be required, that both should be satisfied.

The call for an unmarked tree, of a kind which is common in the neighborhood of a place sufficiently described by the other parts of the entry, to be fixed with certainty, may be considered as an immaterial call. Therefore, where the entry was in the following words, "D. P. enters 2000 acres on a treasury-warrant, on the Ohio, about twelve miles below the mouth of Licking, beginning at a hickory and sugar tree, on the river bank, running up the river from thence 1060 poles, thence at right angles to the same, and back for quantity," it was held, that the call for a sugar tree might be declared immaterial, and the location be sustained on the other calls.

The entry was decreed to be surveyed, beginning twelve miles below the mouth of Licking, on the bank of the Ohio, and running up that river 1060 poles; which line was to form the base of a rectangular parallelogram, to include 2000 acres of land.

February 25th, 1817. This cause was argued by *Talbot*, for the appellants, and *M. B. Hardin*, for the respondents.

March 1st. Marshall, Ch. J., delivered the opinion of the court.—This case depends on the validity and construction of an entry made, in the state of Kentucky, by David Pannel, the ancestor of the appellees, in these words: "David Pannel enters 2000 acres on a treasury-warrant, on the Ohio, about twelve miles below the mouth of Licking, beginning at a hickory and
*208] sugar tree on the river bank, running up the *river from thence 1060 poles, thence at right angles to the same, and back for quantity."

The appellant having obtained an elder patent for the same land, on a junior entry, the appellees brought a bill in the circuit court for the district of Kentucky, sitting in chancery, praying that the defendant, in that court, might be decreed to convey to them. The circuit court directed the entry of the complainant to be surveyed, beginning twelve miles below the mouth of Licking, on the bank of the Ohio, and running up that river 1060 poles; which line was to form the base of a rectangular parallelogram, to include 2000 acres of land. So much of this land as was within Pannel's patent, and also within Johnson's patent, the court decreed the defendant to convey to the plaintiffs. From this decree, the defendant has appealed to this court.

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[1] Littlepage *v.* Fowler, 11 Wheat. 220.

He contends, that the decree is erroneous, because, 1st. It affirms the validity of this entry, which is too uncertain and defective to be established. 2d. If the entry be established, it ought to be so surveyed that the whole land should lie twelve miles below the mouth of Licking.

I. It is undoubtedly essential to the validity of an entry, that it shall be made so specially and precisely, that others may be enabled, with certainty, to locate the adjacent *residuum*. The land intended to be appropriated, must, consequently, be so described as to give notice of the appropriation to subsequent locators. In obtaining this information, however, it would seem to be the plain dictate of common sense, that the person about to take up adjoining *lands, would read the whole of a previous entry which [*209 he wished to avoid, compare together its different parts, and judge, from the entire description, what land was appropriated. If, with common attention, and common intelligence, the land could be ascertained and avoided, the requisites of the law would seem to be complied with. Test Pannel's entry by this standard.

The mouth of Licking is a place of acknowledged and universal notoriety, which no man in the country could be at a loss to find. When placed there, he is informed by the entry, that Pannel's land lies twelve miles below him, on the Ohio. He proceeds down the river twelve miles, and is there informed, that the entry begins at a hickory and sugar tree on the river bank. He looks around him and sees hickory and sugar trees. Here, then, he would say, while uninformed of decisions which have since been made, is the beginning of the entry. In what direction does the land lie? The paper which is to give his information says, "running up the river from thence 1060 poles, thence at right angles to the same, and back for quantity." Would he say, this description is repugnant in itself, containing equal and contradictory directions, neither of which is entitled to any preference over the other, and leaving the judgment in such a state of doubt and perplexity, as to be incapable of deciding the real position of this land? Would he say, the whole land must lie twelve miles from the mouth of Licking? This is so clearly and definitely required, that the entry will admit of no other construction? That the subsequent *words direct- [*210 ing him to run up the river from that point 1060 poles, and thus approach the mouth of Licking, are not explanatory, but contradictory? That the one or the other must be totally discarded? Were this the real impression which would be made on the mind, it cannot be denied, that the state of uncertainty in which these equal and irreconcilable descriptions would place a subsequent locator, ought to vitiate the entry. But if, on the contrary, the obvious and natural construction would be, that since every part of the land cannot be placed precisely twelve miles below the mouth of Licking, the distance is applicable to any part of the tract, and this part of the description may be so explained and controlled by other parts, as to receive a meaning different from that which it would have if standing alone; then the subsequent locator would take the whole description together, and if its different parts could, without difficulty, be reconciled, he would reconcile them. He would say, the beginning must be twelve miles from the mouth of Licking, but the residue of the land must approach that place, because the entry requires positively to run from the beginning up the river. This would, it is thought, be the manner in which this entry would

be understood by a person guided by no other light than is furnished by human reason.

But the courts of Kentucky have constructed a vast and complex system, on the entire preservation of which their property depends, and this court will respect that system as much as the courts of Kentucky themselves.

*211] *In applying the decisions of that country to this cause, we find many points now settled which were formerly controverted questions. In taking the distance from one point to another, on a large river, the measurement is to be with its meanders, not in a direct line. And in ascertaining a place to be found by its distance from another place, the vague words "about" or "nearly," and the like, are to be discarded, if there are no other words rendering it necessary to retain them; and the distance mentioned is to be taken positively. A subsequent locator, then, must look for the beginning called for in this entry, twelve miles below the mouth of Licking, measured by the meanders of the Ohio.

In construing locations, some other principles have been established, which seem to be considered as fundamental. Entries made in a wilderness would most generally refer to some prominent and notorious object, which might direct the attention to the neighborhood in which the land was placed; and then to some particular object which should exactly describe it. The first of these has been denominated the general or descriptive call, and the last, the particular or locative call, of the entry. Reasonable certainty has always been required in both. If the descriptive call will not inform a subsequent locator in what neighborhood he is to search for the land, the entry is defective, unless the particular object be one of sufficient notoriety. If, after having reached the neighborhood, the locative object cannot be found within the limits of the descriptive call, the entry is equally defective.

*212] They must *both be found, and neither can be discarded, unless deemed immaterial. A single call may be, at the same time, so notorious and so formal, as, for example, a spring of general notoriety, as to constitute in itself a call both of description and location; but if this call be accompanied with another, as a marked tree at the spring, it seems to be required, that both calls should be satisfied.

Thus, in the case now under the consideration of the court, the call for a beginning twelve miles below the mouth of Licking, would be sufficiently descriptive, and is sufficiently precise, to be locative. It wound be unquestionably good, were it not accompanied with the additional call for a hickory and sugar tree. Whether it is vitiated by this additional call, is to be determined by a reference to the decisions in Kentucky.

The case of *Grubbs* v. *Rice* (2 Bibb 107) depended on the validity of an entry made in these words: "James Thomas enters 300 acres of land, &c., on the south side of Kentucky, about two miles below the mouth of Red River, beginning at a tree marked I. S., on the bank of the river, and running down the river for quantity." No tree marked I. S. was found at or near the distance required. It was proved, that a tree had been marked I. S., by the person who afterwards made the entry for Thomas, and that it stood on the south side of Kentucky; but instead of being two miles, it was three miles and a quarter, by the meanders of the river, and two miles and

*213] two-thirds of a mile, on a direct course, below the mouth of Red River. *The inferior court disregarded the call for the tree, and fixed the

beginning of the entry at the termination of two miles below the mouth of Red River. On an appeal, this decree was reversed, and Judge WALLACE, in delivering the opinion of the court, said, "This rejection of the call for the tree marked I. S. is certainly subversive of the well-established principle, that no part of an entry ought to be rejected, unless what is evidently mere surplusage, or absolutely repugnant to other expressions which are more important; because to do more would not be construing entries, but making them. But the expression 'about two miles below the mouth of Red River,' is obviously only a general call, and to substitute this in the place of the expression 'beginning at a tree marked I. S., &c.,' which is the only special or locative call in the entry, is still more inadmissible."

The case of *Kincaid* v. *Blythe and others* (2 Bibb 479) turned on the validity of an entry made "on a branch of Silver Creek, about four miles from the little Fort, on Boone's old trace, including a tree marked D. B.' In this case too, the inferior court disregarded the call for the tree, which could not be proved to have existed, when the location was made, and directed the land to be surveyed at the termination of the distance of four miles from the little Fort. On appeal, this decree also was reversed, and, in delivering the opinion of the court, Judge WALLACE said, "It is evident, that when the entry was made, Boone's old trace, the little Fort, and Silver Creek, were all well known by those names to the generality of those who were conversant in *the vicinity. And it further appears, that about four miles from the little Fort, on a southern direction, Boone's old [*214 trace struck Hayes' fork of Silver Creek, which may be presumed to be the branch of Silver Creek intended; and if the entry contained no other calls, it would deserve serious consideration, whether the place where the trace crossed Hayes' fork of Silver Creek ought not to be assumed as the centre of the survey to be made thereon. But this entry calls to include a tree marked D. B., which is obviously a locative and material call, and therefore, conformably to the uniform decisions of this court on similar entries, must be taken into consideration in deciding on this entry."

These cases are admitted to have settled the law to be, that a material locative call, as for a marked tree, cannot be disregarded; and that, if the existence of the tree cannot be proved, the entry cannot be sustained. The only distinction between these cases and that under the consideration of the court is that, in them, the entries call for a marked tree; in this, it calls for a sugar tree and hickory, not stating them to be marked. For the importance of this distinction, we are again referred to the decisions of Kentucky.

The case of *Greenup* v. *Lyne's heirs*, turned on an entry of land "lying on Kentucky river, opposite to Leesburg, beginning at a beech tree, and running up the river, and back for quantity." The validity of this entry was affirmed in the inferior court, and, on an appeal, was also affirmed in the superior court. *In delivering the opinion of the superior court, [*215 Judge LOGAN said, "Had the only call in the entry been to lie on the river, opposite to Leesburg, we should have concurred with the circuit court in the manner of surveying it, by running up and down the river equal distances from a point opposite the centre of Leesburg; and if the call to begin at "a beech tree" had been the only other call, we should still have thought that opinion correct, as the common growth of the timber there is beech, and a tree of the description could have been had at almost any point within the

limits of the claim. This circumstance, we conceive, ought not to affect the entry; for whether the call is regarded or rejected, in the construction of the entry, is totally immaterial; because it seems to the court, that where an uncertainty arises from the number of objects presented, answering the calls of an entry, and it has other calls sufficiently precise to sustain it, that, of the many doubtful objects, that should be taken as intended, which will best preserve the consistency of the others; and in this case, it seems, the call for the tree could be complied with, without changing in the least the position given by the first call, so that it is left as an immaterial call. We are more confirmed in this opinion, when we consider, that the entry, from any other view, must be invalid for uncertainty, although we believe no could doubt, from a liberal and just construction of it, as to the general body and position of the land it calls for."

*216] *This case, if not overruled, certainly goes far in distinguishing between a call for a marked tree, and for a tree not marked; provided such trees as the call requires, are found about the place where the entry must begin. It goes further, and strongly indicates the opinion, that an unmarked tree was an object of less importance in the mind of the locator, than one selected from all others by a mark peculiar to itself. While the latter must have been deemed important, and have strongly fixed his attention, the former may have been thought not very essential. Coming to the place where he intended to begin, looking around him when there, and seeing trees of a particular kind from the common growth, he might suppose it unimportant, at which of these trees he should commence and call for one of them. In such a case, a court may well say, "whether the call is regarded or rejected in the construction of the entry is totally immaterial." There is much reason for this opinion. Certainty is required in entries, for the purpose of giving notice to subsequent locators. The subsequent locator who comes to the place described it in the entry, in order to find the land he wishes to avoid, will, if a marked tree be called for, search for that marked tree; and if it cannot be found, may well conclude, that this is not the land intended to be appropriated; but if only a tree is called for, and trees stand all around him, he will naturally suppose that the nearest may be taken as a beginning; and that to him it is quite immaterial, whether the commencement be at the spot on which he stands, or within ten

*217] feet or ten yards of him. *The subsequent locator is not misled by this call; nor is there any danger of his mistaking the position of the land. It is not without reason, therefore, that the call is pronounced immaterial, and one which may be regarded or rejected. The entry may be sustained by other calls which are sufficiently precise to sustain it.

If, in the case at bar, it had been proved, that sugar trees and hickories were as common at the termination of twelve miles from the mouth of Licking, as the beech trees opposite to Leesburg, the two cases would, in this respect, be precisely alike. But this is not proved; only one witness has been examined to this point, and his testimony is, that there are sugar trees on the bank of the Ohio, in the neighborhood, and that the maple or sugar tree might be found for many miles above and below the corner, standing within fifty yards of each other, on the second bank of the river. The report of the surveyor shows that three elms and a hickory stood at the termination of the twelve miles from the mouth of Licking.

There would certainly be much difficulty in supporting this as a locative call, although it is not absolutely certain, that it might not be so supported. The not less important question is, whether it may be considered as an immaterial call? No case has been cited, in which the call for an unmarked tree has been thought material; and there are cases in which a circumstance, not important in itself, has been dispensed with. The difference between calling for a marked and an unmarked tree, has been *already noticed. It is difficult to suppose, that they are viewed as equally important [*218 by the person making the entry, or by a subsequent locator. If the person making the entry designed to select for the beginning, a particular tree, in exclusion of all cthers, it is in a high degree improbable, that he should omit to mark it. If he made the entry from memory, then the place only, and not the particular tree, would be the object to which his mind would attach importance. So, with the subsequent locator. The distance would bring him to the place, or sufficiently near to it, for every beneficial purpose, and whether a sugar tree and hickory stood at the end of twelve miles, as measured by his chain, or within thirty, forty or fifty yards, would not essentially vary his views with respect to adjacent lands. He could not doubt, to use the expression of the court in the case of *Greenup* v. *Lyne's heirs*, "as to the general body and position of the land" described in the entry. The opinion that the call for an unmarked tree, of a kind which is common in the neighborhood of a place, sufficiently described by other parts of the entry, to be fixed with certainty, may be considered as an immaterial call, is supported by the decision of the court, in the case which has been last mentioned. Although in that case the judge shows that a tree might be found to satisfy the call, at the place fixed as the beginning, yet it is apparent, that different places within a few yards of each other would answer equally well for the beginning, and that different trees might be selected for that purpose. And the judge, after stating that this call *might either be [*219 considered as satisfied, or in itself immaterial, proceeds to show that he thought it immaterial. "Regarding," he proceeds to say, "the call for a beech tree as immaterial, we come to consider," &c. Upon the authority of the case of *Greenup* v. *Lyne's heirs*, then, and upon a view of the whole of this entry, it would seem, that the call for the sugar tree and hickory may be declared immaterial, and the location be sustained on its other calls.

The second question is, in what manner ought this entry to be surveyed? It is admitted to be a general principle, that, where a location calls for land, to lie a given distance from a given point, the whole land must be placed at or beyond that distance, if there be no other words in the location which control this construction. But it is not admitted, that this call can overrule the plain meaning of the whole entry taken together. It is believed to be unquestionably decided, that every material part of the entry is to be considered, and that such construction is to be put upon the whole, as is best adapted to all its material calls. This principle was laid down in *Greenup* v. *Lyne's heirs*, which, on this point, bears a strong analogy to that under the consideration of the court. In *Greenup* v. *Lyne's heirs*, the entry called for land "lying on Kentucky river, opposite to Leesburg, beginning at a beech tree, and running up the river and back for quantity."

It is perfectly settled in Kentucky, that on a call for land lying opposite

to Leesburg, the centre of the *land would be placed opposite to the centre of the town, and a square would be formed on a base line, running up and down the river, to include the quantity ; the entry could not otherwise be sustained. The inferior court laid off this entry in that manner ; and the appellate court declared, that it would be the proper manner, were there not other words in it which controlled this general description by one which was more particular. That more particular description was "running up the river, and back for quantity."

These cases are in principle the same. The one calls for land twelve miles below the mouth of Licking, which description would require land, the nearest part of which is at the given distance ; the other calls for land lying opposite Leesburg, which requires a tract, the centre of which is opposite to the centre of the town. The one calls for a beginning at a sugar tree and hickory, without naming a place for the beginning, otherwise than by the description of the position of the land ; the other calls for a beech tree, under precisely the same circumstances. In the case of *Greenup* v. *Lyne's heirs*, the words "running up the river, and back for quantity" have changed the place of beginning from the centre to the lower end of the town, and the position of the land, so that instead of lying above and below Leesburg, in equal quantities, it lies entirely above that place. Why shall not the same words influence in the same manner, the position of Pannel's land ?

From the language of Pannel's entry, every man would expect the sur-
*221] vey to begin at the place called *for, twelve miles below the mouth of Licking. If that is not the beginning, the location is unquestionably uncertain and void. If that is the beginning, it is the plain mandate of the entry, to run up the river 1060 poles, and back for quantity.

It is the opinion of the majority of the court, that the decree ought to be affirmed, with costs.

Decree affirmed.

Patterson *v.* United States.

Verdict.—Removal by certiorari.

A verdict is bad, if it varies from the issue in a substantial matter, or if it find only a part of that which is in issue; and though the court may give form to a general finding, so as to make it harmonize with the issue, yet, if it appears that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict.

In an action of debt, upon a bond to the United States, with condition that certain merchandise imported and reshipped for exportation, should not be relanded within the United States, and that the certificate and other proofs required by law, of the delivery of the same, without the limits of the United States, should be produced at the collector's office, within one year from the date of the bond; an issue was formed upon the defendant's plea, that the merchandise was not relanded, &c., and that the certificate and other proofs required by law, of the delivery of the same at Archangel, in Russia, were produced, &c., within one year from the date of the bond; the jury found a verdict, that "the within-mentioned writing obligatory is the deed of the within-named R. P., &c., and they find there is really and *justly due upon [*222 the said writing obligatory the sum of $23,989.58:" *Held*, that the verdict was so defective no judgment could be rendered upon it.

A circuit court has no authority to issue a *certiorari*, or other compulsory process to the district court, for the removal of a cause from that jurisdiction, before a final judgment or decree is pronounced.

In such a case, the district court may, and ought, to refuse obedience to the process of the circuit court, and either party may move the circuit court for a *procedendo*, after the transcript of the record is removed into that court, or may pursue the cause in the district court, as if it had not been removed.

But if the party, instead of properly taking advantage of the irregularity in the proceedings, enter his appearance in the circuit court, take defence, and plead to issue, it is too late, after verdict, to object to the irregularity, and the supreme court will, on error, consider the cause as an original suit in the circuit court.

February 20th, 1817. This cause was argued by *D. B. Ogden* and *Harper*, for the plaintiff in error, and by the *Attorney-General* and *Glenn*, for the United States. But as the points made were not considered by the court, and judgment was pronounced on other grounds, the argument is omitted.

March 13th. Washington, Justice, delivered the opinion of the court.—This was an action of debt, instituted in the district court of Maryland, by the United States, against Robert Patterson, the plaintiff in error, upon a bond, dated the 2d of August 1809, in the penalty of $35,000, with condition that certain merchandise, which had been imported into the United States, and which the said Patterson had then reshipped, in order to export the same to Tonningen, should not be relanded in any port or place within the United States, and that the certificate and other proofs required *by law of the delivery of the same, at some place without the limits [*223 of the United States, should be produced at the collector's office of the port of Baltimore, within one year from the date of the bond.

After the declaration was filed in the district court, and the defendant had entered his appearance and taken defence, a writ of *certiorari* issued from the circuit to the district court, in obedience to which, the record of the proceedings in that court was certified and sent up to the circuit court. In this court, the defendant again took defence, and after sundry imparlances, and having had *oyer* of the bond and condition, he pleads, 1st. Performance, generally, of the condition. 2d. That the merchandise mentioned in the condition of the bond was not relanded in the United States, and that the certificate and other proofs required by law of the delivery of the same

at Archangel, in Russia, were produced at the said collector's office, within one year from the date of the said bond. 3d. That the said merchandise, or any part thereof, was not relanded in the United States, and that the certificates and other proofs required by law, of the delivery of the same at Archangel, in Russia, were produced to the said collector's office, on the 11th day of November, in the year 1811. The replication to the first plea alleges a breach of the condition of the bond, in not producing to the said collector's office, the certificate and other proofs required by law of the relanding in some place without the limits of the United States, within one year from the date of the said bond, to which a rejoinder was put in, affirming that the
*224] certificate and other *proofs were produced at the said office, within the said year, upon which an issue is tendered and joined. The same issue is formed upon the second plea, and to the third plea, a general demurrer was put in. The demurrer was, upon argument, sustained, and judgment was entered against the defendant for the penalty of the bond.

A jury was afterwards impannelled to try the issue, who found the following verdict, viz: "that the within-mentioned writing obligatory is the deed of the within-named Robert Patterson, &c., and they find there is really and justly due upon the said writing obligatory the sum of $23,989.58." Upon this verdict, the court gave judgment in favor or the United States, for $35,000, to be released on the payment of the above sum assessed by the jury, from which judgment, a writ of error was obtained to remove the cause to this court.

The court considers it to be unnecessary to decide the questions which were argued at the bar, as the verdict is so defective that no judgment can be rendered upon it. The issue, which the jury were sworn to try, was, whether the certificate, and other proofs required by law, of the delivery of the cargo, at some place without the limits of the United States, were produced at the collector's office at Baltimore, within one year from the date of the bond. The verdict does not find the matter in issue, one way or the other, but finds that the bond in the declaration mentioned is the deed of the defendant, and that there is justly due to the United States, upon the
*225] said bond, a certain *sum of money. But whether the bond was the deed of the defendant, or not, was not a matter in issue between the parties, and consequently, it was a false conclusion to say, that, because it was his deed, therefore, he was indebted to the United States.

The rule of law is precise upon this point. A verdict is bad, if it varies from the issue in a substantial matter, or if it find only a part of that which is in issue. The reason of the rule is obvious; it results from the nature and the end of the pleading. Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue; and although the court in which the cause is tried may give form to a general finding, so as to make it harmonize with the issue, yet, if it appears to that court, or to the appellate court, that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict. It is true, that if the jury find the issue, and something more, the latter part of the finding will be rejected as surplusage; but this rule does not apply to a case where the facts found in the verdict are substantially variant from those which are in issue.

The court deems it proper to take some notice of the mode of proceeding,

for removing this cause from the district to the circuit court. It is believed to be novel in the practice of the courts of the United States; and it certainly wants the authority of law to sanction it. There is no act of congress which authorizes a circuit court to issue a compulsory process to the district court, for the removal of a cause from *that jurisdiction, [*226 before a final judgment or decree is pronounced. The district court, therefore, might and ought, to have refused obedience to the writ of *certiorari* issued in this case by the circuit court, and either party might have moved the circuit court for a *procedendo*, after the transcript of the record was removed into the circuit court, or might have pursued the cause in the district court, in like manner as if the record had not been removed.

But if, instead of taking advantage of this irregularity at a proper time, and in a proper manner, the defendant enters his appearance to the suit in the circuit court, takes defence, and pleads to issue, it is too late, after verdict, to object to the irregularity in the proceedings. This court will consider the suit as an original one in the circuit court, made so by the consent of parties. Had a new declaration been filed in the circuit court no doubt could be entertained as to the correctness of this conclusion. And it is not going too far, to consider the declaration sent from the district court in the same light, after appearance, issue and verdict. This is the opinion of the majority of the court.

The judgment is to be reversed, and a *venire de novo* to be issued by the circuit court.

Judgment reversed, and *venire de novo* awarded.

*The Pizarro: Hibberson & Yonge, Claimants.

Prize.—Further proof.—Spoliation of papers.—Spanish treaty.

If the court below deny an order for further proof, when it ought to be granted, or allow it, when it ought to be denied, and the objection is taken by the party, and appears on the record, the appellate court can administer the proper relief.

But if evidence in the nature of further proof be introduced, and no formal order or objection appear on the record, it must be presumed to have been done by consent, and the irregularity is waived.

Concealment or spoliation of papers, is not, *per se*, a sufficient ground for condemnation in a prize court. It is calculated to excite the vigilance and justify the suspicions of the court; but is open to explanation: and if the party, in the first instance, fairly, frankly and satisfactorily explains it, he is deprived of no right to which he is otherwise entitled: if, on the contrary, the spoliation is unexplained, or the explanation is unsatisfactory; if the cause labor under heavy suspicions, or gross prevarications; further proof is denied, and condemnation ensues from defects in the evidence which the party is not permitted to supply.

Under the Spanish treaty of 1795, stipulating that free ships shall make free goods, the want of such a sea-letter or passport, or such certificates as are described in the 17th article, is not a substantive ground of condemnation;[1] it only authorizes capture and sending in for adjudication, and the proprietary interest in the ship may be proved by other equivalent testimony. But if, upon the original evidence, the cause appears extremely doubtful and suspicious, and further proof is necessary, the grant or denial of it rests on the same general rules which govern the discretion of prize courts in other cases.

The term "subjects," in the 15th article, when applied to persons owing allegiance to Spain, must be construed in the same sense as the term "citizens," or "inhabitants," when applied to persons owing allegiance to the United States, and extends to all persons domiciled in the Spanish dominions.

*228] *The Spanish character of the ship being ascertained, the proprietary interest of the cargo cannot be inquired into, unless so far as to ascertain that it does not belong to citizens of the United States, whose property, engaged in trade with the enemy, is not protected by the treaty.

Appeal from the Circuit Court of the district of Georgia. The ship Pizarro, under Spanish colors, was captured, on the 23d of July 1814, by the private armed schooner Midas, Alexander Thompson, commander, on a voyage from Liverpool to Amelia Island, and brought into the port of Savannah for adjudication. Prize proceedings were instituted in the district court of Georgia, against the ship and cargo, and a claim was duly interposed by Messrs. Hibberson & Yonge, merchants, of Fernandina, Amelia Island, for the ship and cargo, as their sole and exclusive property. Upon the final hearing in the district court, the ship and cargo were decreed to be restored, and this decree was, upon an appeal to the circuit court, affirmed; and from the decree of the circuit court, the cause was brought by appeal to this court.

It appeared from the evidence, that during the voyage, a package, containing papers respecting the cargo, directed to Messrs. Hibberson & Yonge, was thrown overboard, by the advice and assent of the master and supercargo. The reason alleged for this proceeding is, that they were then chased by a schooner, which they supposed to be a Carthaginian privateer. The *229] ship's documents, however, were *retained, in which her Spanish character is distinctly asserted.

These documents were as follows: 1. A certificate of the Spanish consul at Liverpool, dated the 11th of September 1813, certifying that the Pizarro

[1] See The Amiable Isabella, 6 Wheat. 1; The Amistad, 15 Pet. 521.

was a Spanish ship, bound to Corunna. 2. A certificate from the same, of the same date, that Messrs. Hughes & Duncan had shipped 250 tons of salt on board the Pizaro, for Corunna, consigned to Messrs. Hibberson & Yonge. 3. A certificate of health, dated at Fernandina, the 20th of December 1813. 4. A letter from Messrs. Hibberson & Yonge, of the 10th January 1814, to J. Walton, the navigator or sea-pilot, ordering him to sail to Liverpool. 5. A bill of lading, signed by Martinez, the master, for the outward cargo. 6. The affidavit of Messrs. Hibberson & Yonge, that they had shipped the same cargo, on their own account, consigned to Messrs. Hughes & Duncan, &c. 7. The shipping articles from Amelia Island to St. Augustine, or any other port in Europe, and back, dated the 11th of January 1814. 8. Shipping articles from Liverpool to St. Augustine, and back to Liverpool, without a date. 9. A license from the governor of East Florida, authorizing Messrs. Hibberson & Yonge to buy a vessel in the United States, and the copy of a bill of sale from Messrs. S. & W. Hale, of New Hampshire, by their agent Kimbell, dated the 24th of February 1813, together with an order of the governor, of the 6th of March 1813, naturalizing the ship, or permitting her to sail under Spanish colors.

*In the district court, the cause was heard not merely upon the ship's papers, and the testimony of the master and supercargo (who were twice examined in open court), but the claimants were also permitted to introduce new proofs and testimony in support of their claim, without any order for further proof. [*230

February 27th. *Winder*, for the appellants and captors.—1. The proprietary interest in the claimants is not proved.

2. They are excluded from the benefit of further proof, by the spoliation of papers. The court below made no order for further proof; yet it seems to have been admitted and considered by that court, and has crept into the transcript of the record. This was an irregularity, which will be corrected by the appellate tribunal, since the case, on the original evidence, was free from doubt or difficulty, and condemnation ought to have ensued. The spoliation of papers is not satisfactorily accounted for by the master and supercargo, who have prevaricated in their examinations; and the spoliation, being unexplained, inevitably leads to the exclusion of further proof, and consequently, to condemnation. In the case of *The Two Brothers*, 1 Rob. 131, spoliation of papers not being avowed with sufficient frankness by the master, was held to destroy his credit; and the defect of proof thereby induced, together with other circumstances, was deemed a cause of condemnation. In the present *case, all the documents relative to the cargo were thrown overboard, and the excuse is the same which was rejected by the English court of admiralty in *The Rising Sun*. Destroying the papers which might show the Spanish character of the cargo, could not diminish the danger of capture by Carthaginian privateers, since the ship would still appear to be Spanish, and this, together with the want of documentary evidence as to the cargo, would involve both in the same fate. [*231

(a) See also The Polly, 2 Rob. 361; The Rising Sun, Id. 104. In this last case, the master guilty of the spoliation was excluded from further proof as to his share of the cargo.

This explanation of the suppression of the papers is, therefore, weak and futile, and such as cannot relieve the parties from the imputation of *mala fides*.

3. The claimants contend, that the cargo is exempt from confiscation by the Spanish treaty of 1795, which recognises the rule, that free ships make free goods. (*a*) But the term "subjects," in the 15th *and 16th arti- *232] cles, must be understood of subjects who owe a permanent allegiance

(*a*) Article XV. It shall be lawful for all and singular the subjects of his Catholic Majesty, and the citizens, people, and inhabitants of the said United States, to sail, with their ships, with all manner of liberty and security, no distinction being made who are the proprietors of the merchandises laden thereon, from any port to the places of those who now are, or hereafter shall be, at enmity with his Catholic Majesty or the United States. It shall be likewise lawful for the subjects and inhabitants aforesaid, to sail, with the ships and merchandises afore-mentioned, and to trade with the same liberty and security from the places, ports and havens of those who are enemies of both or either party, without any opposition or disturbance whatsoever, not only directly from the places of the enemy afore-mentioned, to neutral places, but also from one place belonging to an enemy, to another place belonging to an enemy, whether they be under the jurisdiction of the same prince, or under several; 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 is also agreed, that the same liberty be extended to persons who are on board a free ship, so that although they be enemies to either party, they shall not be made prisoners, or taken out of that free ship, unless they are soldiers, and in actual service of the enemies.

Articulo XV. Se permitirá à todos y à cada uno de los súbditos de S. M. Católica, y à los ciudadanos pueblos y habitantes de dichos Estados, que puedan navegar con sus embarcaciones con toda libertad y seguridad, sin que haya la menor excepcion por este respecto, aunque los propietarios de las mercaderías cargadas en las referidas embarcaciones vengan del puerto que quieran, y las traygan destinadas à qualquiera plaza de una potencia actualmente enemiga ó que lo sea despues, así de S. M. Católica como de los Estados Unidos. Se permitirá igualmente à los súbditos y habitantes mencionados navegar con sus buques y mercaderías, y freqüentar con igual libertad y seguridad las plazas y puertos de las potencias enemigas de las partes contratantes, ó de una de elles sin oposicion ú obstáculo, y de comerciar no solo desde los puertos de dicho enemigo à un puerto neutro directamente, si no tambien desde uno enemigo à otre tal, bien se encuentre baxo su jurisdicion, ó baxo la de muchos; y se estipula tambien por el presente tartado que los buques libres asegurarán igualmente la libertad de las mercaderias, y que se juzgarán libres todos los efectos que se hallasen à bordo de los buques que perteneciesen à los súbditos de una de las partes contratantes, aun quando el cargamento por entero ó parte de él fuese de los enemigos de una de las dos, bien entendido sin embargo que el contrabando se exceptua siempre. Se ha convenido así mismo que la propia libertad gozarán los sugetos que pudiesen encontrarse à bordo del buque libre, aun quando fuesen enemigos de una de las dos partes contratantes; y por lo tanto no se podrá hacerlos prisioneros ni separarlos de dichos buques à ménos que no tengan la qualidad de militares, y esto hallandose en equella sazon empleados en el servicio del enemigo.

Article XVI.—This liberty of navigation and commerce shall extend to all kinds

Articulo XVI. Esta libertad de navegacion y de comercio debe extenderse à

to the crown of Spain, *not of mere domiciled merchants, such as the claimants. A vessel found without the documents required *by the 17th article is presumptively in the same situation as if she were without [*234

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of merchandises excepting those only which which are distinguished by the name of contraband; and under this name of contraband or prohibited goods, shall be comprehended arms, great guns, bombs, with the fusees and the other things belonging to them, cannon-ball, gunpowder, match, pikes, swords, lances, spears, halberds, mortars, petards, grenades, saltpetre, musquets, musquet-ball, bucklers, helmets, breast-plates, coats-of-mail, and the like kinds of arms, proper for arming soldiers, musquet-rests, belts, horses with their furniture, and all other warlike instruments whatever. These merchandises which follow shall not be reckoned among contraband or prohibited goods: that is to say, all sorts of cloths, and all other manufacfactures woven of any wool, flax, silk, cotton, or any other materials whatever; all kinds of wearing-apparel, together with all species whereof they are used to be made; gold and silver, as well coined as uncoined, tin, iron, latten, copper, brass, coals; as also wheat, barley and oats, and any other kind of corn and pulse; tobacco, and likewise all manner of spices, salted and smoked flesh, salted fish, cheese and butter, beer, oils, wines, sugars, and all sorts of salts: and in general, all provisions which serve for the sustenance of life: furthermore, all kinds of cotton, hemp, flax, tar, pitch, ropes, cables, sails, sail-cloths, anchors, and any parts of anchors, also ships' masts, planks and wood of all kind, and all other things proper either for building or repairing ships, and all other goods whatever, which have not been worked into the form of any instrument prepared for war, by land or by sea shall not be reputed contraband, much less, such as have been already wrought and made up for any other use; all which shall be wholly reckoned among free goods: as likewise all other merchandises and things which are not comprehended and particularly mentioned in the foregoing enumeration of contraband goods: So that they may be transported and carried in the freest manner, by the subjects of both parties, even to places belonging

toda especie de mercaderías exceptuando solo las que se comprehenden baxo nombre de contrabando, ó de mercaderias prohibidas, quales son las armas, canones, bombas con sus mechas, y demas cosas pertenecientes à lo mismo, balas, pólvora, mechas, picas, espadas, lanzas, dardos, alabardas, morteros, petardos, granadas, salitre, fusiles, balas, escudos, casquetes, corazas, cotas de malla, y otras armas de esta especie propias para armar á los soldados, porta-mosquetes, bandoleras, caballos con sus armas y otros instrumentos de guerra sean los que fueren. Pero los generos y mercaderías que se nombrarán ahora, no se comprehenderán entre los de contrabando ó cosas prohibidas, à saber: toda especie de panos y qualesquiera otras telas de lana, lino, sela, algodon, ú otras qualesquiera materias, toda especie de vestidos con las telas de que se acostumbrad hacer, el oro y la plata labrada en moneda ó no, el estano, hierro, laton, cobre, bronce, carbon, del mismo modo que la cevada, el trigo, la avena, y qualquiera otro género de legumbres. El tabaco y toda la especería, carne salada y ahumada, pescado salado, queso y manteca, cerveza, aceytes, vinos, azúcar, y toda especie de sal, y en general todo género de provisiones que sirvan para el sustento de la vida. Ademas toda especie de algodon, cánamo, lino, alquitran, pez, cuerdas, cables, velas, telas para velas, áncoras, y partes de que se componen. Mástites, tablas, maderas de todas especies, y qualesquiera otras cosas que sirvan para la construccion y reparacion de los buques, y otras qualesquiera materias que no tienen la forma de un instrumento preparado para la guerra por tierra ó por mar, no serán reputadas de contrabando, y ménos las que están ya preparadas para otros usos. Todas las cosas que se acaban de nombrar deben ser comprehendidas entre las mercaderías libres, lo mismo que todas las demas mercaderías y efectos que no están comprehendidos y nombrados expresamente en la enumeracion de los géneros de contrabando, de manera que podrán ser transportados y conducidos con la mayor

any documents *and no equivalent proof can be admitted, because the
*236] pre-existing law of nations, and the practice of *prize courts under that law, though they exempt neutral property from confisca-

to an enemy, such towns or places being only excepted as are, at that time, besieged, blocked up or invested. And except the cases in which any ship of war or squadron shall, in consequence of storms or other accidents at sea, be under the necessity of taking the cargo of any trading vessel or vessels, in which case, they may stop the said vessel or vessels, and furnish themselves with necessaries, giving a receipt, in order that the power to whom the said ship of war belongs, may pay for the articles so taken, according to the price thereof, at the port to which they may appear to have been destined by the ship's papers: and the two contracting parties engage, that the vessels shall not be detained longer than may be absolutely necessary for their said ships to supply themselves with necessaries: that they will immediately pay the value of the receipts, and indemnify the proprietor for all losses which he may have sustained in consequence of such transaction.

Article XVII. To the end, that all manner of dissensions and quarrels may be avoided and prevented on one side and the other, it is agreed, that in case either of the parties hereto should be engaged in a war, the ships and vessels belonging to the subjects or people of the other party must be furnished with sea-letters or passports, expressing the name, property and bulk of the ship, as also the name and place of habitation of the master or commander of the said ship, that it may appear thereby, that the ship really and truly belongs to the subjects of one of the parties, which passport shall be made out and granted according to the form annexed to this treaty. They shall likewise be recalled every year, that is, if the ship happens to return home within the space of a year.

It is likewise agreed, that such ships being laden, are to be provided not only with passports as above mentioned, but also with certificates, containing the several particulars of the cargo, the place whence the ship sailed, that so it may be known whether any forbidden or contraband goods be on board the same: which

libertad por los súbditos de las dos partes contratantes á las plazas enemigas, exceptuando sin embargo las que se hallasen en la actualidad sitiadas, bloqueadas, ó embestidas, y los casos en que algun buque de guerra ó esquadra que por efecto de avería, ú otras causas se halle en necesidad de tomar los efectos que conduzca el buque ó buques de comercio, pues en tal caso podrá detenerlos para aprovisionarse, y dar un recibo para que la potencia cuyo sea el buque que tome los efectos, los pague segun el valor que tendrian en el puerto adonde se dirigiese el propietario, segun lo expresen sus cartas de navegacion: obligandose las dos partes contratantes á no detener los buques mas de lo que sea absolutamente necesario paro aprovisionarse, pagar inmediatamente los recibos, é indemnizar todos los danos que sufra el propietario á conseqüencia de semejante suceso.

Articulo XVII. A fin de evitar entre ambas patres toda especie de disputas y quejas, se ha convenido que en el caso de que una de las dos potencias se hallase empenada en una guerra, los buques y bastimentos pertenecientes á los súbditos ó pueblos de la otra, deberán llevar consigo patentes de mar ó pasaportes que expresen el nombre, la propiedad, y el porte del buque, como tambien el nombre y morada de su dueno y comandante de dicho buque, para que de este modo conste que pertenece real y verdaderamente á los súbditos de una de las dos partes contratantes; y que dichos pasaportes deberán expedirse segun el modelo adjunto al presente tratado. Todos los anos deberán renovarse estos pasaportes en el caso de que el buque vuelva á su pais en el espacio de un ano.

Igualmente se ha conveindo en que los buques mencionados arriba, si estuviesen cargados, deberán llevar no solo los pasaportes sino tambien certificados que contengan el pormenor del cargamento, el lugar de donde ha salido el buque, y la declaracion de las mercaderías de contra-

tion, refuse further proof where there has been spoliation of papers *malâ fide*, and condemn the property as enemy's. So also, in this case, the Spanish character of the ship cannot be established, because the claimants have forfeited the privilege of further proof by the misconduct of their own agents, and consequently, cannot furnish the equivalent testimony required by the 17th article. The justifiable inference is, that the property in the ship and cargo belongs to the enemy, or to citizens of the United States trading *with the enemy, which it will not be pretended is protected by the treaty. [*237 [*238

Key and the *Attorney-General*, for the respondents and claimants. —1. Even the total want of papers is not a substantive ground of condemnation: it may be explained, as Sir William Scott observes in *The Betsey*, 1 Rob. 84, alluding to the ancient French law.

2. Nor is the spoliation of papers conclusive to exclude further proof, and

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certificates shall be made out by the officers of the place whence the ship sailed, in the accustomed form: And if any one shall think it fit or advisable to express in the said certificates the person to whom the goods on board belong, he may freely do so: Without which requisites, they may be sent to one of the ports of the other contracting party, and adjudged by the competent tribunal, according to what is above set forth, that all the circumstances of this omission having been well examined, they shall be adjudged to be legal prizes, unless they shall give legal satisfaction of their property by testimony entirely equivalent.

Article XVIII. If the ships of the said subjects, people or inhabitants of either of the parties, shall be met with, either sailing along the coasts or on the high seas, by any ship of war of the other, or by any privateer, the said ship of war or privateer, for the avoiding of any disorder, shall remain out of cannon shot, and may send their boats aboard the merchant ship, which they shall so meet with, and may enter her to number of two or three men only, to whom the master or commander of such ship or vessel shall exhibit his passports, concerning the property of the ship, made out according to the form inserted in this present treaty, and the ship, when she shall have showed such passport, shall be free and at liberty to pursue her voyage, so as it shall not be lawful to molest or give her chase in any manner, or force her to quit her intended course.

bando que pudiesen hallarse a bordo, cuyos certificados deberán expedirse en la forma acostumbrada por los oficiales empleados en el lugar de donde el navio se hiciese á la vela, y si se juzgase útil y prudente expresar en dichos pasaportes la persona propietaria de las mercaderías se podrá hacer libremente, sin cuyos requisitos será conducido á uno de los puertos de la potencia respectiva, y juzgado por el tribunal competente, con arreglo á lo arriba dicho, para que exâminadas bien las circunstancias de su falta, sea condenado por de buena presa si no satisfaciese legalmente con los testimonos equivalantes en un todo.

Articulo XVIII. Quando un buque perteneciente á los dichos súbditos pueblos y habitantes de una de las dos partes fuese encontrado navegando á lo largo de la costa ó en plena mar por un buque de guerra de la otra ó por un corsario, dicho buque de guerra ó corsario, á fin de evitar todo desórden, se mantendrá fuera del tiro de canon, y podrá enviar su chalupa á bordo del buque mercante, hacer entrar en él dos ó tres hombres á los quales ensenará el patron ó comandante del buque su pasaporte y demas documentos, que deberán ser conformes á lo provenido en el presente tratado, y probará la propiedad del buque, y despues de haber exhibido semejante pasaporte y documentos, se les dexará segun libremente su viage, sin que les sea lícito el molestarle ni procurar de modo alguno darle caza, ú obligarle á dexar el rumbo que seguia.

never has been so held by any tribunal whose decisions this court will respect. *The Two Brothers*, 1 Rob. 113; *The Rising Sun*, 2 Ibid. 89. In this case, the stupid and artless manner in which the agents of the owners acted, is a proof that the latter did not participate in, nor can they be made penally responsible for, the misconduct of the former.

3. If the owner of the ship was a domiciled subject of Spain, the ship, and consequently, the cargo, is entitled to protection under the treaty. Commercial domicil stamps a national character for every purpose, in the view of a court of prize; and if the operation of the treaty were confined to Spanish subjects (properly so called), while it is extended to all persons inhabiting the United States, it would be unaccountably deficient in reciprocity. What fortifies the contrary construction is that the term *subjects* is several times used indiscriminately in the treaty, to signify the inhabitants of both countries. The purpose for which the documents prescribed by the treaty are required, shows that a merely formal defect only authorizes
*239] detention and sending in for *adjudication, and if "equivalent testimony" is produced, restitution must follow, though the captors are exempt from costs and damages. Equivalent testimony is that which satisfactorily proves the same thing as that in which there was defective proof before; and the proof we have produced is testimony more than equivalent. The form of passport alluded to in the 17th article is not annexed to the treaty, nor is it to be found in the department of state.[1] The Spaniards have relied on the good faith with which this country has always fulfilled its engagements; they have neglected the form, and relied on the spirit of the stipulation. The papers produced are, therefore, equivalent to a formal passport; and there is no rule by which they can be excluded, as there was no attending circumstance of fraud, in the destruction of the original documents, and consequently, the case is unaffected by that *mala fides* which precludes explanation from extrinsic testimony.

March 5th, 1817. Story, Justice, delivered the opinion of the court, and after stating the facts, proceeded as follows:—A preliminary objection has been taken in the argument at bar, to the regularity of the proceedings in this cause, and it is urged, with great earnestness and force, that the further proof was not admissible, except under an explicit order of the court for this purpose; and that the conduct of the master and supercargo, in the suppression of the documents of the cargo, and in prevaricating in their
*240] examination, has *justly forfeited the claim which the owners might otherwise have to introduce the further proof.

The proceedings in the district court were certainly very irregular; and this court cannot but regret, that so many deviations from the correct prize practice should have occurred, at so late a period of the war. The ship's papers ought to have been brought into court, and verified, on oath, by the captors, and the examinations of the captured crew ought to have been taken upon the standing interrogatories, and not *vivâ voce* in open court. Nor should the captured crew have been permitted to be re-examined in court. They are bound to declare the whole truth upon their first examin-

[1] Therefore, the proprietary interest of the ship may be proved, according to the ordinary rules of the prize court. The Amiable Isabella, 6 Wheat. 1.

ation ; and if they then fraudulently suppress any material facts, they ought not to be indulged with an opportunity to disclose what they please, or to give color to their former statements, after counsel has been taken, and they know the pressure of the cause. Public policy and justice equally point out the necessity of an inflexible adherence to this rule.

It is upon the ship's papers, and the examinations thus taken in preparatory, that the cause ought, in the first instance, to be heard in the district court ; and upon such hearing, it is to judge whether the cause be of such doubt as to require further proof ; and if so, whether the claimant has entitled himself to the benefit of introducing it. If the court should deny such order, when it ought to be granted, or allow it, when it ought to be denied, and the objection be taken by the party, and appear upon the record, the appellate court can administer the proper relief. *If, however, evidence in the nature of further proof be introduced, and no formal [*241 order or objection appear on the record, it must be presumed to have been done by consent of parties, and the irregularity is completely waived. In the present case, no exception was taken to the proceedings or evidence in the district court ; and we should not, therefore, incline to reject the further proof, even if we were of opinion, that it ought not, in strictness, to have been admitted.

The objection, which is urged against the admission of the further proof would, under other circumstances, deserve great consideration. Concealment, or even spoliation of papers, is not of itself a sufficient ground for condemnation in a prize court. It is, undoubtedly, a very awakening circumstance, calculated to excite the vigilance, and justify the suspicions of the court. But it is a circumstance open to explanation, for it may have arisen from accident, necessity or superior force ; and if the party, in the first instance, fairly and frankly explains it to the satisfaction of the court, it deprives him of no right to which he is otherwise entitled. If, on the other hand, the spoliation be unexplained, or the explanation appear weak and futile ; if the cause labor under heavy suspicions, or there be a vehement presumption of bad faith or gross prevarication, it is made the ground of a denial of further proof, and condemnation ensues, from defects in the evidence, which the party is not permitted to supply.

In the present case, there can be no doubt, that there has been a gross prevarication and suppression *of testimony by the master and supercargo. Nothing can be more loose and unsatisfactory than their first [*242 examinations ; and the new and circumstantial details given upon their second examinations are inconsistent with the notion of perfect good faith, in the first instance. The excuse, too, for throwing the packet of papers overboard is certainly not easily to be credited ; for the ship's documents which still remained on board would, in the view of a Carthagenian privateer. have completely established a Spanish character. It is not, indeed, very easy to assign an adequate motive for the destruction of the papers. If the ship was Spanish, it was, as to American cruisers, immaterial to whom the cargo belonged ; for by our treaty with Spain (treaty of 1795, art. 15), declaring that free ships shall make free goods, the property of an enemy on board of such a ship is just as much protected from capture as if it were neutral. The utmost, therefore, that this extraordinary conduct can justify on the part of the court is, to institute a more rigid scrutiny into the char-

acter of the ship itself. If her national Spanish character be satisfactorily made out in evidence, the spoliation of the documentary proofs of the cargo will present no insuperable bar to a restitution. Very different would be the conclusion, if the case stood upon the ground of the law of nations, unaffected by the stipulations of a treaty.[1]

*243] *Upon a full examination of the evidence, we are of opinion, that the Spanish character of the ship is entirely sustained, and therefore, the claimants are entitled to a decree of restitution. Two objections have been urged against this conclusion: 1. That the ship is not documented according to the requisitions of the treaty with Spain, and therefore, not

*244] within the protection of that treaty. 2. That it does not *appear that Mr. Hibberson (who is a native of Great Britain) has ever been naturalized in the dominions of Spain, and therefore, he is not a subject of Spain, within the meaning of the treaty.

As to the first objection, it is certainly true, that the ship was not furnished with such a sea-letter or passport, or such certificates as are described in the 17th article of the treaty. But the want of such documents is no

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(*a*) By the ancient French law, spoliation of papers was a substantive ground of condemnation. Thus, by the ordinance of 1543, art. 43, and of 1584, art. 70, the throwing overboard of the charter-party, or other papers, respecting the lading of the vessel, is declared cause of condemnation. And by the ordinance of August 1681, *Des Prises*, art. 6, all vessels, on board of which no charter-party, bills of lading, or invoices are to be found, are, together with their cargoes, declared good prize. Doubts having arisen as to the application of this rule of evidence, in cases where sufficient papers were found remaining on board, to furnish proof of the proprietary interest, the ordinance of the 5th September 1708, was rendered; by which it was provided, that every captured vessel, from which papers have been thrown overboard, shall be good prize, together with the cargo, upon proof of this fact alone, without its being necessary to examine into the nature of the papers destroyed, nor to inquire whether sufficient papers were found remaining on board, to furnish evidence that the ship and the goods of her lading belong to allies or friends. But this decision appearing too rigorous in practice, Louis XIV., in a rescript of the 2d February 1710, addressed to the Admiral of France, directed the council of prizes to apply the terms of this ordinance, according to the peculiar circumstances, and the subsidiary proofs in each case. Valin is of the opinion, that though this rescript escaped the attention of the framers of the regulation of the 21st October 1744 (the 6th article of which is entirely conformable to the ordinance of the 5th September 1708), yet it ought to be applied to temper the rigor of this article, according to circumstances. Valin, *sur l'Ordonnance*, Ib. And according to the authority of a celebrated modern jurist of France, such regulations should always be tempered by wisdom and equity; they are improperly styled laws; and essentially variable *pro temporibus et causis*. He cites, in confirmation of his opinion, that even the want or suppression of papers is not conclusive, a sentence of the council of prizes of the 27th December 1779, restoring the captured vessel, notwithstanding some papers had been thrown overboard, it being proved, that the papers were not of such a nature as to show the property enemy's, and the master not being accessory to the spoliation. See the opinions of M. Portalis, in the cases of The Pigou and The Statira, 1 Cranch 99, note, Ib. 104, note. The Spanish law as to spoliation, is conformable with that of France, and its application to the above case would probably have been urged by the counsel for the captors, upon the principle of reciprocity, had they not been precluded from resorting to that argument, by a former decision of the court, in the case of The Nereide, 9 Cranch 388; a majority of the judges being of opinion, that the principle of reciprocity or amicable retaliation, formed no rule of judicial decision in the courts of this country, until it was prescribed as such by the legislative will. Id. 422.

substantive ground for condemnation. It only justifies the capture, and authorizes the captors to send the ship into a proper port for adjudication. The treaty expressly declares, that when ships shall be found without such requisites, they may be sent into port, and adjudged by the competent tribunal; and "that all the circumstances of this omission having been well examined, they shall be adjudged to be legal prizes, unless they shall give legal satisfaction of their property by testimony entirely equivalent." It is apparent, from *this language, that the omission to comply with the requisites of the treaty was not intended to be fatal to the property. [*245
And, certainly, by the general law of nations, as well as by the particular stipulations of the treaty, the parties would be at liberty to give further explanations of their conduct, and to make other proofs of their property. If, indeed, upon the original evidence, the cause should appear extremely doubtful or suspicious, and further proof should be necessary, the grant or denial of it would rest upon the same general principles which govern the discretion of prize courts in other cases. But in the present case, there is no necessity for such further proof, since the documents and testimony now before us, are, in our opinion, as to the proprietary interest in the ship, entirely equivalent to the passports and sea-letter required by the treaty.

As to the second objection, it assumes, as its basis, that the term "subjects," as used in the treaty, applies only to persons who, by birth or naturalization, owe a permanent allegiance to the Spanish government. It is, in our opinion, very clear, that such is not the true interpretation of the language. The provisions of the treaty are manifestly designed to give reciprocal and co-extensive privileges to both countries; and to effectuate this object, the term "subjects," when applied to persons owing allegiance to Spain, must be construed in the same sense as the term "citizens," or "inhabitants," when applied to persons owing allegiance to the United States. What demonstrates the entire propriety of this construction is, that in the 18th article of the *treaty, the terms "subjects," "people," and "inhabitants," are indiscriminately used as synonymous, to designate [*246
the same persons in both countries, and in cases obviously within the scope of the preceding articles. Indeed, in the language of the law of nations, which is always to be consulted in the interpretation of treaties, a person domiciled in a country, and enjoying the protection of its sovereign, is deemed a subject of that country. He owes allegiance to the country, while he resides in it; temporary, indeed, if he has not, by birth or naturalization, contracted a permanent allegiance; but so fixed that, as to all other nations, he follows the character of that country, in war as well as in peace. The mischiefs of a different construction would be very great; for it might then be contended, that ships owned by Spanish subjects could be protected by the treaty, although they were domiciled in a foreign country, with which we were at war; and yet the law of nations would, in such a predicament, pronounce them enemies. We should, therefore, have no hesitation in overruling this objection, even if it were proved that Mr. Hibberson was not a naturalized subject of Spain; but we think the presumption very strong, that he had become, in the strictest sense of the words, a Spanish subject.

The Spanish character of the ship being ascertained, it is unnecessary to inquire into the proprietary interest of the cargo, unless so far as to ascertain that it does not belong to citizens of the United States; for the treaty

would certainly not protect the property of American citizens trading with
*247] the enemy *in Spanish ships. There is no presumption, from the evidence, that any American interest is concerned in the shipment. The whole property belonged either to British subjects or to the claimants, and we think the proofs in the case very strongly establish it to belong as claimed. The decree of the circuit court is affirmed, with costs.

Decree affirmed.(a)

(a) It is obvious, that the privilege of the neutral flag of protecting enemy's property, whether conferred by treaty or by the ordinances of belligerent powers, cannot extend to a fradulent use of the flag, to cover enemy's property in the ship as well as the cargo. The Minerva, 1 Marriott 235; The Cittade de Lisboa, 6 Rob. 358; The Eendraught, Ib. note. During the war of the American revolution, the United States, recognising the principles of the armed neutrality, exempted, by an ordinance of congress, all neutral vessels from capture, except such as were employed in carrying contraband goods, or soldiers, to the enemy; it was held, that this exemption did not extend to a vessel which had been guilty of grossly unneutral conduct, in taking a decided part with the enemy, by combining with his subjects to wrest out of the hands of the United States and of France, the advantages they had acquired over Great Britain, by the rights of war, in the conquest of Dominica. By the capitulation of that island, all commercial intercourse with Great Britain was interdicted. In the case in question, the vessel was purchased by neutrals, in London, who supplied her with false and colorable papers, and assumed on themselves the ownership of the cargo, for a voyage from London to Dominica. The continental court of appeals, in pronouncing the vessel and cargo liable to condemnation, observed, "Had she been employed in a fair commerce, such as was consistent with the rights of neutrality, her cargo, though the property of an enemy, could not be prize; because congress had said, by their ordinance, that the
*248] rights of neutrality should extend protection *to such effects and goods of an enemy. But if the neutrality were violated, congress have not said, that such a violated neutrality shall give such protection: nor could they have said so, without confounding all the distinctions between right and wrong." The Erstern, 2 Dall. 36. The only treaties now subsisting between the United States and foreign powers, containing the stipulation that free ships shall make free goods, are the above treaty with Spain, that of 1782 with the Netherlands (which, it is presumed, still exists, notwithstanding the changes in the political situation of that country), and the treaties with the Barbary states. The conventions between the latter and Christian powers always contain the stipulation, that the flag and pass shall protect the cargo sailing under it. In the memorable case of The Nereide, 9 Cranch 388, it was contended by the counsel for captors, that this stipulation in the Spanish treaty, taken in connection with the law of Spain, necessarily implied the converse proposition, that enemy's ships make enemy's goods, which is not expressed in the treaty. But this argument was overruled by the court, who held, that the treaty did not contain, either expressly or by implication, a stipulation that enemy's ships shall make enemy's goods. Id. 418. See Ward on the Relative Rights and Duties of Belligerent and Neutral Powers, 145.

United States *v* Tenbroek.

Internal revenue.

The act of congress of the 24th July 1813, imposing a duty, according to the capacity of the still, on all stills employed in distilling spirits from domestic or foreign materials, and inflicting a penalty of $100 and double duties, for using any still or stills, or other implements in distilling spirituous liquors, without first obtaining a license, as required by the act, does not extend to the rectification or purification of liquors already distilled.

United States *v.* Tenbrook, Pet. C. C. 180, affirmed.

*Error to the Circuit Court for the district of Pennsylvania. This [*249
was an action of debt, commenced in the district court in Pennsylvania, by the United States, against the defendant in error, to recover a penalty alleged to have been incurred for using a still, and distilling spirituous liquors, without having a license therefor, as required by an act of congress passed on the 24th of July 1813.

This act imposes a duty, according to the capacity of the still, on all stills employed in distilling spirits from domestic or foreign materials, and inflicts a penalty of $100 and double duties, on all persons who, after the first day of January then ensuing, should use any still or stills, or other implements, in distilling spirituous liquors, without having first obtained a license, as required by the provisions of the act. For every license, the act imposes a duty of nine cents for each gallon of the capacity of the still employed in distilling spirits from domestic materials, for the term of two weeks, and in proportion for a longer period. And on all stills employed in distilling spirits from foreign materials, a duty of 25 cents for each gallon of the capacity of the still, for the time of one month.

To the declaration, which was in the usual form, the defendant, in proper person, plead *nil debet*, on which issue was joined. It was proved on the trial, and admitted by the defendant, that he was the proprietor of a distillery, within the district of Pennsylvania, which he used, and for which he had not taken out a license, agreeable to the act of congress *before [*250
recited. It was also proved, on the part of the defendant, that his distillery was not used in distilling spirits from domestic materials, but in rectifying the said spirits, after they had been distilled from domestic materials; that he is not a distiller, but a rectifier of spirits. He contended, that distillation and rectification of spirits are distinct vocations; that rectifying such spirits is not a part of the process of distillation, but a mere purification of the spirits themselves from feculent or useless matter; and that he was not liable to the penalty of the act of congress. The attorney for the United States contended, that rectification of spirits in a distillery is nothing more than distillation repeated, and in this repetition, the spirits must be deemed, and in fact are, domestic materials.

The court charged the jury, that the act of congress, laying duties on licenses to distillers of spirituous liquors, did not apply, unless when the still is used for the purpose of distilling spirits from domestic or foreign materials; and that if the still, or other implement, be not employed, in distilling sprits from domestic or foreign materials, there can be no penalty incurred for using a still for any other purpose, although no license be taken out; and that spirits cannot be considered as a domestic material. That penal laws must be construed strictly, and must not be amplified by intend-

ment. That whether rectification be part of the process of distillation, was a fact to be left to the jury. The counsel for the United States excepted to this charge.

*251] There was a verdict and judgment for the defendant. *The cause was removed by writ of error to the circuit court, when the judgment of the district court was affirmed, with costs. It was brought before this court, by writ of error, and submitted on the observations of the attorney-general.

March 1st. The *Attorney-General* now contended, for the United States, that the district judge ought not to have permitted witnesses to be examined. It was no case for the application of the maxim, *quilibet in sua arte credendum est.* If the witnesses knew nothing of the subject, their testimony could not enlighten others. If they did, it was plain, that their knowledge was derived from being engaged in the same line of business, which gave them an interest in the construction of the law. In the case of the *Cast-Plate Glass Company*, Anstr. 40, Chief Baron EYRE declares, that in explaining an act of parliament, no evidence should be admitted; for that would be to make it a question of fact, in place of a question of law. The judge alone must direct the jury on the point of law. In doing this, he must form his judgment of the meaning of the legislature, in the same manner as if the case had come before him by demurrer, where no evidence can be allowed. On demurrer, a judge may well inform himself, from dictionaries or books, on the particular subject concerning the meaning

*252] of any word. Yet, if he does so at **nisi prius*, and shows them to the jury, they are not to be considered as evidence, but only as the grounds on which he has formed his opinion, in the same manner as if he were to cite authorities for the point of law he lays down.

The single question, in the present case, was, whether a person, using a still for the purpose of rectifying spirits, is within its true meaning? It is necessary to remark, that the duty under this act, was not upon the quantity of liquor distilled, nor upon its removal. This, indeed, had been the case with some parts, and at other times, with this part of our excise system. But under the present act, the duty was upon the implement or still itself. To speak the language of the debates, it was upon the capacity, not the gallon; a distinction materially relevant to a right understanding of the point in controversy. By the first section of the act, a license is required to be taken out for all stills used for the purpose of distilling spirituous liquors; no exception is made as to any particular kind of still. The term, spirituous liquors, is so comprehensive, that it must necessarily include all liquors that contain spirits, without any reference to the proportion or quantity which they may contain. By the second section, a certain amount of duty is laid on stills employed in distilling spirits from domestic materials, and a different amount on those that work on foreign materials. It is evident, that no intention existed to define what was meant by materials, but barely to discriminate between foreign and domestic, with a view to make the duty

*253] lighter on spirits produced from *the latter than on the former, according to the common policy of our legislation.

Two points will be made for the United States. 1. That spirits are the materials upon which rectification operates. 2. That rectification is a branch

of the process of distilling. The first point is so plain, that the defendant himself must admit it. The second alone opens a door to argument. The question lies out of the ordinary track of legal discussion. To understand it, we must have recourse to books of art. It is these which will best fix the true meaning of the terms distillation and rectification. We shall then be enabled to determine, if there be any, the difference between them. Doctor Black, in his Elements of Chemistry, after speaking of fermentation, says, "The spirit is separated more or less perfectly from these substances, by distillation, it being more volatile than most of them, especially, the acid, mucilaginous and coloring matter. The water is but imperfectly separated at first, on account of the small difference of volatility between it and the spirit. To reduce the spirit to a state of purity, we must perform several other operations, such as distilling it again, once or twice, with a gentle heat, which is called rectifying. By this, we separate the greater part of the water which had come over in the first distillation." Black's Chemistry, vol. 3, p. 24. Fourcroy, in his Elements (vol. 1, p. 176), defines rectification to be, "a second distillation, in which substances are purified, by their most volatile parts being raised by heat carefully managed. The *attorney-general next referred to Hall's Distiller (which, he said, [*254 was agreed to be a very accurate work upon this subject), and to the Encyclopœdia, where the definitions were substantially the same as in Black and Fourcroy. Even the common dictionaries of the language, he said, defined rectification to be the act of "improving by repeated distillations."

The point appearing to stand thus upon the score of authority, it was next to be inquired, how it stood upon that of reason? The duty, as the law so plainly makes known, is laid, in the broadest manner, upon all stills used for distilling spirituous liquors. It is neither graduated by the strength of the spirits produced, nor by the simplicity or complexity of the manufacture. The first process in distillation is understood to be, that in which the wash is put into the still. From this, low wines are drawn, or spirits of an inferior quality. From a case in Anstruther 558, it would seem, that in England, the first duty attaches on the wash, before distillation. For a still employed in the first process, it was, on all hands, admitted, that a license must be taken out. The inferior spirits so drawn do not constitute marketable spirits. A second process is then used. This consists, for the most part, in putting them into a smaller still, called a doubler. From the doubler, they come out, having the quality of common marketable spirits. A license ought surely be taken out for a still so employed, call it a doubler or by any other name. But the original matter or material, is here clearly out of view, for it went into the first still. Nothing but the spirits extracted from it were carried *over to the doubler. Does not this then establish [*255 the point, that inferior spirits may become domestic materials, under the act? It cannot, with any show of reason, be pretended, that they have lost the properties of matter, merely by being separated from substances with which they were primarily combined. Between the derivatives of matter and materials, it would be strange, indeed, to attempt any distinction, as applicable to the case under consideration. The spirits extracted by the doubler are understood to be generally about proof. For various purposes, it is necessary to increase their strength. This is effected by a third or fourth distillation, generally, though not necessarily, in the same

stills. By this process, not only is the strength raised, but the purity is increased. Now, in what, may it be asked, does this operation differ from the second process in the doubler? Spirits of an inferior strength are the materials of distillation, in the one case and in the other.

The last, and any similar subsequent operations, may be called rectifications. But they are distillations too. They impart to the spirits more strength as well as more purity. Is it just so with the second process in the doubler. It may, perhaps, be said, that these subsequent processes are all carried on by the rectifier, on spirits previously distilled. That it is done merely to fit them for combination with other materials, of which mixtures are made by persons not distillers, and that in such process extraneous matter is often introduced with a view to greater purity. To this it may be *256] answered, first, that these processes in nowise destroy *the character of distillation, as they do not necessarily prevent an augmentation in the strength of spirits. And secondly, that the introduction of extraneous matter is not confined to the higher process of distillation, as water, charcoal and other ingredients are not unfrequently used in the process by which low wines are converted into proof spirits. Suppose, a patent to be taken out for carrying on the original process, as well as rectification, in the same still; how can the duty be made to attach, even in the case of the doubler, except on the hypothesis assumed for the United States? It would be difficult, if not impracticable, to fall upon any other mode. Again, the duty on stills is properly considered as a commutation for that which might have been laid upon the liquor. Is it not, therefore, as just, that the duty should be paid upon the still, when used to produce rectified spirits, as when it is used to produce any other kind of spirits? The English statutes *in pari materia* will be found to countenance the doctrine contended for on the part of the United States; particularly, that of 2 Geo. III., ch. 5, from the 12th section of which, it appears, that the rectifier who distils spirits and the common distiller, are considered the same. Several of the other sections would also show that rectification and distillation, when an increase of strength was the object, were used as equivalent terms. The system, in England, contemplated the laying of a duty, first on the low wines, and then on the spirits distilled from them. So, congress, with like equity, may have intended *257] to impose *a duty, first upon the still, when used in the original manufacture of spirits, and again on its use in the manufacture of spirits of a higher proof. So far is such a principle from being at all repugnant to the general theory of American taxation, that it is sanctioned by the whole analogy of our impost revenue. Thus, under the present tariff, iron in bars, iron in sheets, and iron in bolts, is each charged with a different duty. Leather in different forms, as in boots, saddles, caps, slippers, pays differently. The duty levied upon imported spirits is graduated according to the degree of proof. Brown sugars, white sugars, lump sugars, powdered sugars, are all subject to different rates. Tobacco, under its different forms of manufacture, is chargeable with different duties, and the list might easily, if it were necessary, be extended. Other nations have refined somewhat more upon the principle. Mr. Brougham, in his Colonial Policy, mentions, that there was once a particular sauce for fish, used in Holland, which was made to pay no less than thirty different duties of excise! a provident decree against the luxury of the palate, among a people as renowned for frugality as riches.

Yet it may be, that this sauce was a less noxious superfluity than the liquor of the still. Revenue laws are to be construed and applied with great exactness. They are framed for the security of great national interests, and the effect of such laws, founded on considerations of public policy, is not to be weakened, by a minute tenderness to hardships, real or supposed, in particular instances. It is also a *good rule, where doubts exist in a revenue case, to lean in favor of the revenue. *The Betty Cathcart*, 1 Rob. 220 ; 1 Bl. Com. 324 (Christian's ed.). [*258

Duvall, Justice, delivered the opinion of the court, and after stating the facts, proceeded as follows :—The court, in considering this question, must be governed by the language of the act of congress of the 24th July 1813. By this act, a specific duty is laid on licenses to stills, employed in distilling spirituous liquors from domestic or foreign materials, and a penalty is inflicted for distilling without a license.

The distillation of spirituous liquors is performed by a double process : by the application of heat to a still containing the material. The product of the first process, after running through the still, is commonly called low wines, or singlings ; the low wines undergo a second process of distillation, by which spirits are produced : they are to be proof of the first, second, third or fourth degree, as defined and required by law. These are marketable ; and here the process ends. The material from which the spirits are extracted, appears to be the object of the law. The rectification or purification of spirits, after their distillation has been complete, in order to fit them for certain purposes of combination with other materials, is no part of the process of distillation, and is not a breach of the provisions of the act of congress. The distillation of spirits, and the rectification of them, after they are distilled, appear to be distinct and separate acts. No duty is specifically *laid by law on the rectification of spirits, nor does it appear, that any was contemplated ; and if the process is confined to the rectification of spirits already distilled, no penalty is incurred, although a license is not previously obtained. It was evidently the intention of the legislature, to exact one duty only on the distillation of spirits. [*259

It is the opinion of this court, that there is no error in the judgment of the circuit court. This opinion is given on the request of the attorney-general ; it being probable that the same question may frequently occur. But as this cause is improperly brought before this court, by writ of error, having been first carried from the district to the circuit court by the same process, it is dismissed.(*a*)

Writ of error dismissed.

(*a*) *Vide* United States *v.* Goodwin, 7 Cr. 103; United States *v.* Gordon, Id. 287; in which cases it was determined, that a writ of error does not lie to carry to the supreme court a civil cause which has been carried from the district court by writ of error.[1]

[1] Sarchet *v.* United States, 12 Pet. 144.

J. C. F. Chirac *v.* Lessee of A. F. Chirac *et al.*

Naturalization.—Power of French subjects to take and hold lands.

J. B. C., a native of France, emigrated into the United States in 1793, and became domiciled in Maryland; on the 22d September 1795, he took the oaths of citizenship, according to an act of assembly of Maryland, passed in 1779, and the next day received a conveyance *in fee of lands in that state; on the 6th July 1798, he was naturalized under the laws of the United States; and in July 1799 died intestate, leaving no legitimate relations, other than the plaintiffs in ejectment, who were natives and residents of France. Upon the supposition that the lands were escheatable, the state of Maryland conveyed them to his natural son J. C. F. C., with a saving of the rights of all persons claiming by devise or descent from the intestate, under which grant J. C. F. C. took possession of the lands, and remained in possession until the ejectment was brought; in March 1809, the defendants in error, the heirs-at-law of J. B. C., French subjects, brought an action of ejectment for the lands in question; and in May 1815, obtained a verdict in their favor, and a judgment thereon, which was affirmed: It was *held*, that the power of naturalization is exclusively in congress;[1] but that the treaty of amity and commerce between the United States and France, of 1778, art. 11, enabled the subjects of France to purchase and hold lands in the United States.

Quære? What was the effect of this treaty under the confederation?

J. B. C. having died seised in fee of the lands in question; his heirs being French subjects; the treaty of 1778 having been abrogated, and the act of Maryland, of 1789, permitting the lands of a French subject, who had become a citizen of Maryland, dying intestate, to descend on the next of kin, being non-naturalized Frenchmen, with a proviso vesting the land in the state, if the French heirs should not, within ten years, become resident citizens of the State, or convey the lands to a citizen: it was determined, that the time for the performance of this condition having expired, before the action was brought, the estate was terminated, unless supported in some other manner than by the act of Maryland.

But the convention of 1800, between the United States and France, enabling the people of one country holding lands in the other, to dispose of the same by testament or otherwise, and to inherit lands in the respective countries, without being obliged to obtain letters of naturalization; it was *held*, that it rendered the performance of this condition a useless formality, and that the conventional rule applied equally to the case of those who took by descent, under the act, as to those who acquired by purchase, without its aid.

The further stipulation in the convention, "that in case the laws of either of the two states should restrain strangers from the exercise of the rights of property with respect to real estate, such real estate may be sold, or otherwise disposed of, to citizens or inhabitants *of the country where it may be," was held not to affect the rights of a French subject, who takes or holds, by the convention, so as to deprive him of the power of selling to citizens of this country; and was held to give to a French subject, who had acquired lands by descent or devise (and perhaps, in any other manner), the right, during life, to sell or otherwise dispose thereof, if lying in a state where lands purchased by an alien, generally, would be immediately escheatable.

Although the convention of 1800 has expired, by its own limitation, it was determined, that the instant the descent was cast on a French subject, during its continuance, his rights became complete under it, and could not be affected by its subsequent expiration.[2]

Error to the Circuit Court for the district of Maryland. John Baptiste Chirac, a native of France, emigrated to the United States, in the year 1793, and settled in Maryland. On the 22d of September 1795, he took the oaths of citizenship, according to the form prescribed by an act of assembly of the state of Maryland, passed in the year 1769, and the next day, received a conveyance in fee of land lying within that state. On the 6th of July 1798, he was naturalized, as prescribed by the laws of the United States; and in July 1799, he died intestate, leaving no legitimate relations, other than the plaintiffs, who are natives and residents of France.

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[1] See the License Cases, 5 How. 585.

[2] Carneal *v.* Banks, 10 Wheat. 181. And see Hauenstein *v.* Lynham, 100 U. S. 489.

Supposing the lands of which he died seised to be escheatable, the state of Maryland conveyed them to John Charles Francis Chirac, his natural son, with a saving of the rights of all persons claiming by devise or descent from the intestate. Under this act, John Charles Francis Chirac took possession of the land of his father, and had remained in possession ever since. *In March 1809, the defendants in error, who are the heirs-at-law of John Baptiste Chirac, and subjects of the king of France, brought [*262 their ejectment for the land of which their ancestor died seised; and in May 1815, under the instruction of the court, to which exceptions were taken, obtained a verdict in their favor, on which a judgment was rendered; which judgment was now before the court on a writ of eror.

The act of assembly of the state of Maryland, on the construction of which the cause mainly turned, was passed in 1780, and is entitled "an act to declare and ascertain the privileges of the subjects of France, residing within this state." The 1st section gives to French subjects the capacity of holding lands within the state, on certain conditions. The 2d section gives to those subjects who may be resident in the state, all the rights of free citizens thereof. The 3d section contains a proviso, restricting and limiting the privileges granted by the act, and declaring that nothing therein contained "shall be construed to grant to those who shall continue subjects of his most Christian majesty, and not qualify themselves as citizens of this state, any right to purchase or hold land or real estate, but for their respective lives, or for years." The 4th section enacts, that if any French subject who shall become a citizen of Maryland, "shall die intestate, the natural kindred of such decedent, whether residing in France or elsewhere, shall inherit his or her real estate, in like manner as if such decedent, and his kindred, were the citizens of this state," with a proviso, that *whenever any French [*263 subject shall, by virtue of the act, become seised in fee of any real estate, his or her estate, "after the term of ten years be expired, shall vest in the state, unless the person seised of the same, shall, within that time, either come and settle in, and become a citizen of this state, or enfeoff thereof, some citizen of this or some other of the United States of America."

Harper, for the plaintiff in error, and the defendant in the court below.—1. The act of congress abrogating the French treaties, in consequence of the non-fulfilment of their stipulations by France, and the second article of the convention of 1800, stipulating for further negotiation respecting the claims of the United States for indemnities, and respecting the revival of the treaties, drew after them a virtual repeal of the act of Maryland of 1780; that act being founded on the reciprocity stipulated by the treaties. The intervention of the local legislatures was deemed necessary to carry into effect treaties made by the national government under the confederation. The legislature of Maryland understood it to have been so, for their act is not a literal transcript of the treaty of 1778; it limits and controls the reciprocity stipulated by the treaty. As nobody, at that period, could conceive the possibility that we should ever cease to maintain the relations of friendship and alliance with France, no time for the duration of the act was limited; but when the treaty was annulled, the act fell with it. Consequently, [*264 the heirs of John Baptiste Chirac had no *inheritable quality.

2. He acquired no capacity to hold, by his naturalization under the local

law, since, by the constitution, congress alone has the power of prescribing uniform rules of naturalization; and the act of Maryland is a general naturalization law, not a special act authorizing aliens to hold lands, or conferring other particular privileges. If the states could make such a law, the constitution of the United States would be completely evaded; as the citizens of one state are entitled to all the privileges and immunities of citizens in every other state.

3. The heirs of John Baptiste Chirac have not conformed to the provisions of the act of Maryland, by settling in the state, and becoming citizens, nor by enfeoffing some person of the lands, within ten years from the time when they became seised; and consequently, their right was gone, before the ejectment was brought. The term seisin, in the act, means, not a seisin in fact, a *pedis possessio*, but a legal seisin; and the ten years' limitation begins to run, after the seisin in law. The technical word enfeoff, as here used, merely refers to the alienation of the land, which may be by bargain and sale, or any other usual mode of conveyance known in the state; and it was not necessary, that they should come into the state, in order to execute any of these conveyances, or even to make a feoffment.

Winder and *Mercer*, contrà.—1. The constitution of the United States, and the laws made under it, do not, *ipso jure*, repeal a state law relative to the same matter, but only annul such parts of the latter as are inconsistent with the former. The respective *states will preserve the right of *265] making naturalization laws, giving certain civil rights to foreigners, without conferring universal political citizenship.

2. The act of Maryland was not founded on the treaty merely; the legislature had other objects of policy in view, than a mere compliance with the stipulations of the treaty; the continuance of the act was wholly independent of the treaty. It is a part of the code of Maryland, abstracted from the treaty, and would exist, with or without the treaty. It, consequently, remained in full force and vigor, notwithstanding the abrogation of the French treaties in 1798. The time of limitation contained in the act, within which the party is obliged to come and reside in the state, or to enfeoff a citizen, does not refer to a mere seisin in law. The term "seised," if unconnected with other expressions, qualifying its import, might, indeed, imply a legal seisin only; but with the injunction to "enfeoff," it necessarily imports a seisin in fact, because such a seisin is necessary, to enable the party to make a feoffment.

3. But the convention of 1800, which was concluded, whilst the defendants in error held an estate in fee-simple, under the act of Maryland, determinable by their failure to comply with one of the alternative conditions contained in that act, is conclusive of this cause. That convention enables the citizens of both countries to dispose by testament, donation or otherwise, of their property, whether real or personal, situate in the territories of either, to whomsoever they please; and to succeed as heirs *ab intestato*, *with- *266] out being naturalized. (Art. 7.) The first clause of the article gives a new power to dispose of property held by citizens of either country in the dominions of the other, viz., the power to dispose by testament, or in any other manner. It, of course, repeals so much of the act of Maryland as restricts the power of disposing to the mode of feoffment only; and not

only does not prescribe any period of time within which it is to be done, but necessarily gives the lifetime of the party, since it allows a disposition by last will and testament, which can only take effect after the death of the party. The second clause places the citizens of both countries in the same predicament as to inheritances, as if they were naturalized. The defendants in error were, by the laws of the state, heirs to John Baptiste Chirac, subject to a liability to have their estate defeated, unless they became naturalized. This clause superseded the necessity of naturalization, or rather, naturalized them for this particular purpose. The further stipulation "that in case the laws of either of the two states should restrain strangers from the exercise of the rights of property with respect to real estate, such real estate may be sold, or otherwise disposed of, to citizens or inhabitants of the country where it may be," can only refer to the laws made by the two contracting parties, *i.e.*, France and the United States; not any particular state of our domestic confederacy: for the states of the Union, as separate and independent sovereignties, are not included. *No act of theirs [*267
could affect the convention. It is to them the supreme law; and no state law incompatible with it can be valid: therefore, that part of the act of Maryland which prescribes only one mode of disposing of real property belonging to Frenchmen, is void. The treaty secures the right to dispose of it in any mode.

Martin, in reply.—1. It is a general rule, adopted by sovereign states that the real property within their dominions should not be owned by aliens; not that this universal rule is considered as a deprival of property, the suffering a penalty, or the incurring of a forfeiture, but as an absolute disability to acquire, to hold, and to enjoy the property, founded upon reasons of public policy. 1 Bro. Abr. 132, Alien, C.; *Attorney-General* v. *Duplessis*, Parker 144, *in notis*; 5 Bro. P. C. 91. The act of Maryland merely dispenses with this rule to a certain extent, and upon certain conditions: it does not inflict any penalty or forfeiture on the kindred of the decedent; nor create in them any disabilities; nor deprive them of any property; nor infringe any of their rights whatsoever. Consequently, they must show that they have strictly complied with the terms on which this boon has been granted.

2. The moment the French subject, on whom the act confers a capacity to hold, dies, his kindred inherit; and the moment the kindred inherit, they become seised in fee; and the moment they become seized in fee, the time of limitation begins to run, within *which they must either come and [*268
settle in the state, &c., or enfeoff a citizen. The policy of the legislature in prescribing this limitation was, that not more than ten years should elapse from the decease of the French proprietor, before the lands should again be held and owned by a citizen, whose interest it might be to cultivate and improve the same for the benefit of the community. It was, therefore, perfectly immaterial, by what technical mode of conveyance the property should be conveyed, and whether the seisin of the heirs should be a seisin in fact, or a legal seisin. The conveyance might be by any sufficient deed; and even a feoffment might be made by an attorney, without obtaining actual possession.

3. The stipulation in the convention of 1800 does not, of itself, give to

French citizens property which they had not before, nor enlarge or alter their estates in the lands held by them. They must have been legally entitled to property, when the convention took place, or must have legally acquired it afterwards. The ancestor of the defendants in error had in his lifetime a fee-simple, and died seised thereof; but of this estate he was seised, not as a French citizen, but as a citizen of Maryland; and upon his death, his heirs, being aliens, could have had no legal claim to the property, and it would have escheated to the state, had it not been for the act of Maryland. Under that act, they became seised of an estate in fee-simple, but conditional and liable to be defeated, unless they complied with the terms of the act. Had they, within the ten years, become citizens of the state, *269] they would not have wanted the protection *of the treaty, for their property would have been protected as that of citizens. Had they, within the same time, enfeoffed a citizen, the estate would have vested in him, and the protection of the treaty would have been equally superfluous. As the heirs performed neither the one nor the other of these alternative conditions, their estate was defeated, at the expiration of the term of ten years, and became vested in the state. From that time, the defendants in error have not been seised of any estate to be operated on by the convention; and consequently, it can give them no right to recover the lands, either from the state, or from the plaintiff in error, who claims under the state.

March 11th, 1817. MARSHALL, Ch. J., delivered the opinion of the court.—The first point made by the plaintiff in error is, that the estate of which John Baptiste Chirac died seised was, in his lifetime, escheatable, because it was acquired before he became a citizen of the United States; the law of the state of Maryland, according to which he took the oaths of citizenship, being virtually repealed by the constitution of the United States, and the act of naturalization enacted by congress.

That the power of naturalization is exclusively in congress does not seem to be, and certainly ought not to be, controverted; but it is contended, that the act of Maryland, passed in the year 1780, "to declare and ascertain the privileges of the subjects of France, residing within that state," gives to *270] those *subjects the power of holding land, on the performance of certain conditions prescribed in that act. The 2d section gives to the subjects of France who may reside within the state of Maryland, all the rights of free citizens of that state. The 3d section contains a proviso, restricting the privileges granted by the act, and declaring that nothing therein contained shall be construed to grant to those who should continue subjects of his most Christian majesty, and not qualify themselves as citizens of this state, any right to purchase or hold lands, or real estate, but for their respective lives, or for years. This act certainly requires that a French subject, who would entitle himself, under it, to hold lands in fee, should be a citizen according to the law which might be in force at the time of acquiring the estate. Otherwise, he could only purchase or hold for life or years. John Baptiste Chirac was not a citizen, according to that law, when he purchased the land in controversy.

It is unnecessary to inquire into the consequences of this state of things, because we are all of opinion, that the treaty between the United States and France, ratified in 1778, enabled the subjects of France to hold lands in the

United States. That treaty declared that "the subjects and inhabitants of the United States, or any one of them, shall not be reputed *aubians* (that is aliens) in France;" "they may, by testament, donation or otherwise, dispose of their goods, movable and immovable, in favor of such persons as to them shall seem good; *and their heirs, subjects of the said United States, whether residing in France or elsewhere, may succeed them *ab intestat*, without being obliged to obtain letters of naturalization. The subjects of the most Christian king shall enjoy, on their part, in all the dominions of the said states, an entire and perfect reciprocity relative to the stipulations contained in the present article."(*a*) Upon every principle of fair construction, this article gave to the subjects of France a right to purchase and hold lands in the United States. [*271

It is unnecessary to inquire into the affect of this treaty, under the confederation, because, before John Baptiste Chirac emigrated to the United States, the confederation had yielded to our present constitution, and this treaty had become the supreme law of the land.

*The repeal of this treaty could not effect the real estate acquired by John Baptiste Chirac, because he was then a naturalized citizen, comformable to the act of congress; and no longer required the protection given by treaty. [*272

John Baptiste Chirac having died seised in fee of the land in controversy; his heirs-at-law being subjects of France; and there being, at that time, no treaty in existence between the two nations: did his land pass to these heirs, or did it become escheatable? This question depends on the law of Maryland. The 4th section of the act already mentioned enacts, among other things, that if any subject of France who shall become a citizen of Maryland, "shall die intestate, the natural kindred of such decedent, whether residing in France or elsewhere, shall inherit his or her real estate, in like manner as if such decedent, and his kindred, were the citizens of this state." An attempt has been made to avoid the effect of this claim in the act, by contending, that it was passed for the sole purpose of enforcing the treaty, and was repealed by implication when the treaty was repealed. The court does not think so. The enactment of the law is positive, and in its terms perpetual. Its provisions are not made dependent on the treaty; and, although the peculiar state of things then existing might constitute the

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(*a*) Before the French revolution, the *droit d'aubaine* (*jus albinatus*) was abolished, or rather modified, by the treaties between France and the greater part of the other civilized powers of the world. But it seems, according to an observation of M. Tronchet, in the discussions on the civil code, that this conventional law only excluded the royal fisc from taking by escheat, the property of foreigners deceased in France, but did not exclude their French relations from inheriting, in preference to their foreign heirs, in the same or a nearer degree of affinity; because the foreign heirs had not the active power of inheriting. This was given to all foreigners, without distinction, and independent of treaties, by the national assembly in 1789. But this concession was repealed by the civil code, which again placed the matter upon its original footing of reciprocity, by enacting that foreigners should enjoy in France the same civil rights which are, or shall be, conceded to Frenchmen by the treaties with the nation to which such foreigners may belong. Liv. 1, ch. 1, *De la Jouissance des Droits Civils*, Art. II. *Discussions du Code Civil, par* MM. Jouanneau, &c., tom. 1, p. 45.

principal motive for the law, the act remains in force from its words, however that state of things may change.

*273] But to this enacting clause, is attached a proviso, *that whenever any subject of France shall, by virtue of this act, become seised in fee of any real estate, his or her estate, "after the term of ten years be expired, shall vest in the state, unless the person seised of the same shall, within that time, either come and settle in, and become a citizen of this state, or enfeoff thereof some citizen of this or some other of the United States of America. The heirs of John Baptiste Chirac then, on his death, became seised of his real estate in fee, liable to be defeated by the non-performance of the condition in the proviso above recited. The time given by the act for the performance of this condition expired in July 1809, four months after the institution of this suit. It is admitted, that the condition has not been performed; but it is contended, that the non-performance is excused, because the heirs have been prevented from performing it, by the act of law and of the party. The defendant in the court below has kept the heirs out of possession, under the act of the state of Maryland, so that they have been incapable of enfeoffing any American citizen; and having been thus prevented from performing one condition, they are excused for not performing the other. Whatever weight might be allowed to this argument, were it founded in fact, its effect cannot be admitted in this case. The heirs were not disabled from enfeoffing an American citizen. They might have entered, and have executed a conveyance for the land. Having

*274] failed to do so, their estate has terminated, *unless it be supported in some other manner than by the act of Maryland.

This brings the court to a material question in the cause. While the defendants in error were seised of an estate in fee simple, determinable by their failure to perform the condition contained in the act of 1780, another treaty was entered into between the United States and France, which provides for the rights of French subjects claiming lands by inheritance in the United States. This treaty enables the people of one country, holding lands in the other, to dispose of the same, by testament or otherwise, as they shall think proper. It also enables them to inherit lands in the respective countries, without being obliged to obtain letters of naturalization. Had John Baptiste Chirac, the person from whom the land in controversy, descended, lived until this treaty became the law of the land, all will admit, that the provisions which have been stated would, if unrestrained by other limitations, have vested the estate of which he died seised in his heirs. If no act had been passed on the subject, and the appellees had purchased lands lying in the United States, it is equally clear, that the stipulations referred to would have operated on these lands, so as to do away that liability to forfeiture to which the real estates of aliens are exposed. Has it the same, or any effect, on the estate of which the appellees were seised when it was entered into?

*275] It has been argued, that the treaty protects existing *estates, and gives to French subjects a capacity to dispose and to inherit; but does not enlarge estates. This is true. But the estate of the defendants in error requires no enlargement. It is already a fee, although subject to be defeated by the non-performance of a condition. The question is, does this treaty dispense with the condition, or give a longer time for its performance? The condition is, that those who hold the estate shall become citizens of the

United States, or shall enfeoff a citizen, within ten years. Does the treaty control or dispense with this condition?

The direct object of this stipulation is, to give French subjects the rights of citizens, so far as respects property, and to dispense with the necessity of obtaining letters of naturalization. It does away the incapacity of alienage, and places the defendants in error in precisely the same situation, with respect to lands, as if they had become citizens. It renders the performance of the condition a useless formality, and seems to the court to release the rights of the state as entirely, in this case, as in the case of one who had purchased, instead of taking by descent. The act of Maryland has no particular reference to the case of Chirac, but is a general rule of state policy, prescribing the terms on which French subjects may take and hold lands. This rule is changed by the treaty; and it seems to the court, that the new rule applies to all cases, as well to those where the lands have descended by virtue of the act, as to those where lands have been acquired *without its aid. The general power to dispose "without limitation," which [*276 is given by the treaty, controls the particular power to enfeoff within ten years, which is given by the act of Maryland.

But the treaty proceeds to stipulate, "that in case the laws of either of the two states should restrain strangers from the exercise of the rights of property with respect to real estate, such real estate may be sold, or otherwise disposed of, to citizens or inhabitants of the country where it may be." In many of the states, perhaps, in all of them, the laws do "restrain strangers from the exercise of the rights of property with respect to real estate;" consequently, this provision limits, to a certain extent, the principles antecedently granted. What is the extent of this limitation?

It will probably prevent a French subject from inheriting or purchasing the estate of a French subject, who is not also a citizen of the United States; but it cannot affect the right of him who takes or holds by virtue of the treaty, so as to deprive him of the power to do that for which this clause stipulates; that is, "to sell or otherwise dispose of the property to citizens or inhabitants of this country." This general power to sell, according to the principles of our law, and, it is presumed, of that of France, endures for life. A subject of France, then, who had acquired lands by descent or devise (perhaps also, by any other mode of purchase), from a citizen of the United States, would have a right, during life, to sell or otherwise dispose of those lands, if lying in a state where lands purchased by an alien, generally, would, *be immediately escheatable on account of alienage. The [*277 court can perceive no reason for restraining this construction, in the application of the treaty to the state of Maryland, where the law, instead of subjecting the estate to immediate forfeiture, protects it for ten years. The treaty substitutes the term of life, for the term of ten years given by the act.

If, then, the treaty between the United States and France still continued in force, the defendant would certainly be entitled to recover the land for which this suit is instituted. But the treaty is, by an article which has been added to it, limited to eight years, which have long since expired. How does this circumstance affect the case? The treaty was framed with a view to its being perpetual. Consequently, its language is adapted to the state of things contemplated by the parties, and no provision could be made for the event of its expiring within a certain number of years. The court

must decide on the effect of this added article, in the case which has occurred. It will be admitted, that a right once vested does not require, for its preservation, the continued existence of the power by which it was acquired. If a treaty, or any other law, has performed its office, by giving a right, the expiration of the treaty or law cannot extinguish that right. Let us, then, inquire, whether this temporary treaty gave rights which existed only for eight years, or gave rights during eight years which survived it?

The terms of this instrument leave no doubt on this subject. Its whole effect is immediate. The instant *the descent is cast, the right of the party becomes as complete as it can afterwards be made. The French subject who acquired lands by descent, the day before its expiration, has precisely the same rights under it, as he who acquired them the day after its formation. He is seised of the same estate, and has precisely the same power, during life, to dispose of it. This limitation of the compact between the two nations, would act upon, and change all its stipulations, if it could affect this case. But the court is of opinion, that the treaty had its full effect, the instant a right was acquired under it; that it had nothing further to perform; and that its expiration or continuance afterwards was unimportant.

*278]

Judgment affirmed.

The George.

Collusive capture.

A question of collusive capture. The capture pronounced to be collusive, and the property condemned to the United States.
The George, 2 Gallis. 249, affirmed.

This is the same cause which is reported in the first volume of these reports, p. 408, and which was ordered to further proof upon the points there stated.

*279] *The case was argued by *Webster* and *G. Sullivan*, for the captors, and by the *Attorney-General*, for the United States.

March 15th, 1817. Johnson, Justice, delivered the opinion of the court. —This is one of those cases which too often occur in courts exercising admiralty jurisdiction, in which the court is left to decide between the most positive testimony on the one hand, and the most obstinate circumstances on the other.

The privateer Fly had captured the schooner George, and carried her into the province of Maine. But various circumstances having excited a suspicion that the capture was collusive, a claim was filed in behalf of the United States, and she was adjudged to the government, in opposition to the right set up by the captor.

In all the courts through which this case has passed, the most ample opportunities have been given for the production of testimony. But, unfortunately, this indulgence has only served to thicken the difficulties of the case. We have now before us the most positive depositions of the supercargo and the shippers of the George (men whose veracity stands unimpeached), denying in every point, the collusion, and contradicting, in almost every material point, the evidence upon which the adjudications took place in the

courts below. On the other hand, the characters of Thomas and Rodick, who swear to positive confessions on the subject of the fraud, are amply supported *by the most respectable testimony, whilst the veracity of [*280
Wasgate and Stanwood, who testify to the same point, stands wholly unimpeached. It is painful to a court ever to express an opinion that results in an imputation of wilful perjury, and, as much as it is possible in this case, we will put out of view the clashing testimony of individuals, and consider the case upon those facts concerning the truth of which the evidence leaves no doubt.

It is a notorious fact, and is expressly and repeatedly sworn to in this case, that during the restrictive system, and the late war, English manufactures, in immense quantities, were accumulated in the small ports on the west coast of Nova Scotia, and it is a melancholy truth, which this court has had but too much cause to know, that many unprincipled individuals were actively engaged in introducing those goods into the United States, under innumerable artifices, and to an immense amount. The protection of the British government was openly given to this intercourse, and there were found but too many in our country who countenanced and encouraged it. Hence, this illicit intercourse was actively carried on, and naturally casts a suspicion on such shipments made in that quarter. On the other hand, although an effort has been made to show, that a trade in the same articles was carried on between those provinces and the Havana, but one instance can be shown of such a shipment. All the witnesses agree, that the exports from St. John's to the Havana consisted of fish and lumber. Indeed, from the course of trade at that time, it is notorious, that the Havana, [*281
*as well as other Spanish ports to the southward, were crowded with British manufactures, for the same unprincipled trade carried on at Amelia Island. The shipment, then, in the first instance, is a suspicious one, and and leads to the opinion, that the dry-goods were intended for the United States, whilst the fish and lumber were to be used only as the cover under which they were to be introduced. But this reasoning may be consistent with the idea of a destination to any port of the United States, as well as the ports in that vicinity with which this privateer appears to have been connected. Let us, then, examine, if the George was equipped for a voyage of any duration. And here, the evidence is irresistible, to show that she was not. She had no dunnage or platform, for the purpose of preserving the goods from damage by water, and nothing was stowed or packed in such a manner as to indicate preparation for a protracted voyage. Her sails and rigging were old, worn and deficient in quantity, and her mainsail too large both for mast and boom. Her wood and water, and provisions, very scanty; and her crew, before the mast, not more than one-half of what were necessary for a long and a winter's voyage. Add to this, that her master is proved to have been a very young man, scarcely twenty-one years of age, altogether unknown to the shippers, and engaged only four days before the vessel's sailing. It cannot be believed, that so valuable a cargo could have been destined for so long a voyage, with such defective equipments; no court, upon such evidence, would *have hesitated to avoid a policy on [*282
either vessel or cargo. We, therefore, think, that her real destination must have been to some port in the vicinity of that at which her voyage commenced. How, then, was the cargo to be introduced?

Here, I regret, that it is necessary to notice a part of the testimony of Gregory Vanhorne, which certainly casts a shade upon all the rest of his testimony. The George, it appears, had actually sailed, under convoy of the Beaver, as far as Etang Harbor. There, the vessel lay in a secure port, under the protection of the Martin sloop of war, and at a place occasionally assigned as a place of rendezvous to vessels that were to sail under convoy. Yet, Vanhorne swears, that he heard the commander of the Martin expressly order the master of the George to depart for the place where she was captured, an open road, without protection, only fifteen miles from Etang Harbour, and there to wait the indefinite arrival of some unascertained convoying vessel. This cannot be true; for, independently of the fact, which appears to be satisfactorily established, that Long Island Harbor, in the island of Grand Magnan, when this vessel was captured, had never been used as a place of rendezvous for a convoy, it is very clear, that such an order would not have been obeyed by a vessel that feared exposure to capture; for it is proved to have been a place often visited by American privateers.

We, therefore, consider the vessel's departure from Etang Harbor to the
*283] place where sho was *captured as voluntary, and her patient stay at that place, as manifesting that she did not fear exposure to American capture. Yet, it does not follow, necessarily, that it was the Fly privateer that she was waiting for, nor that she expected to be captured at all. The cargo intended for the American market may, by possibility, have been intended to be introduced into the United States, by being transshipped into some smuggling vessel. So far, everything comports perfectly with the innocence of this capture.

But the privateer Fly also draws suspicion upon herself, in the very inception of her voyage. We find, what we pronounce absolutely unprecedented, notwithstanding every effort to prove the contrary, that the captain, Dekoven, is sole owner of the privateer, and every man under him, from the lieutenant down, is engaged on wages. In the case of *The Washington Privateer* (*ante*, p. 169), it was a circumstance of great weight with this court, that nine out of the fifteen of the ship's company were joint-owners, and it was thought improbable, that such a transaction, if there was fraud in it, would have been confided to so many witnesses. But here, no man but the captain is to participate in the prize-money, and he thus presents himself as the most convenient agent possible to be intrusted with such an undertaking. Perhaps, this circumstance may give a leaning to the mind of the
*284] court, in considering the effect which ought to be *given to other evidence in the cause; but if so, it is Dekoven's misfortune, and one which he has himself furnished the cause for.

It then becomes necessary to consider, whether the arrival of Captain Dekoven was the object of this vessel, in taking the position she did, in the island of Grand Magnan. And here, it is proper to remark, that Etang Harbor, lying up the bay of Passamaquoddy, N. W. and by W. of St. Johns, where this vessel took in her cargo, is off the course to Cuba, and a very convenient situation for intelligence with Machias, in the province of Maine, by means of a chain of islands extending across the bay. One of these islands is Moose Island, about five leagues distant from Grand Magnan, and something less from Etang Harbor. Now, the evidence is very satisfactory, to prove that the Fly lay, some time in December, at Machias; that during

that time, Sebor, the lieutenant and brother-in-law of Dekoven, was absent from the vessel. And Jabez Mowry, who resides on Moose Island, swears, that during that time, Sebon was on Moose Island, and holding communication with certain notorious smugglers from the states; to one of which, of the name of Toler, from New York, he had a letter. Again, the pilot who was on board the Fly swears, that from all he saw on the occasion of the capture, he concluded it was amicable; and Aaron Gale, a witness, resident upon the island of Grand Magnan, who saw the whole transaction, swears to the same fact, and adds, that after the capture, the captain of the privateer and his prize-master came on shore to *a neighboring house, where the witness then was, and got something to [*285 drink. This looks very little like a consciousness of being among enemies. To this he adds, that he heard a British officer, who was at the time recruiting upon the island, threaten Vanhorne, the supercargo, who, together with all the crew, except the supposed captain, were immediately put on shore, to put him in irons for the fraud in thus colluding with the enemy.

I will notice but two more pieces of testimony which the case affords, and which, taken with the rest, we think too strong to be resisted. The first is, that of Richard Higgins, who testifies that, on the arrival of the George off the harbor called Frenchman's Bay, or, as he expresses himself, at Mount Desert, he, the deponent, was the first person who boarded her; that Sebor, the lieutenant of the Fly, who was the prize-master, told him where they had captured the George; upon the witness's inquiring what she was loaded with, he replied, fish and lumber. The witness remarked, that she floated very light for such a load, upon which Sebor replied, he did not know what the cargo consisted of, and that he wanted to get farther to the westward. The witness then told him, distinctly, "that he presumed the capture had been made by some previous understanding, and that if such were the case, he thought he would be likely to fare better, and undergo a less rigorous scrutiny, if he put into this district, than he would, if he went into any of the more western districts, upon which, after consulting with some one of his crew, he went in." This testimony is important, in [*286 *two views, 1st. The plot here developes itself, and we find the fish and lumber actually resorted to as the means of cloaking the introduction of the British goods. And the resort of Sebor to this deception (for he must have known it to be such, had it been only from the inspection of the invoice), shows his privity to the secrets of the machinery. 2d. Going into the port, after the suggestion of Higgins, amounts to a passive acquiescence in the correctness of his suggestions, and an acceptance of the facilities held out to him to induce him to enter that port.

The last and only remaining piece of testimony that we shall notice, is that of Joseph Grindel, of Penobscot, who swears, that he was in St. Johns, at the time the George was lading; that he was familiarly acquainted with Vanhorne, the supercargo, and that he held a conversation with him, respecting a passage, and the shipment of a hogshead of molasses to the states, and remitting the money to his mother, at Penobscot, which, if it be true (and we have no cause to doubt his veracity), puts to rest every question relative to the fraudulent design with which this adventure was undertaken. And the same witness further swears, that after consenting to take his adventure on board (an adventure that never could have been intended for the

Havana market), Vanhorne sailed a day or two sooner than he had intimated to the witness. That upon this, he complained to Nehemiah Merrit, the shipper, and received from him this notable answer, "He suspected your politics and was afraid you would betray him."

*287] *Upon the whole, we are of opinion, that it was a case of collusive capture, and that the decree below should be affirmed.

Decree affirmed.

The Argo.

Depositions de bene esse.

The provision in the judiciary act of 1789, § 30, as to taking depositions *de bene esse*, does not apply to cases pending in this court, but only to cases in the district and circuit courts. Testimony by depositions can be regularly taken for this court, only under a commission issuing according to its rules.

Appeal from the Circuit Court for the district of Massachusetts. This was an information for a violation of the non-importation acts. On the part of the appellants, it was alleged, that the vessel (which sailed from Portland, in the district of Maine, in April 1813, and returned to that port, laden with a cargo of molasses, in the month of August, of the same year), instead of going to Cumana, her ostensible port of destination, had proceeded to Guadaloupe, then a British possession, and there took in her cargo. This was the sole question of fact in the cause; on which the court below decreed restitution to the claimant, from which decree, an appeal was entered, on behalf of the United States, to this court.

*288] *March 7th. *Webster*, for the claimants, objected to the reading of the depositions taken *de bene esse* in this cause. He argued, that there is no provision in the laws, by which testimony in writing can be taken, to be used here, without a commission issuing from this court. The provisions of the judiciary act of 1789, § 30, do not extend to the supreme court; and the act of 1803, ch. 93, does not prescribe any new mode of taking testimony, but only declares that new evidence may be used in prize and instance causes. *Ex parte* testimony may be taken, to be used in the courts below, but here it may not; because this is the tribunal of last resort, and the other party might be surprised by the production of such proof, to his irretrievable injury. It was to guard against this consequence, that the laws omitted any provision for such testimony to be used in this court.

The *Attorney-General*, contrà, stated, that it had been the uniform practice, to take testimony to be used in this court, in the same manner as if taken for the district and circuit courts; and that the practice had been uniformly acquiesced in. He argued, that this court, sitting as a court of admiralty, had a right to receive *ex parte* affidavits, in the same manner as the circuit and district courts, or the courts of admiralty abroad, who received affidavits and permitted them to be read, whether taken *ex parte*, or under a commission.

March 11th, 1817. Marshall, Ch. J., delivered the opinion of the court.

*289] —*On considering the 30th section of the judiciary act of 1789, the court is of opinion, that the provision, as to taking depositions *de*

bene esse, does not apply to cases pending in this court. In terms, the provision refers to cases in the district and circuit courts. Testimony, by depositions, can be regularly taken for this court only under a commission issuing according to its rules. A practice has hitherto prevailed, to take depositions *de bene esse*, in causes pending here, and as no objection has been made at the bar, it has passed *sub silentio*. Under such circumstances, we cannot say, that the United States are in default in taking depositions, according to the usual practice. We shall, therefore, continue this cause to the next term, to enable the parties, if they choose, to take testimony under commissions issued under the rules prescribed by this court.

Cause continued.(*a*)

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*Morgan's Heirs *v.* Morgan *et al.* [*290

Jurisdiction.—Parties in equity.—Specific performance.

The jurisdiction of the circuit court having once vested, between citizens of different states, cannot be divested by a change of domicil of one of the parties, and his removal into the same state with the adverse party, *pendente lite*.[1]

In a suit demanding a specific performance of a contract, by conveying lands, in the state of Ohio, stipulated to be conveyed as the consideration for other lands sold, in the state of Kentucky, or, in lieu thereof, requiring indemnification by the payment of money; it was held, that all the co-heirs of the vendor, deceased, ought to be made parties to the bill, and that the death of one of the heirs ought to be proved, in order to excuse his omission as a party to the bill.[2]

It is a universal rule of equity, that he who asks for a specific performance, must be in a condition to perform himself; therefore, the vendor, being unable to make a title, free from incumbrances, to the lands sold in Kentucky, was held not to be entitled to a decree for a specific performance.[3]

Appeal from the Circuit Court of Kentucky. This was a bill in equity, filed by the complainants in the court below (who are the defendants here), founded on a bond, conditioned for the conveyance of 5000 acres of land, to be situated within certain bounds of the state of Ohio; for which land a conveyance was prayed, if the defendant was possessed of, or had the means of acquiring, the title thereto, and in the event of such inability on the part of the defendant, to comply specifically with his stipulation, a compensation in damages in lieu thereof; *and in this latter case, that a tract of [*291
1000 acres of land, situate in the county of Bourbon, in the state of Kentucky, which formed the consideration on the part of the complainants, for the 5000 acres of Ohio land, and for the conveyance of which the ances-

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(*a*) See the rule of the present term, as to the mode of taking depositions, by commission, out of this court, or the circuit courts, in causes of admiralty and maritime jurisdiction. This rule applies both to prize and instance causes. Further proof is admissible in the latter as well as the former. (The James Wells, 7 Cranch 22; The Clarissa Claiborne, Id. 107.) But it must not be understood, that instance or revenue causes stand on the same footing with prize causes, in respect to the inadmissibility of further proof, until they are heard on the original evidence. Further proof may be exhibted in these cases, in the first instance, and if the courts have doubts on the hearing, still further proof may be ordered.

[1] Mollan *v.* Torrance, 6 Wheat. 537; Dunn *v.* Clarke, 8 Pet. 1; Clarke *v.* Mathewson, 12 Id. 164; United States *v.* Myers, 2 Brock. 516; Kanouse *v.* Martin, 15 How. 208.

[2] See Shields *v.* Barrow, 17 How. 130, 142.

[3] Bank of Columbia *v.* Hagner, 1 Pet. 455; Garnett *v.* Macon, 2 Brock. 186.

tor of the complainants had, contemporaneously with the first bond, executed his own obligation to he defendant, should be sold, for the purpose of completing such indemnity, upon the suggestion of the insolvency of the defendant; on the ground of the equitable lien existing on the part of the complainants in that land, for the purpose of such indemnity.

The bill further alleged, that the ancestor of the complainants, discovering the inability or unwillingness of the defendant to fulfil the stipulations of his said bond, for the purpose of his ultimate indemnity against the consequences of such failure, had instituted an ejectment in the Fayette circuit court, against James Patton, to whom the defendant had, many years before, sold, and invested with the possession of, the said 1000 acre tract, against whom judgment had been rendered in his favor. That subsequent to such judgment, an adjustment of the accounts of improvements, rents and profits had been effected between them, which was shown by an agreement in writing, in which it was stipulated, that the said Patton should pay to the ancestor of the complainants the sum of $30, in full for rents, and should yield up the possession of the premises on a day therein named. But that in violation of the spirit and true intention of this agreement of compromise, he, the said Patton, *had fraudulently prosecuted a writ *292] of error to the said judgment in ejectment; and having procured, in the appellate court, a reversal of the said judgment, had secretly, illegally, and by combination with Chilton Allen and others, procured a sale, under color of an execution for the costs, on the reversal aforesaid, for the sum of $13.72½, and sacrificed 666⅔ acres of the said tract, worth many thousand dollars, for that trivial sum; the said Allen having become the purchaser, and subsequently conveyed 500 acres thereof to Patton, and the residue to James Scoby, all of whom were made parties to the bill. The complainants, for the purpose of giving legal effect to the lien given them by equity, on this tract of 1000 acres of land, for the satisfaction of their demand, prayed, that the sale, and all other proceedings on the execution for costs, be vacated, on account of the fraud and illegality by which the same was effected.

Morgan, the defendant, in his answer, admitted, that he was unable to comply with the contract to convey the lands N. W. of the Ohio; alleged fraud in the original contract, &c. Allen, Patton and Scoby denied fraud, &c., and alleged a good title under the sheriff's deed.

On the hearing, the court, at their November term, in 1814, dismissed the bill as to Allen, Patton and Scoby; but decided, that the defendant, Morgan, was responsible for the value of the lands in Ohio, and directed a jury to ascertain its value. At the May term 1815, a jury estimated the Ohio land to be worth, on the 11th day of December 1795, *$5000; *293] on the 11th of December 1796, $6250; and at that date, $20,000. At the November term 1815, a motion for a rehearing having been overruled, a decree was rendered, on behalf of the complainants, for $6250, with interest from the 11th December 1796, and costs, against the defendant, Morgan, and execution ordered against his estate. Commissioners were also appointed to sell the land, if the money could not be made by execution, and the commissioners directed to convey to the purchaser. The complainants were also directed to join in the conveyance, and to stipulate to

pay, at the rate of 20 shillings per acre, for any of the land that might be lost by a superior title.

By a copy of the will of C. Morgan, of Pennsylvania, exhibited in the cause, it appeared, that the testator had a son, William Morgan, who was one of his heirs, and who is no party in the cause. It also appeared, that there were two other executors, not named in the bill. During the progress of the suit, Daniel Morgan, one of the complainants, removed to, and became a citizen of, Kentucky. This was shown to the court, and a motion made to dismiss the suit for the want of jurisdiction, and overruled.

March 8th. *M. B. Hardin* and *Jones*, for the appellants.—1. The voluntary change of citizenship by one of the complainants, *pendente lite*, is a waiver of the privilege of maintaining a suit in the circuit court, which exists only between citizens of different states, and ceases by the parties becoming citizens of the *same state. The general rule is, that a court, once having jurisdiction of a cause, will keep it; but that relates to [*294 the subject-matter of the suit: here, it is a personal privilege, which the party waives, by removing into the same state with his adversary; and in this case, into any other state; because all the parties on one side must be citizens of one state, and all the parties on the other, citizens of another state.

2. There is a defect of proper parties to the bill.

3. This is, substantially, a bill by a vendor, to compel the vendee to complete the contract, and ought not to be sustained; because the contract was unequal, and the vendor had himself disaffirmed it. Where there is inequality in the contract, a court of equity will not decree a specific performance, even in a case where damages might be recovered at law, but will remit the parties to their legal remedy.

4. In order to obtain a specific performance, the vendor must show that he has a good title to give; which is not the case here, the land being incumbered by the judicial sale, which gives, at least, a presumptive title against the vendor's claim.

5. The decree is inequitable in its details. If damages ought to have been decreed, the estimated value of the land stated in the written contract was the true measure of damages, and not the sum stated in the decree. The order for the sale of the land, under incumbrances, was improper; as some of the complainants were infants, some *femes covert*, and one of the heirs not made a party to the suit; so that no legal title could be acquired by a purchaser, without time, trouble and expense.

**Talbot*, contrà.—1. The removal of one of the parties cannot oust [*295 the court of its jurisdiction. The citizens of different states have not an individual, peculiar, personal privilege; but it is a classification of persons, who, under the constitution, have a right to sue in the national courts.

2. As it regards the primary object of the suit, the title to the Ohio land, the bill is that of daily and familiar use; that with a double aspect, requiring of the chancellor a specific execution of the stipulation for conveyance, in pursuance of the defendant's bond, or in the event of inability (in relation to which the complainant is ignorant), upon the ascertainment of such entire inability, compensation equivalent to the value of the land in lieu thereof. The enforcement of the equitable lien, held by the complainants on the

Bourbon land, the possession of which (but not the title) their ancestor had transferred to the defendant, Morgan, is the peculiar and exclusive province of the equitable tribunal; and especially, in Kentucky, by the laws of which, the equitable claims to real estate are not made subject to execution. The equity of the lien on behalf of the complainants is irresistible, on the supposition of the inability of the defendant, Morgan, to convey the Ohio land; the Bourbon land constituting the entire consideration for the stipulation of the defendant for the conveyance of the other; and the ancestor of the complainants having taken no personal security, but retained the legal title as his only guarantee for the faithful execution of the stipulation on the part of the defendant, Morgan; and the embarrassments in which the title
*296] and possession *of the Bourbon land had become involved, by the acts of the defendant, Morgan, and those claiming through and under him, in relation to the fraudulent and illegal sale of that land, under color of the execution, forms another distinct and unquestionable ground for the interposition of equity jurisdiction; the tribunal of the chancellor alone possessing competent powers, by a single suit (avoiding multiplicity of harassing litigation), to embrace all these various subjects of controversy, and by its decree, co-extensive with the matters in contest, to do final and complete justice to all the parties.

3. The subsequent, fraudulent, or illegal sale and purchase of the Bourbon land, effected through the agency of Patton claiming and holding possession of the same, under the defendant; a sale effected not only in violation of the solemn stipulations between said Patton and the ancestor of the complainants, by the terms of which, the proceedings under the ejectment, and all matters in relation thereto, were finally compromised between them; but also, in defiance of the various provisions of the acts of the Kentucky legislature, authorizing the sales of real estate under execution, ought not to affect or prejudice the right of the complainants to recover of the defendant, Morgan, an indemnity for his failure to convey the Bourbon land.

4. The sale of the Bourbon land, under color of the execution for costs, was irregular and illegal, in the following particulars: 1st. That the act of the Kentucky legislature, under which this sale is attempted to be justified, only authorizes the sale of real estate on execution for debt or damages, and
*297] *not executions for costs alone, as was that from the court of appeals, in the present case. 2d. The act requires that the sale to be effected under such executions, shall be advertised on the door of the court-house, on a court day; thereby clearly intending that such advertisement should be placed in that situation, in time to afford the requisite information to all persons attending court, for the entire day; which was not done on this occasion, the advertisement not having been put up until the latter part, or afternoon of the day. 3d. The said sale was not advertised at the court-house, and some meeting-house door, and at the other most public places within the county, as required by the said act; in consequence of which omissions to comply with those important requisitions of the law, the land of the complainants, worth several thousand dollars, was sacrificed for a paltry and insignificant sum.

March 11th, 1817. Marshall, Ch. J., delivered the opinion of the court. 1. In this case two questions respecting the formal proceedings of the circuit

court have been made by the counsel for the appellant. The first is, that one of the complainants in the original suit having settled in the state of Kentucky, after this bill was filed, that court could no longer entertain jurisdiction of the cause, and ought to have dismissed the bill. We are all of opinion, that the jurisdiction having once vested, was not divested by the change of residence of either of the parties.

*2. It appearing from the will, that at its date, the testator had a child who is not a party in this suit, the bill ought to be dismissed, or the decree opened and the cause sent back to make proper parties. It is unquestionable, that all the co-heirs of the deceased ought to be parties to this suit, either plaintiff or defendant; and a specific performance ought not to be decreed, until they shall be all before the court. It would, perhaps, be not enough to say, that the child named in the will, and not made a party, is most probably dead. In such a case, as this, the fact of his death ought to be proved, not presumed.(a) But as the opinion of the court on the merits of the cause will render it unnecessary to decide this question, it is thought best for the interest of all parties, to proceed to the consideration of another point, which will finally terminate the contest, *so far as it is to be determined in a court of equity. [*298 [*299

This is a suit for the specific performance of a contract, either by conveying lands in the state of Ohio, stipulated to be conveyed, as the consideration for land sold, in the state of Kentucky; or, if that be out of the power of the obligor, by paying money in lieu thereof. Although the contract is not contained in one instrument, but consists of two bonds, the one given by Charles Morgan, of Pennsylvania, binding himself to convey the land in Kentucky, and the other by Charles Morgan, of Kentucky, binding himself to convey the land in Ohio; yet, it is essentially one contract; and it sufficiently appears, that the land in Ohio forms the consideration for the lands in Kentucky. It is, then a case standing on those general principles which govern all applications to a court of equity, to decree the specific performance of a contract.

In cases of this character, no rule is more universal, than he who asks for a specific performance must be in a condition to perform himself. This point was fully considered in the cases decided in this court between *Hepburn & Dundas* and *Colin Auld*, as the agent of Dunlop & Co., and the principles laid down in those cases are believed to be entirely correct.[1] (1 Wheat. 179.)

(a) The general rule, requiring all persons interested to be made parties to the suit, is confined to parties to the interest involved in the issue, and who must, necessarily, be affected by the decree. It is a rule of convenience merely, and may be dispensed with, when it becomes extremely difficult or inconvenient. Wendell *v.* Van Rensselaer, 1 Johns. Ch. 349. And the want of proper parties is not a good plea, if the bill suggest that such parties are out of the jurisdiction of the court. Milligan *v.* Milledge, 3 Cranch 220; Travers *v.* Buckley, 1 Ves. 385; Cowslad *v.* Coley, 1 Vern. 140. In such a case, if the property in litigation be within the control of the party who is brought before the court, it may be acted upon by the court. Smith *v.* Hibernia Company, 1 Sch. & Lef. 240; Williams *v.* Whinyates, 2 Bro. C. C. 399. No person need be made a party, against whom, if brought to a hearing, the plaintiff cannot have a decree; as a residuary legatee, and a bankrupt, in a suit brought against the assignees. De Golls *v.* Ward, in note 1, to 3 P. Wms. 311.

Let us inquire, then, whether the plaintiffs in the court below have brought themselves within this rule? It is incumbent on them to show an
*300] ability to convey to the defendant in that court a clear estate in *fee-simple in the tract of one thousand acres lying in Kentucky, which was sold to him by their ancestors. Have they done so? The co-heirs are, some of them, *femes covert*, and some of them infants. The decree against the defendant for the value of the Ohio land is not dependent on their making him a conveyance of the land in Kentucky, but is absolute. He is to pay the consideration-money, and then obtain a title, if he can. It is true, that in the event of selling the Kentucky land, which is to take place, after exhausting the personal estate of Charles Morgan, of Kentucky, the complainants are directed to join in the conveyance; but this contingency may not happen; and if it should, a decree that *femes covert* and infants, who are plaintiffs, and against whom no cross-bill has been filed, should convey, might not secure a conveyance. This might be corrected, by sending the case back, with instructions to new model the decree, so as to adapt it to the situation of the parties, did it appear to the court that the appellees are able to make such a title as the appellant ought to receive.

But the appellees appear to the court to be incapable of making an unincumbered title to the land sold by their ancestor. Six hundred and sixty-six acres have been sold under an execution, and conveyed by the officer making the sale. The *terre-tenants* have been brought before the court. The bill, as to them, has been dismissed, and from the decree of dismissal,
*301] there has been no appeal. Can this *court close its eyes on their title, or declare it invalid? It has been said, that the sale is fraudulent, irregular and illegal. But the court empowered to examine these allegations, has decided against them, and from its decree, no appeal has been taken. The incumbrance is an incumbrance in fact, and its legality can be inquired into by this court, only in a suit to which the persons claiming the title are parties.

It might be urged, that as the appellant sold to Patton, and Patton holds also under the sheriff's sale, he is not now at liberty to consider Patton's title as an incumbrance on the land. This argument would be entitled to great consideration, was it applicable to the whole land sold by the sheriff. But it is inapplicable to one hundred and sixty-six acres, part of the tract which has never been sold by the appellant. If the titles acquired under the sheriff's sale be such as would be annulled in a court of law or equity (concerning which this court gives no opinion), it was incumbent on the plaintiffs, to annul them, before they obtained a decree for a specific performance.

Other objections have been made to the decree of the circuit court. It has been said, that the contract was in its origin unequal, and that the ancestor of the appellees had, in his lifetime, by his conduct, disaffirmed the contract. It is deemed unnecessary to examine these objections, because
*302] the court is of opinion, that the inability of the appellees to make *such a title to the land, at this time, as the appellant ought to accept, deprives them of the right to demand a specific performance. Neither party can at present claim the aid of this court, but ought to be left to pursue their legal remedies.

Decree reversed, and bill dismissed.(*a*)

(*a*) There can be no doubt, that the origin of the doctrine of the English court of

chancery, as to the specific performance of agreements, is to be traced to the Roman law; although the commentators on that law are divided in opinion, as to whether it would compel the actual delivery of the thing sold, or whether, in case of refusal, on the part of the vendor, his obligation resolves itself into the payment of pecuniary damages. Those civilians who are of the latter opinion, ground themselves, 1st. On the Code *de act. vend. et empt.*, L. 4, tit. 49, § 4, which subjects the vendor to damages for refusing to deliver possession of the thing sold. 2d. On the maxim of law, that *nemo potest cogi præcisè ad factum;* from whence they conclude, that *nemo potest cogi ad traditionem.* The contrary opinion is supported, among others, by Pothier, who states it to be conformable to the practice on the European continent, to enforce a specific performance of the contract of sale. He answers the above objections, drawn from the fourth law of the Code *de act. vend. et empt.*, by stating, that this law does, indeed, give to the vendee the action *in id quod interest*, against the vendor who refuses to deliver possession of the thing sold; but that it does not confine his remedy to this action alone. He cites Paulus, Sent. 1, 13, 4, as a precise authority, that the vendor may be compelled to deliver the thing specifically, *potest cogi ut tradat;* but as it may not always be convenient or practicable for the vendee to cause himself to be put in possession *manu militari*, he is, by this law, permitted to resort to his action *in id quod interest.* He has the choice of the two remedies. As to the argument drawn from the maxim, that *nemo potest cogi ad factum*, and that those contracts which consist in the obligation to do a certain thing, resolve themselves *in id quod interest actoris*, Pothier answers, that this maxim is inapplicable, except where the act to be done is mere personal act of the debtor, *merum factum;* as where a person contracts to *copy a manuscript, [*303
or to excavate a ditch, in which case, if the agreement be not performed, the obligation necessarily resolves itself into pecuniary damages. But that the act of delivering possession of the thing sold, is not *merum factum, sed magis ad dationem accedit:* and that the debtor may be compelled to perform it specifically. *De Vente*, No. 68. This principle he extends even to personal property; but in the practice of the English court of chancery, agreements respecting chattels are not, in general, enforced, as has been before noticed. 1 Wheat. 154 n. So also, that court refused to decree a specific performance of a covenant to make good a gravel pit. Scholefield *v.* Whitehead, 2 Vern. 127. And to refer a controversy to arbitration. Street *v.* Rigby, 6 Ves. 818. These last cases fall within the distinction stated by Pothier of a mere personal act, the obligation of which, in case of non-performance, resolves itself into pecuniary damages; to recover which the party must resort to his action at law. But Lord Hardwicke held, contrary to the principle of this distinction, in the case of the City of London *v.* Nash, 3 Atk. 512, that a covenant to build or rebuild might be specifically enforced, but not a covenant to repair. And the same case is mentioned, as within the jurisdiction of the court of chancery, in the year book of 8 Edw. IV. 4 b, one of the earliest recognitions of the equitable powers of the court. But the modern authorities seem to lean against this doctrine. Lucas *v.* Commerford, 3 Bro. C. C. 167; s. c. 1 Ves. jr. 236; Mosely *v.* Virgin, 3 Ves. 184; Flint *v.* Brandon, 8 Id. 164; Errington *v.* Aynesley, 2 Bro. C. C. 343.

Although the vendee is not obliged to take a defective title, yet, if there be a mistake or misrepresentation as to the quantity or quality of the property sold, or of the estate of the vendor therein, the vendee may, if he elect so to do, have the difference deducted from the purchase-money, by way of compensation, and a specific performance as to the rest. There is a settled distinction, when a vendor comes into a court of equity, to compel the vendee to a performance; and when a vendee seeks to compel a vendor to perform. In the first case, if the vendor be unable to make out a title, as to part of the subject-matter of the contract, which was the principal object of the purchaser, equity will not compel the vendee to perform the contract *pro tanto.* In the second case, the vendee may, if he chooses, take the part to which a title can be made. Waters *v.* Travis, 9 Johns. 465; Milligan *v.* Cooke, 16 Ves. 1; Halsey *v.* Grant, 13 Id. 77; Mortlocke *v.* Buller, 10 Id. 316; *Paton *v.* Rogers, 1 Ves. & B. 353. But [*304
where the particular or memorandum described the estate, as containing, by esti-

mation, so many acres, "be the same more or less," the vendee was held not to be entitled to an abatement in the price, for a deficiency in the quantity of acres sold. Winch *v.* Winchester, 1 Ves. & B. 375. The court of chancery, in decreeing a specific execution of agreements, governs itself by a moral certainty, for it is impossible, in the nature of things, there should be a mathematical certainty of a good title. Therefore, it was held, in England, that a reservation in the grant, of an estate by the crown of royal mines, within the premises, was not such a blemish in the title as would excuse the vendee from taking it; because, it seems, the crown had no power to grant a license to any person to come upon a subject's estate, and search for such mines; and even if it had the power, it was extremely improbable, that it would ever be exercised. Lyddal *v.* Weston, 2 Atk. 20. So also, in this country, where A. contracted to convey to B., "by a good and valid conveyance in law," a farm, which was originally parcel of a large tract of ground, granted by the proprietor of a manor, to the ancestor of A., in fee, "yielding and paying to the grantor, his heirs and assigns, the yearly rent of ten shillings," the proportion of which quit-rent, on the farm, was 54 cents a year; the existence of the quit-rent being known to B., at the time of the contract, it was held, that the existence of such an incumbrance (if it were any), was no objection to a decree for a specific performance of the contract. Ten Broeck *v.* Livingston, 1 Johns. Ch. 357.

In general, the vendor may compel a specific performance, if he can make a good title, at the time of the decree, although he had not a good title, when the land ought to have been conveyed according to the terms of the contract. Langford *v.* Pitt, 2 P. Wms. 630; Mortlocke *v.* Buller, 10 Ves. 315; Coffin *v.* Cooper, 14 Id. 205; Hepburn *v.* Auld, 5 Cranch 262; Hepburn *v.* Dunlop, 1 Wheat. 179. Where, after bill, answer and replication, no further steps were taken in the cause, for upwards of twenty years; this was held as not, of itself, a reason for refusing a specific performance, there being acquiescence on both sides. Cain *v.* Allen, 2 Dow. 289. And where an agreement for the sale of lands was suffered to remain unexecuted for fourteen years, the vendee having taken, and continued to hold, possession; the court, under the peculiar facts of the case, decreed a specific performance of the contract. Waters *v.* Travis, 9 Johns. 466. But as a general rule, the court will not suffer a party, at *the distance of
*305] years, to come to the court and say that he is ready to make a good title, and demand a specific performance. Jenkins *v.* Hiles, 6 Ves. 646; Wynn *v.* Morgan, 7 Id. 205. And the parties may make time of the essence of the agreement, so that if there be a default at the day, without any just excuse, and without any waiver afterwards, the court will not interfere to help the party in default. Benedict *v.* Lynch, 1 Johns. Ch. 370.

The court of chancery will not, except under very particular circumstances, upon a bill for the specific performance of a contract, if the party be not entitled to a specific performance, direct an issue of *quantum damnificatus*, or a reference to the master to ascertain the damages. The plaintiff, if he chooses that remedy, must resort to law, it not being like the case of a defect of title as to part, or of quality, or quantity, where a specific performance may be decreed as to so much as the vendor is able to perform, and a compensation to the vendee for the residue. Todd *v.* Gee, 17 Ves. 273. But where the defendant has put it out of his power to perform the contract, the bill will be retained, and it will be referred to the master to assess the plaintiff's damages. Denton *v.* Stewart, 1 Cox 258; Greenaway *v.* Adams, 12 Ves. 395. And where a specific performance was refused, because the contract was within the statute of frauds, yet the plaintiff having sustained an injury, for which he was entitled to compensation, and for which he had no remedy, or, at best, a doubtful and inadequate remedy at law, the court retained the bill and awarded an issue of *quantum damnificatus*, to assess the damages sustained by the plaintiff by the acts of the defendants. Phillips *v.* Thompson, 1 Johns. Ch. 131.

*Liter *et al. v.* Green.

Real action.

In a writ of right, brought under the statute of Kentucky, where the demandant described his land by metes and bounds, and counted against the tenants jointly, it was held, that this was matter pleadable in abatement only, and that by pleading in bar, the tenants admitted their joint seisin, and lost the opportunity of pleading a several tenancy.

The tenants could not, in this case, severally plead, in addition to the *mise*, or general issue, that neither the plaintiff, nor his ancestor, nor any other under or from whom he derived his title to the demanded premises, were ever actually seised or possessed thereof, or of any part thereof; because it amounted to the general issue, and was an application to the mere discretion of the court, which is not examinable upon a writ of error.

Quære? Whether the tenants could plead the *mise* severally, as to the several tenements held by them, parcel of the demandant's premises, without answering or pleading anything as to the residue?

Under such pleas, and the replication prescribed by the statute, the *mise* was joined; the parties proceeded to trial; and the following general verdict was found, viz: "The jury find the demandant hath more mere right to hold the tenement, as he hath demanded, than the tenants, or either of them, have, to hold the respective tenements set forth in their respective pleas, they being parcels of the tenement in the count mentioned:" It was *held*, that this verdict being certain to a common intent, was sufficient to sustain a judgment.

It was also held, that a joint judgment against the tenants for the costs, as well as the land, was correct.

March 8th, 1817. This cause was argued by *Hughes*, for the plaintiffs in error, and by *M. B. Hardin* and *Jones*, for the defendant in error.

*Story, Justice, delivered the opinion of the court.—This is a writ of right for the recovery of lands, brought in the form prescribed by [*307 the statute of Kentucky, in which the demandant described his land by metes and bounds, and counted against the tenants jointly. To this count, the tenants demurred, and upon a joinder, the demurrer was overruled by the court, and upon motion of the tenants, leave was given to them to withdraw the demurrer, and plead anew.

A motion was then made to the court, by the tenants, to compel the demandant to count against them severally, upon the ground, that they held separate and distinct tenements, parcels of the land demanded; which motion was overruled by the court. And in our judgment, this was very properly done, for the matter was pleadable in abatement only; and by pleading in bar, the tenants admitted their joint seisin of the freehold, and lost the opportunity to plead a several tenancy. Assuming, that at common law, a writ of right *patent* may be brought against divers tenants, who hold their lands severally, and that the demandant may count against them severally, it does not follow, that this doctrine applies to a writ of right *close;* but if it did, and the demandant should, in such case, count against the tenants jointly, and the tenants should plead to the merits, it would, for all the purposes of the suit, be an admission of the joint-tenancy. And the clause in the statute of Kentucky, requiring, that where several tenements are demanded, the contents, situation and boundaries of each shall be inserted in the *count, has not affected this rule. It supposes that the several [*308 tenements are held by the same tenants.

The tenants next moved the court to allow them severally to plead, in addition to the *mise*, or general issue, that neither the plaintiff, nor his ancestor, nor any other, under or from whom he derived his title to the

demanded premises, were ever actually seised or possessed thereof, or of any part thereof; which motion the court refused to grant. And in our judgment, this was very properly done. In the first place, this plea was clearly bad, as amounting to the general issue, and indeed, for other manifest defects: in the next place, it was an application to the mere discretion of the court, which is not a subject of examination upon a writ of error.

The court then permitted the tenants to sever in pleading, and to plead the *mise* severally, as to several tenements held by them, parcel of the demanded premises, without answering or pleading anything as to the residue. Upon the propriety of this pleading, we give no opinion, as it is not assigned for error by the demandant, and the error, if any, is in favor of the tenants.

The replication prescribed by the act of Kentucky, was pleaded to the several pleas; and upon the *mise* so joined, the parties proceeded to trial. The court being divided upon several points made at the trial, the jury was discharged. At a subsequent term, the tenants again moved the court for leave to withdraw the *mise* joined, and to plead non-tenure as to some, and several tenancy as to others, in abatement, which was refused by the court; and in our judgment, for the reasons already stated, was properly refused.

*309] *The cause was then again tried by a jury, who returned a general verdict for the demandant, which, under the direction of the court, was amended by the jury, and recorded as follows: "The jury find, that the demandant hath more mere right to hold the tenement, as he hath demanded, than the tenants, or either of them, have, to hold the respective tenements set forth in their respective pleas, they being parcels of the tenement in the count mentioned." It is objected by the tenants, that this verdict is insufficient, because it does not contain a several finding upon the several issues of the tenants, but is a joint finding against them all; and only by inference and argument, a finding of the several issues for the plaintiff. This objection cannot be sustained. The verdict expressly and directly affirms the right of the demandant, and denies the right of the tenants to the land contained in their respective pleas, the same being parcel of the land demanded. A verdict, certain to a common intent, is sufficient to sustain a judgment.

At the trial, a bill of exception was taken. The first point in the exception is, the refusal of the court, upon the prayer of the counsel for the tenants, to direct the jury, that the demandant was not entitled to recover in the suit, upon the proof by the tenants, that they claimed their several tenements, under distinct and several titles. This refusal was perfectly correct; for the matter did not go to the merits, and could be taken advantage of only, as has been already stated, by a plea in abatement.

*310] *The next exception is, that the court allowed a copy of the survey of the land claimed by the demandant, to go in evidence to the jury, for the purpose of identifying the same. No ground for this objection has been stated; and it seems to be utterly untenable.

Another exception is, that the court refused to allow, as evidence to the jury, to prove that the demandant did not hold the legal title to 2000 acres, parcel of the land demanded in this suit, the copies of a certain record of a decree in chancery, in a suit between the demandant and third persons (with whom the tenants had no privity of title or estate), and also, of a deed made

in pursuance of such decree, by which deed 2000 acres of the land demanded by the writ appeared to be conveyed to third persons. This exception is not now relied on, and is certainly open to various objections. Without adverting to the objections, that neither the record nor the deed were properly authenticated, and that it was an attempt to set up an outstanding title in third persons, having no privity with the tenants; it is decisive against the admission, that the 2000 acres, or any part thereof, are not shown to be within the boundaries of the land claimed by any of the tenants, or put in issue between the parties.

The last exception is, that the court refused to instruct the jury, that if it should be proved that divers of the tenants had no title to certain parcels of the demanded premises, but that they claimed the same, under a third person, having the legal title thereof, then, that they ought to find for the said *tenants, because they had no title. This exception is also not [*311 relied on, and certainly could not be supported, for it could be given in evidence only on the plea of non-tenure.

A motion was afterwards made for a new trial, the proceedings on which, not being matters of error, need not be mentioned.

The only remaining objection, urged as a ground for reversal, is, that the judgment is a joint judgment against the tenants for the costs, as well as the land. We are all of opinion, that the judgment is right, and that the tenants can take nothing by this objection. The judgment is, therefore affirmed, with costs.

Judgment affirmed.(*a*)

(*a*) A writ of right patent is always directed to the lord of the manor, or his bailiff, and is a commission unto them, that they should do right. The form of the writ is, "we command you that, without delay, you do full right (*plenum rectum teneatis*) to A., of B., of one messuage, &c., in I., which he claims to hold of you, by the free service of one penny *per annum*, for all service, of which W., of T., deforceth him, and unless you will do this, let the sheriff of, &c., do it, that we may hear no more clamor thereupon for want of right. Witness, &c." Fitz. N. B. 1, G; Bracton, lib. 5, ch. 2, p. 328; Reg. Brev. 1; Glanville, lib. 12, ch. 3, ch. 4; 3 Bl. Com. app. 1. This writ is the sole authority for the lord to hold plea of the land In controversy; and without it, no one is bound to answer in the lord's court. Glanville, lib. 12, ch. 2, ch. 25. It is called a writ of right patent, because it is an open letter of request, or command, given to the plaintiff, and exposed to full view, in contradistinction to writs close, which are always closed up and sealed, or are supposed to be closed up and sealed, and directed to particular persons. 2 Bl. Com. 346; 3 Id. 195; 3 Reeves' Hist. 45; Fitz. N. B. 1, F. When the writ of right patent was brought to the lord's court, an entry thereof was made in his *court by the steward, and the writ was then delivered back to the plain- [*312 tiff. Upon the entry, a summons issued from the lord's court, to the tenant, commanding him to appear at the next court, to answer the plea; and this was the first process by which the tenant had any knowledge of the suit. Rast. Ent. 244–6; Booth, 4, 88, 89, 92; Bracton, lib. 5, ch. 3, § 3, p. 329; Id. ch. 6, p. 333. On the other hand, a writ of right close is always directed to the sheriff, and was immediately returnable into the court of common pleas. Booth 91. The form of it is, "The King, to the sheriff of ——: Command A., that he justly, and without delay, render unto B., one messuage, with the appurtenances, which he claims to be his right and inheritance, and whereof he complains, that the said A. unjustly deforces him; and unless he shall so do, and if the said B. shall give you security of prosecuting his claim, then summon, by good summoners, the said A., that he appear before our justices at Westminster, on, &c., to

show wherefore he hath not done it, and have you there the summoners and this writ. Witness, &c."[1] Reg. Brev. 4; Fitz. N. B. 2, F; Booth 91; 3 Wils. 419.

This difference between a writ of right patent and a writ of right close, may well warrant a distinction in respect to the causes of action to be joined in it. A writ of right patent, being a mere authority to the lord to take cognisance of the suit, at the complaint of the plaintiff, may well include divers tenements, held by several tenants, whereof the plaintiff is deforced. Nor are the rights of the several tenants affected by such joinder; for, as to them, the subsequent summons is the first process (Booth 4, 92); and in this they are severed, each tenant being summoned to answer only for the tenements held by himself. And for this purpose, where the land is severally held by several tenants, the writ always specifies the quantity of land in the possession of each. Reg. Brev. 1 *b*. The position, therefore, stated by Fitzherbert (Nat. Brev. 2, D), that a writ of right may be brought against divers tenants, who hold their lands severally, may be good law, when applied (as he applies it) to a writ of right patent. But it is not thence to be inferred, that the same doctrine is to be applied to all the subsequent proceedings; and that in the subsequent summons, process and pleading, the
*313] tenants are to be joined in the same manner as if they were joint-tenants *of the whole land. In fact, the summons in a writ of right patent, is a several process against each tenant, for the land held severally by him; and in this respect, it is exactly what the original precept is, in a writ of right close.

When once the tenant is summoned into court, either upon a writ of right patent, or a writ of right close, the same exceptions and pleadings in abatement or in bar, and the same defence upon the merits, equally applies in a suit upon the one as the other. Non-tenure, joint-tenacy, sole tenancy, and several tenancy, are good pleas in abatement, wherever they apply to any parcel of the land demanded of any particular tenant or tenants. Bracton, speaking on the subject says, "*tunc demum videndum an tenens totam rem teneat quam petitur, cum certa res debeat in judicium deduci, vel si ejus partem, tunc quotam, vel si omnino nihil, et similiter si res petita pertineat ad jurisdictionem judicantis; et ideo petitur visus rei petitæ, quia ex hoc competere poterit exceptio tenenti, ne sit actio inanis cum tenente, cum rem restituere non possit vel totam secundum quod petitur.*" Bract. lib. 5, ch. 7, fol. 376. And he again treats more fully on the subject in the book, de Exceptionibus, "*sunt etiam quaedam quæ visum sequuntur et de quibus certificari poterit tenens antiquam petens ei visum fecerit; et certa res in judicium deducator, de qua debeat tenens respondere, ut tunc sciri possit, si totam rem petitam tenuerit, ve ejus partem, vel etiam nihil, et sic fiat de pertinentiis, &c. Et post modum, si qua competat ex ipsa re, ut si nihil inde teneat vel non nisi ejus partem, et idem de pertinentiis.*" Bracton, lib. 5, de Except. ch. 1, fol. 400. "*Item cadit breve, si tenens minus teneat, quam petens petat, secus tamen si plus teneat.*" Bracton, fol. 414 *b*. And in another place, speaking of the doctrine that when a writ is bad in part, it is bad in the whole, he says, "*et cum breve ita in se fuerit vitiosum in aliqua parte, nulla parte valebit, quantum ad unum actionen; secus esset, si plures sint ibi actiones ratione plurium tenentium. Et si unus petat per unum breve feodum unius militis in una villa et versus alium in eodum brevi feodum alterius militis eodem villa vel in diversis, quamvis cadat breve de feodo unius militis, nihilominus stabit de feodo alterius militis versus eundem, quia ibi sunt diversæ actiones propter diversitates tenementorum, quamvis breve unicum. Item eodem modo erunt actiones plures ratione diversarum personarum et rerum ubi plures sunt tenentes.*" Bracton, fol. 414 *a*. Bracton here manifestly refers to a writ of right patent, where several tenements are demanded in the writ of several tenants severally,
*314] and in such case, he considers, *that the writ may abate as to one and remain as to the other, not because they may be joined in the same action, but because the suit against them is considered as several actions (*diversæ actiones*). In a subsequent place, the same subject is again mentioned. "*Cum autem tenens visum habu-*

[1] It has been very justly remarked by Mr. Sergeant Williams, in his learned note to 2 Saund. 43 *a*, note 1, that Mr. Sergeant Wilson is mistaken in calling the writ of right in Tyssen *v.* Clarke, 8 Wils. 419, 541, 558, a writ of right patent, for it was a writ of right close.

erit, vel quod tantundem valet, scire poterit utrum petenti respondere teneatur, et ad breve secum vel non teneatur secundum quod tenuerit totam rem nomine proprio, vel alieno, vel nihil inde tenuerit, vel non nisi ejus partem; quia si totam non tenuerit, amittere non potest quod non habet, et ita cadit breve, sed non actio, nisi ita sit quod petens ostendere possit quod tenens teneat in dominico et in servitio, nisi tenens docere possit contrarium, quod nec in dominico nec in servitio, &c. &c. In hæc quidem actione per breve de recto sicut in qua libet alia actione per quam petitur res corporalis designare oportet petentem quae et qualis sit res quae petitur, ut si sit res immobiliis sicut tenementum designare oportet qualitatem et quantitatem, &c. Item utrum tota petatur an ejus pars, et ne plus petatur a petente quam tenens teneat." Bracton, lib. 5, ch. 27, fol. 431 *b*, 432 *a*. See also, Id. p. 433 *b*. Fleta, lib. 5, ch. 5, 4, asserts the same doctrine. "*Item continetur in brevi qui terram illam tenet, ad quod excipi poterit quod totum non tenet sed alius talis tenet inde tantum.*" These quotations have been the more largely made from these venerable writers, with a view to show how deeply and early these doctrines are to be found in the rudiments of the common law.

It has been very justly observed by Booth (ch. 11, p. 31), that in real actions, may be pleaded in abatement of the writ, joint-tenancy, sole tenancy, and several tenancy. And although it is said, that in a writ of *nuper obiit*, in an assize, or in any other action where no land certain is demanded, several tenancy is not pleadable (Bro., Sev. Tenancy, 18; 2 Leon. 8), yet this is to be understood, that several tenancy is not pleadable to the writ; for after a plaint in an assize, several tenancy may well be pleaded in abatement. Stepkin *v.* Wentworth, Dyer 244 *a;* Booth 34, 277. And several tenancy, if well pleaded, and found true, abates the whole writ; and the cause assigned for this by Fincledon, Ch. J., in 41 Edw. III. 20 *b*, is, because the tenants cannot answer in common. Fitzherbert laid down the same rule in 27 Hen. VIII. 30, and said, "*ceo several tenancy va in abatement de tout le breve, et si il soit tried versus le demandant donques tout son breve abatera, et nous impoimous donc judgement pour le demandant sur un male breve.*" Brooke's Abr., Several Tenancy, 1. The same sale is recognised in Theldall's *Dig. lib. 11, ch. 31, § 7. Nor is there a single case in the books, in which it has been argued or held, that several tenancy is not a good plea [*315 in abatement to a writ of right. On the contrary, the reasons for the plea, as manifestly apply to this action, as any other real action, and the ancient writers who treat on the subject evidently presuppose its legal validity; and the more modern authorities are conclusive on the point. When, therefore, the court in the above case, in allusion to the passage above quoted from Fitzherbert's Natura Brevium, 2, D, state, that "assuming at common law a writ of right patent may be brought against several tenants who hold their lands severally, and that the demandant may count against them severally, it does not, therefore, follow, that this doctrine applies to a writ of right close;" it is manifest, that the court have reference to the different natures of the two writs in their original state; for upon a view, and after a count, in a writ of right patent, if several tenements are jointly demanded of several tenants, who are jointly summoned, they may plead several tenancy in abatement of the count or lands put in view upon the writ. And as a writ of right close demands the tenements directly of the tenants, they may plead several tenancy, directly to the writ, for in a *præcipe quod reddat*, it is a good plea to the writ. Com. Dig. F. 12; Thel. Dig. lib. 5, ch. 3, § 1; ch. 4, § 2; 27 Hen. VIII. 30.

In the United States, all writs of right are returnable into the common-law courts of the state, and are directed to and returnable by the sheriff or other public officers. They are, therefore, writs of right close, and subject to the general doctrines of the common law, applicable to such writs; and it is manifest, that the doctrine of Fitzherbert (even supposing it to be law as to writs of right patent), cannot be admited to control those general doctrines, or take away the right of pleading joint-tenancy, sole tenancy, or several tenancy, in abatement of such writs.

Writs of right, since the reign of Queen Elizabeth, have gradually become obsolete in England; or are of such rare occurrence, that the learning respecting them is not as well known as it deserves to be. Indeed, a modern treatise upon the general nature

*Shipp *et al. v.* Miller's Heirs.

Land-law of Kentucky.

An error in description is not fatal in an entry, if it do not mislead a subsequent locator. The following entry, "H. M. enters 1687 acres of land, on a treasury-warrant, No. 6168, adjoining Chapman *Aston* on the west side, and Israel Christian on the north, beginning at Christian's north-west corner, running thence west, 200 poles; thence, north, parallel with Aston's line until an east course to Aston's line will include the quantity," was held valid, although no such entry as that referred to could be found in the name of *Aston*, but the particular description clearly pointed out an entry in the name of Chapman *Austin*, as the one intended, and this, together with Christian's entry, satisfied the calls of H. M.'s entry.

It is a general rule, that when all the calls of an entry cannot be complied with, because some are vague or repugnant, the latter may be rejected or controlled by other material calls, which are consistent and certain.[1] Course and distance yield to known, visible and definite objects; but they do not yield, unless to calls more material and equally certain.[2] Chapman Austin's entry calling to lie "on the dividing ridge between Hinkston's fork and the south fork of Licking, beginning two miles north of Harrod's lick, at a large buffalo road, and running about north for quantity," and there being no buffalo road, two miles north of Harrod's lick (a place of general notoriety), it was determined, that a call for a large buffalo road might be rejected, and the entry supported by the definite call for course and distance.

*317] It is a settled rule, that where no other figure is called for in an entry, it is to be surveyed in a square coincident with the cardinal points, *and large enough to contain the given quantity; and that the point of beginning is deemed to be the centre of the base line of such square. Chapman Austin's entry calling to run about a north course, for quantity, the word "about" is to be rejected, and the land is to run a due north course, having on each side of a due north line, drawn through the centre of the base, an equal moiety.

The act of Kentucky of 1797, taken in connection with preceding acts, declaring that entries for land shall become void, if not surveyed before the first day of October 1798, with a proviso allowing to infants and *femes covert* three years after their several disabilities are removed, to complete surveys on their entries; it was held, that if any one or more of the joint-owners be under the disability of infancy or coverture, it brings the entry within the saving of the proviso as to all the other owners. Distinction between this statute and a statute of limitations of personal actions.[3]

A call for a spring branch, generally, or for a spring branch, to include a marked tree, at the head of such spring, is not a sufficiently specific locative call; and where further certainty is attempted to be given, by a call for course and distance, and the course is not exact, and the distance called for is a mile and a half from the place where the object is to be found, the entry is void for uncertainty.

Appeal from the Circuit Court for the district of Kentucky.

March 5th, 1817. This cause was argued by *Talbot*, for the appellant, and by *Sheffey*, for the appellees.

March 11th. Story, Justice, delivered the opinion of the court.—This is a bill in equity, brought by the appellees, who are the heirs-at-law and devisees of Henry Miller, deceased, to be relieved against the claims of the appellants,

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and structure of real actions, and the proper pleadings and evidence in each, is a *desideratum* in the science of jurisprudence. We may, however, respectfully refer those who may be desirous of a more thorough knowledge of the writ of right to the title *Droit*, in the great abridgments of Brooke, Fitzherbert, Comyn and Viner; to the learned note of Mr. Serjeant Williams, 2 Saund. 45; to Booth on Real Actions, to Reeves's History of the Law; and particularly to 1 Reeves's History, ch. 7, p. 398, *et seq:* and 3 Reeves's History 45, and above all, to the venerable Bracton, lib. 5, fol. 327, *et seq:* where he treats of the writ of right and its incidents.

[1] Boardman *v.* Reed, 6 Pet. 328. [2] Preston *v.* Bowman, 6 Wheat. 580.
[3] Miller *v.* McIntire, 11 Wheat. 441.

under prior patents, to a tract of land, to which the appellees assert a prior equitable title, under a prior entry by their ancestor.

*On the 11th of December 1782, the said Henry Miller made the following entry: "Henry Miller enters 1687 acres of land, on a treasury-warrant, No. 6168, adjoining Chapman *Aston* on the west side, and Israel Christian on the north, beginning at Christian's north-west corner, running thence west, 200 poles, thence north, parallel with Aston's line, until an east course to Aston's line will include the quantity." Henry Miller died in 1796, and in 1804, this entry was surveyed, and after that time, a patent issued thereupon, in due form of law. At the time of the death of Miller, and also of the survey of the entry, several of the plaintiffs were under age, and some of them, at the commencement of the suit, continued to be under age. [*318

There was not, on the 11th of December 1782, any entry upon record in the entry-taker's books, in the name of Chapman *Aston*. But there were several in the name of Chapman *Austin*, and several in the name of Isaac Christian. One, in the name of Chapman Austin, is dated 26th of June 1780, for 4000 acres of land, lying on Red River, and another, in the name of Israel Christian, dated the 5th of December 1782, for 2000 acres of land lying on the same river; but there is no proof in the cause, that these entries are in the neighborhood of each other. The entries relied on by the complainants as those referred to in Miller's entry, are as follows: "On the 26th of June 1780, Chapman *Austin* enters 4000 acres on the dividing ridge between Hinkston's fork and the south fork of Licking, beginning two miles north of Harrod's Lick, at a large buffalo road, and *running about a north course for quantity." "On the 29th of November 1782, Israel Christian, assignee of Archibald Thompson, enters 200 acres of land, upon a military warrant, No. 193, adjoining an entry of Chapman Austin, at his south-west corner, on the dividing ridge between Hinkston's and Stoner's fork, two miles north of Harrod's Lick, running thence west, 200 poles, thence north, until an east course, to strike Austin's line, will include the quantity." [*319

The appellants having the elder grant, the first question arising in the cause is, as to the validity of the entry of Miller. It is, in the first place, contended, that it is void, because it contains no sufficient description of the position of the land, and no specific reference to any other definite entries, to make it certain. It is, in the next place, contended, that it is void, because Chapman Austin's entry, on which it is dependent, is void for uncertainty.

There is certainly a mistake in Miller's entry, as to the name of *Aston*, and the defect cannot be cured by considering *Aston* and *Austin* as one name, for they are not of the same sound. But an error in description is not fatal in an entry, if it does not mislead a subsequent locator. Upon searching the entry-book no such name could be found as Chapman Aston; and if Miller's entry had only called to adjoin Aston, there would have been great force in the objection. But it calls also to adjoin Israel Christian's entry on the north, and to begin at his north-west corner. A subsequent locator would, therefore, necessarily be led to examine that entry. On such examination, he *could not fail to observe that it calls to adjoin an entry of Chapman Austin, at his south-west corner, on the dividing [*320

ridge between Hinkston's and Stoner's fork, two miles north of Harrod's lick. This specific description would clearly point out the particular entry to which it refers. It could be no other than the entry of Chapman Austin for 4000 acres, already stated; for that calls for the same ridge, and to begin at the same distance from Harrod's lick. Two entries would thus be found adjoining each other, which would, as to position and course, perfectly satisfy the calls of Miller's entry. No other entries could be found which would present the same coincidences. A subsequent locator could not, therefore, doubt, that these were the entries really referred to in Miller's entry, and that Chapman *Aston* was a misnomer of Chapman *Austin*. The entry, then, of Miller, contains, in itself, a sufficient certainty of description, if the entries to which it refers are valid; for *id certum est quod certum reddi potest.*

As no objection is alleged against Christian's entry, all consideration of it may at once be dismissed. The validity of the entry of Chapman Austin remains to be examined. It calls to lie "on the dividing ridge between Hinkston's fork and the south fork of Licking, beginning two miles north of Harrod's lick, at a large buffalo road, and running about north for quantity." It is conceded, that Harrod's lick was, at the time of the entry, a place of general notoriety; and it is proved, that there was no buffalo road
*321] two miles north of that lick. The nearest buffalo road *was, at its nearest approach, more than two miles from the same lick, and crossed the ridge at more than three miles distance from it; and a line drawn due north from the lick would not strike that road, until after it had crossed the ridge, at about four miles distance from the lick. The calls, then, in the entry cannot be completely satisfied, in the terms in which they are expressed. The general descriptive call, to lie on the dividing ridge, as well as the call for distance, must be rejected, if a buffalo road, about four miles north of the lick, were to be deemed a sufficient compliance with the call for a large buffalo road; for the whole land would then lie, not on, but beyond the ridge. Such a construction of the entry would be unreasonable. Is, then, the entry void for repugnancy or uncertainty, or can it be sustained, by rejecting the call for a large buffalo road?

It is a general rule, that when all the calls of an entry cannot be complied with, because some are vague or repugnant, the latter may be rejected, or controlled by other material calls, which are consistent and certain. On this account, course and distance yield to known, visible and definite objects. But course and distance do not yield, unless to calls more material, and equally certain. The locative calls in this entry are for a point two miles north of Harrod's lick, and for a large buffalo road. If we reject the first call the entry is void for uncertainty, for there is no definite starting point. If we reject the last call, the other is perfectly certain. The general leaning of courts has been to support entries, if it could be done by any reasonable
*322] construction. *The law, indeed, declares, that every entry should contain a description of the land so certain that subsequent locators might be able to ascertain it with precision, and locate the adjoining residuum. But that description is held to be sufficiently certain, which, by due diligence, inquiry and search in the neighborhood, will enable a locator to find the land. A locator having this entry in his hands, would first proceed to Harrod's lick, as a notorious object which was to direct all his subsequent

inquiries. Upon measuring off the two miles north from the lick, he would arrive at a point, clearly described in the entry. He would find himself very near the dividing ridge between Hinkston's fork and the south fork of Licking, upon which the land is unequivocally declared to lie. But he could find no buffalo road in that direction, until after he had crossed the ridge, nor could he find any such road, within any reasonable distance, in any other direction. Under such circumstances, it is not easy to perceive, how he could be misled. Being arrived at a spot, to which he was directed by a definite locative call, which he could not mistake, and by a general call which is perfectly satisfied, he would scarcely be induced to direct it in search of another call, which was not to be found in the neighborhood, and which, without the first, would be uncertain and indefinite. In the opinion of the court, the call for a large buffalo road may be rejected, and the entry of Chapman Austin be supported by the other definite call for course and distance. In this opinion, we are the more confirmed by the admission of counsel, that the same *entry has been sustained in the state courts of Kentucky. [*323

Supposing the entry of Chapman Austin to be good, the next inquiry is, whether it is rightly surveyed? for if it is, then Christian's and Miller's entries are also rightly surveyed. It is contended, that as no base or figure is given by the entry, the land cannot be laid off in any direction; and if so neither the survey made by order of the circuit court, nor, indeed, any other survey, can be good. But it is a settled rule, which has been repeatedly recognised by this court, that where no other figure is called for in an entry, is to be surveyed in a square, coincident with the cardinal points, and large enough to contain the given quantity; and that the point of beginning is to be deemed the centre of the base line of such square. In the present case, a point two miles distant from Harrod's lick is to be taken as the centre of the base line of a square, to contain the given quantity of land. The entry calls to run about a north course for quantity; but according to the course of decisions in Kentucky, the word, "about," is to be rejected, and the land is to run a due north course, having on each side of a due north line, drawn through the centre of the base, an equal moiety. This is precisely the manner in which the survey was directed to be executed by the court below.

Another objection to the title of the plaintiffs is, that the survey on Miller's entry was not executed and returned, within the time prescribed by law. *The act of 1797, taken in connection with preceding acts, declares, that entries for land, in general, shall become void, if not surveyed before the first day of October 1798; with a proviso, allowing to infants and *femes covert* three years after their several disabilities are removed, to complete surveys on their entries. The ancestor of the plaintiffs died in 1796, and some of them then were, and still continue to be, under the disability of infancy. The present entry was not surveyed until 1804. [*324

It is argued, that the proviso does not save any entries, except where *all* the owners are under the disability of infancy or coverture, at the time when the general limitation takes effect. And it is likened to the case decided by this court, where a joint personal action was held not to be saved, by the disability of one of the plaintiffs, from the operation of the statute of limitations. *Marsteller* v. *Mc Clean*, 7 Cranch 156. It is admitted, that there

is some analogy between the cases; but as they do not arise upon the same statute, a decision in the one furnishes no absolute authority to govern the other. There are also differences in the nature and objects of these statutes, which might well justify a different construction. The statute of limitations is emphatically termed a statute of repose; it is made for the purpose of quieting rights, and shutting out stale and fraudulent claims. It has, therefore, always been construed strictly against the plaintiff, and no case has been excepted from its operation, unless within the strict letter or manifest equity of some exception in the act itself. The statutes of Kentucky, allowing *further time to owners to survey their entries, is made with a different aspect. It is to save a forfeiture to the government; and acts imposing forfeitures are always construed strictly as against the government, and liberally as to the other parties. It is manifest, that the act meant to protect the rights of infants and *femes covert* from forfeiture, until three years after the disability should be removed. Yet if the argument at bar be correct, their rights are completely gone, in all cases where they are not the sole and exclusive owners. Such a construction would materially impair the apparent beneficial intention of the legislature. If, on the other hand, they are authorized, in such cases, to have their entries surveyed and returned, so as to protect their own joint interest, no reason is perceived, why such survey may not be justly held to inure to the benefit of all the other joint-owners. The courts of Kentucky have already decided this question; and held, that if any one joint owner be under disability, it brings the entry within the saving of the proviso, as to all the other owners. *Kennedy* v. *Bruice*, 2 Bibb 371. This is a decision upon a local law, which forms a rule of property; and this court has always held in the highest respect, decisions of state courts on such subjects. We are satisfied, it is a reasonable interpretation of the statute, and upon principle or authority, see no ground for drawing it into doubt.

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The title of the plaintiffs being established, it is next to be compared with the titles of the respondents. It is conceded on all sides, that none of the titles of the latter are of superior dignity to that of *the plaintiffs, except the title claimed under an entry of Thomas Swearingen, on a military warrant. This entry is as follows: "On the 26th of April 1780, Thomas Swearingen enters 1000 acres, in Kentucky, by virtue of a military warrant, for military services performed by him last war, on a spring branch about six miles a north-eastwardly course from Stoner's spring, to include a tree, marked A. B. C. S. T. at the head of said spring." Stoner's spring is admitted to be a place of notoriety; but the marked tree and spring branch, instead of being at the distance of six miles, is found at the distance of four miles and a half, and in a course not north-easterly. The call for a spring branch, generally, or for a spring branch, to include a marked tree at the head of the spring, is not a sufficiently specific locative call. It requires further certainty, to point out its position; and this is attempted to be given, in the present entry, by the call for course and distance. The course is not exact, and the distance called for is a mile and a half from the place where the object is to be found. It is the opinion of this court, that it would be unreasonable, to require a subsequent locator to search for the object, at so great a distance from the point laid down in the entry; and the entry must, therefore, be pronounced void for uncertainty.

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MARSHALL, Ch. J. (*dissenting.*)—In this case, I dissent from the opinion which has been delivered, on one point—the validity of Austin's entry. I am not satisfied, that the call for the buffalo road ought to be discarded as immaterial. It appears to me, to bear a *strong analogy to a call for a marked tree. It is an object of notoriety, distinguishable from [*327 other objects, peculiar to itself, and which would be looked for by subsequent locators. Finding a buffalo road in the neighborhood, the judgment would be divided between the call for that road, and the call for course and distance.

Understanding that this entry has been determined in Kentucky, to be sufficiently certain, I would have acquiesced in that decision, had it not also been stated, that the question on its validity, did not come before the court. Under these circumstances, we should, had the court thought the entry invalid, have suspended our opinion, until the case could be inspected. This delay is rendered unnecessary, by the opinion that the location may be sustained.

Decree affirmed.

The ANNA MARIA.

Prize.—Responsibility of captors.

A suit by the owners of captured property, lost through the fault and negligence of the captors, for compensation in damages.

The right of visitation and search is a belligerent right which cannot be drawn into question; but must be conducted with as much regard to the safety of the vessel detained, as is consistent with a thorough examination of her character and voyage.

*Detention, after search, pronounced to be unjustifiable, under the circumstances of the case. [*328

The value of the captured vessel, and the prime cost of the cargo, with all charges, and the premium of insurance, where it has been paid, allowed in ascertaining the damages.

March 11th, 1817. APPEAL from the Circuit Court for the district of Maryland. This cause was argued by *Harper* and *Swann*, for the appellants; and by *Winder* and *Jones*, for the respondents.

The schooner Anna Maria, belonging to citizens of the United States, sailed from Alexandria, on the 27th of September 1812, laden with a cargo, also belonging to American citizens, and bound to St. Bartholomews, a neutral island. On the 16th of October, the schooner made the Virgin Islands, where she continued, it being calm, until the 19th. About midday on the 19th, light breezes sprang up from the eastward, and the Anna Maria, as stated by her master, was using her utmost endeavors to make St. Bartholomews. It appeared, however, that the vessel headed towards St. Thomas, an island in possession of the British. In this situation, a sail, which proved to be the Nonsuch privateer, of Baltimore, was discovered, bearing east north-east from them, which gave chase under English colors, and soon overtook them. The Anna Maria was boarded, about four in the afternoon, and her master, with all her papers, sent on board the Nonsuch. A search for other papers was commenced, and continued for *about [*329 two hours. The boarding-officer, who had appeared in the disguise of a British officer, then returned to the Nonsuch, being succeeded by another officer, who kept possession of the Anna Maria, with two men, and

was ordered to continue under the lee of the Nonsuch until the succeeding day, when it was intended, as alleged, to continue the search. The whole crew of the Anna Maria were taken out, and, with her master, put in irons. The next morning, about nine, two other vessels were descried, and, as stated by the master of the Anna Maria, and by one of the officers of the privateer, were chased by the Nonsuch. In the chase, she lost sight of the Anna Maria, and soon afterwards fell in with her. The officer, with the two men on board her, attempted, as they say, to bring her into the United States; but being in want of water, wood and candles, they went into St. Jago de Cuba, and sold a part of the cargo, to enable them to purchase these necessaries. In attempting to bring the vessel out of port, she was run aground and injured; after which, she was sold, with the residue of her cargo, and the proceeds remained in the hands of the American consul for those who might be entitled to them.

The Nonsuch soon afterwards returned to the United States, and a libel was filed by the owners of the Anna Maria and cargo, against the owners of the Nonsuch, in the district court of Maryland, claiming compensation in damages for the injury they had sustained. This libel was dismissed by the
*330] district *court, and the decree affirmed by the circuit court; on which, the cause was brought by appeal to this court.

Swann and *Harper*, for the appellants, admitted, that the owners of the captured property could not come into a court of prize, unless with clean hands, to claim restitution in damages. If the original seizure was justifiable, and there was no subsequent misconduct on the part of the captors, they could not be compelled to make restitution. But it is the duty of captors to send in the captured vessel immediately, for adjudication before the proper tribunal, and to the most convenient port. This they had not done; and were, therefore, responsible to the owners in damages. Even if the commander of the privateer acted *bonâ fide*, he acted with gross negligence and unskilfulness, and the authority of the case of *The Der Mohr*, 3 Rob. 129, 4 Ibid. 314, is enough to charge him with restitution in value.

Winder and *Jones*, for the respondents, argued, upon the facts of the case, that the real destination of the captured vessel was to supply the enemy, and that there was probable cause of seizure. If so, damages could not be recovered. There was sufficient ground for carrying in for adjudication, or ground of condemnation as prize; either would be sufficient to justify the captors in the seizure; the only question is, whether the right of seizure was
*331] *properly exercised? The prize law does not prescribe any particular mode of exercising the right of visitation and search, nor when, nor into what particular port, the prize is to be sent for adjudication. It is the exercise of a military discretion; and the case of *The Der Mohr* shows, that the captors are not responsible for an accidental loss, after the capture, if there is probable cause of seizure and carrying in for adjudication.

March 13th, 1817. Marshall, Ch. J., delivered the opinion of the court, and after stating the facts, proceeded as follows:—To sustain the claim of the libellants, the first point to be established is, the fairness of the voyage. It being admitted, that the vessel and cargo were American, the only inquiry is, was the Anna Maria really destined for a neutral port?

Her papers show that she was destined for St. Bartholomews; her master swears, that he intended to reach that port, and no other; and that he was using his best endeavors to make it, when he was stopped by the Nonsuch. The circumstances which might create doubt respecting the truth of this testimony, are his situation and course, when descried by the Nonsuch. He was within six or eight leagues of St. Thomas, and steering a course which brought him nearer to that island. But his place is accounted for by the current and the calm which had preceded his capture; and his course is stated by himself, and his testimony *is not contradicted, to have been calculated to enable him to gain St. Bartholomews, to the leeward of which he had fallen. This representation is supported by the fact, that being at the Virgin Islands, on the 16th, he might, by availing himself of the current, have reached St. Thomas before he was descried by the Nonsuch. It is also supported by the great improbability of his attempting to enter an enemy's port, without obtaining a license, which would have protected him from hostile capture in that port, as well as on his voyage to it. That he had not a license is proved, not only by his own oath, but by the fact that, although the master and crew, as well as the vessel, have remained in possession of the captors, no license has been found, and there is no reason to believe, that it could have been secreted, and it is not probable, that it would have been destroyed on the appearance of the Nonsuch, since she chased and boarded under British colors. [*332

The voyage, then, must be considered as entirely fair. The next subject of inquiry is, the right to visit and to detain for search. This is a belligerent right, which cannot be drawn into question. As little can it be questioned, that the situation of the Anna Maria justified a full and rigorous search. But this search ought to have been conducted with as much regard to the rights and safety of the vessel detained, as was consistent with a thorough examination of her character and voyage. All that was necessary to this object was lawful; all that transcended it was unlawful.

*When the Anna Maria was boarded, her master gave a plain and true account of the character of the vessel and cargo, which was verified by the ship's papers, and which does not appear to have been doubted. But although the vessel and cargo were American, the trade might be hostile; and the right to examine fully into this fact was complete. There was no prevarication in the statements of the master, which could excite suspicion, and the search for other papers was continued for two hours, without intermission. Although the character of British officers was maintained, nothing indicating British connection in the voyage was discovered, and although the trunks were broken open and searched, no additional papers were found. It was pressing the right of search as far as it could bear, to determine on repeating it the next day; and an inattention to the safety of the Anna Maria, which only her neighborhood to the island of St. Thomas could excuse, longer to detain her. But there is some reason to doubt, whether further search was the real object of this detention. It does not appear to have been recommenced at nine the next morning; and this leads to the opinion, that the vessel was detained, not so much to make further search, as in the hope of drawing from the master, or some of the crew, who were all in irons, something which might lead to the condemnation of the vessel and cargo. This conduct must be viewed with much lenity, to be pardoned. [*333

But whatever excuse may be made for the detention thus far, none can be given for the transactions which remain to be noticed.

*334] *Before the captain of the Nonsuch left the Anna Maria, in pursuit of other objects, he ought to have decided either to seize her as prize, or to restore her. Had he seized her as prize, her master, at least, ought to have been returned to her, and her papers should have been sealed and put in possession of a prize-master. If he determined not to seize her as prize, her master and crew ought to have been restored, that she might have prosecuted her voyage. No apology can be made for leaving her in the condition in which she was placed. Stripped of her crew and of her papers, left in possession of an officer and two men, without orders whither to proceed, she was exposed to dangers, for the loss resulting from which, those who placed her in this situation must be responsible. Had she been regularly captured, many of the difficulties encountered in St. Jago de Cuba might have been avoided; had she been restored, she might, and probably would, have reached her port of destination in safety.

The proceedings of the Nonsuch, after a search, converted the whole transaction into a wanton marine trespass, for which no sufficient excuse has been given. However meritorious may have been the services of the private armed vessels of the United States, in the aggregate, those individuals who have acted with this culpable disregard to the rights of others, ought not to escape the animadversion of the law. The conduct of the officers of the Nonsuch, on board the Anna Maria, was unjustifiably licentious. Breaking

*335] *open trunks, when keys were offered them, taking out the crew and putting them in irons, and leaving her in this situation, were acts not to be excused. The honor and the character of the nation are concerned in repressing such irregularities; and the justice of the court requires that compensation should be made for the injury which the libellants have sustained.

The sentence of the circuit court must be reversed, and the cause remanded to the circuit, with directions to reverse the sentence of the district court, and to direct commissioners to ascertain the amount of damages sustained by the libellants; in doing which, the value of the vessel, and the prime cost of the cargo, with all charges, and the premium of insurance, where it has been paid, with interest, are to be allowed. Out of this decree must be deducted the amount of the proceeds of the Anna Maria and cargo, unless the libellants shall choose to abandon those proceeds to the defendants.

Sentence reversed.(*a*)

(*a*) *Vide* Appendix, note I.

*Colson *v.* Thompson.

Specific performance.

Bill for the specific execution of an alleged agreement to convey to the plaintiff one-third of a certain tract of land, in Kentucky, belonging to the defendant, as a compensation for locating and surveying the same. Bill dismissed.

In order to obtain a specific performance of a contract, its terms should be so precise as that neither party can reasonably misunderstand them; if the contract be vague and uncertain, or the evidence to establish it be insufficient, a court of equity will not enforce it, but will leave the party to his legal remedy.[1]

The plaintiff who seeks for the specific performance of an agreement, must show that he has performed, or offered to perform, on his part, the acts which formed the consideration of the alleged undertaking on the part of the defendant.[2]

Appeal from a decree of the Circuit Court for the district of Kentucky. The appellee filed his bill in that court, stating, that in the year 1779, a number of persons, amongst whom was the defendant below, who was the appellant in this court, employed him, the complainant, to locate lands for them, in the then district of Kentucky; that he received from the defendant certain land-warrants to the amount of 25,000 acres, which he located for him, on the 20th of May 1780. That the terms on which he was to do the business were, that the owner of the warrants should furnish all the money that should be necessary for locating and surveying the said lands. That the complainant should direct the doing thereof, and receive, for his compensation, what *should be given to other persons for similar services. The bill then averred, that the usual proportion which [*337 was then generally given to locators for similar services, was one-third part of the land so located by them. The complainant further alleged, that he was prevented from surveying the above entry, by the Indians, who were very troublesome, and who rendered the execution of such business difficult and dangerous; that during this time, the defendant procured a survey to be executed, of the entry made in his name, by the complainant, and obtained a patent for the same. The bill admitted that the complainant received a sum of money from the defendant, which, however, he charged as paid on account of the expenses attending the locating and surveying the said entry, and not as a compensation for his services. The prayer of the bill was, for a conveyance of one-third part of the above-mentioned tract of 25,000 acres of land. It appeared by the exhibits in the cause, that the above entry was surveyed on the 28th October 1786.

The defendant stated in his answer, that previously to his employing the complainant to locate and survey his warrants, he received offers from other persons to do the business, upon the terms stated in the bill, which he rejected, and that he was induced to authorize his friend, Mr. Webb, to place the warrants in the complainant's hands, in consequence of his having understood that he would undertake the business for a fair compensation in money. That Mr. Peachy, the agent of the defendant, paid to the complainant upwards of 7000 pounds of tobacco, within a few months after

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[1] King *v.* Thompson, 9 Pet. 204; McConnell *v.* Lexington, 12 Wheat. 582; Kendall *v.* Amy, 2 Sumn. 278; Smith *v.* Burnham, 3 Id. 435; Bowen *v.* Waters, 2 Paine 1.

[2] And see McIver *v.* Kyger, 3 Wheat. 53; Dorsy *v.* Packwood, 12 How. 126; Boone *v.* Missouri Iron Co., 17 Id. 340; McNeil *v.* Magee, 5 Mason 244; Kendall *v.* Amy, 2 Sumn. 278; Denniston *v.* Coquillard, 5 McLean 253.

the entry was made. The *answer further stated, that the defendant frequently applied to the complainant to have the entry, which he had caused to be made, surveyed; and that, after repeated promises to comply with these demands, made and broken, the complainant confessed it was not in his power to execute the business, and after claiming the tobacco, which he had received as a compensation for his services, advised the defendant to apply to some other person to attend to the surveying of the entry. The defendant owned, that from the year 1785, when this advice was given, until some time after he claimed his grant, he was frequently in company with the complainant, who, to the best of his recollection, never intimated that he expected to receive any part of the lands, nor was any such demand ever made by complainant, until the institution of this suit, in 1794.

There was an amended bill filed in the cause, and the above answer was, by the agreement of parties, received as an answer to this bill. The amended bill stated, that the entry of the 25,000 acres of land was made by the intervention of a Mr. Shelby, a particular friend of the complainant. That the defendant caused the said entry to be surveyed, without consulting the complainant on the subject, although he averred, that he was always ready and willing, whenever he might have been called upon for this purpose, to show the beginning and other calls of the entry, and to give the necessary directions to the surveyor.

The depositions taken in the cause proved, that at the time when the entry was made, it was usual, in Kentucky, for the locators of lands to
*339] receive from *the owners, as a compensation for their services, a proportion of the land so located, beside the expenses which might be incurred in surveying the land, which the locator received from the owner in money. But what that proportion was, was not precisely ascertained by any of the witnesses. They stated, generally, that it was sometimes one-third, and sometimes one-half. Mr. Peachy, the agent and attorney in fact of the defendant below, from the year 1780, when the defendant went to the West Indies, until his return, stated, that he had lands located in Kentucky, for a part of which he allowed the locator one-fifth, and for the residue one tenth, of the land located, as a compensation for his services, beside paying the expenses of surveying, &c. This witness further stated, that he never heard or understood, in conversation with the complainant, the defendant, or Mr. Webb, with whom the defendant deposited his warrants to be delivered to the complainant, that the defendant was to give any part of the land, in consideration of locating the same.

The circuit court decreed, that the defendant below should convey to the complainant one-third of the said tract of 25,000 acres of land, according to certain boundaries which had been previously laid down, under an order of that court; from which decree, the defendant appealed.

March 12th, 1817. Washington, Justice, delivered the opinion of the court.—In deciding this case, we are necessarily led to the examination of
*340] the following questions: 1. What *was the contract between these parties, the specific execution of which is sought to be enforced by this bill, and how is it proved? 2. Has the complainant entitled himself to ask for an execution of the contract, in case the same should be sufficiently proved?

The amended bill states that the complainant received certain land-warrants from the defendant, with instructions to locate the same, in Kentucky, but that no particular stipulation was made respecting the compensation which he was to receive for his services, except that the general custom of the country in similar cases, and the general tenor of the complainant's contracts with other persons for such services, were to furnish the rule of compensation to be allowed to him. This rule is averred to be one-third of the land located.

The defendant, in his answer, states, that no contract of any sort was entered into between the complainant and himself. He even denies that he had any conversation with the complainant on this subject, at any time previous to the entry being made. He states that offers were made to him by other persons to locate his warrants, on the terms mentioned in the bill, which he rejected, and that, in consequence of his having understood that the complainant would do the business for a fair compensation in money, he deposited his warrants with his friend, Mr. Webb, with a request that he would engage the complainant to locate them.

The allegations of the bill in relation to this contract are wholly unsupported by the evidence in the cause ; and on the other hand, the answer, in relation to this point, is strongly corroborated by the testimony *of [*341
Mr. Peachy ; by the uncertainty of the alleged usage as to the proportion of the land to be allowed to the locator ; the improbability that so loose a contract would be made, so early as the year 1779, when a usage, if any existed, must necessarily have been recent and unknown, especially, to persons living remote from Kentucky, at that time wild and unsettled : and above all, by the circumstance, that from the year 1786, when the survey was made, under the direction of another agent, no demand of a part of the land appears to have been made by the complainant, until the institution of this suit, in the year 1794.

This defect in the proof would seem to be fatal to the pretensions of the complainant. The contract which is sought to be specifically executed ought not only to be proved, but the terms of it should be so precise as that neither party could reasonably misunderstand them. If the contract be vague or uncertain, or the evidence to establish it be insufficient, a court of equity will not exercise its extraordinary jurisdiction to enforce it, but will leave the party to his legal remedy.(*a*)

(*a*) See, as to agreements, the performance of which will not be decreed by a court of equity, for want of certainty, the following cases : Elliot *v.* Hele, 1 Vern. 406 ; 1 Eq. Cas. Abr. 20 ; Bromley *v.* Jefferies, 2 Vern. 415 ; Emery *v.* Wase, 5 Ves. 849. But the court will, if practicable, execute an uncertain agreement, by rendering it certain. Allen *v.* Harding, 2 Eq. Cas. Abr. 17. So, an agreement to sell at a fair valuation, may be enforced. Emery *v.* Wase, 5 Ves. 849 ; Milnes *v.* Gery, 14 Id. 407. And if the terms of an agreement are to be ascertained by an award, being so ascertained, that agreement will be enforced in equity, if there is anything to be specifically performed ; as, estates to be conveyed, &c. : but where the parties have contracted that the value of their respective interests shall be ascertained by arbitrators, or an umpire, if the acts done by the parties for the purpose of carrying their agreement into effect by an award, are not valid at law, as to the time, manner or other circumstances, the agreement cannot be enforced in equity ; unless there has been acquiescence, notwithstanding the variation of circumstances ; or the agreement evidenced by such award has been part

*But if these objetions could be surmounted, that which remains to be considered under the second head, appears to the court to be conclusive against the appellee.

2. Has the complainant entitled himself to ask for an execution of the contract, if he had proved it? It is very obvious, from the complainant's own showing, that the contract between himself and the defendant, taken in connection with the alleged usage, was, that the former should not only make the entry, but should also cause the same to be surveyed under his direction and superintendence. It was the entry and the survey which constituted the location, in the contemplation of the parties, and formed the real consideration for which the allowance of a part of the land to the locator was to be made. The complainant states, in his bill, that the owner the warrants was bound by the usage, not only to make this allowance, but *343] was also to furnish all the *money necessary for locating and surveying the land, and he endeavors to excuse himself for not having caused a survey to be made. Now, if the mere making of the entry amounted to a full performance of the contract on the part of the locator, any stipulation with the same person for the expenses attending the survey would have been idle and unnecessary. But the evidence of Isaac Shelby, upon this point, is conclusive. He states, that the usual compensation to a locator was one-third of the land for locating and directing the survey.

If this, then, be the contract, as alleged by the complainant himself, in what manner has he performed his part of it? In the first place, the entry was made, not by him, but by Isaac Shelby, under some agreement which is not disclosed in the bill, nor proved by any testimony in the cause. In the next place, it does not appear, that, from the year 1780, when this entry was made, the complainant made one effort to have the entry surveyed; but the defendant, after wasting about six years, was compelled to employ another agent to have that service performed.

How does the complainant excuse himself for the breach of his contract in this respect? He alleges, that he was prevented, during all that time, by Indian hostility, which rendered it troublesome and dangerous to make surveys in the part of the country where this entry was made. This assertion, is not proved by a single witness, except Thomas Allen, who deposes that from 1780 to 1789, he believes it was difficult to get any *344] persons to risk their *lives in making surveys on the Ohio, towards the Yellow Bank, except for high wages, as he has been informed. Now, even if this witness had positively proved the point for which he was examined, still, his testimony could not avail the complainant, since he admits, that for high wages, men could have been procured to perform the service; and those wages, it was incumbent on the complainant, who claims no less than between 8000 and 9000 acres of this land, to pay. The difficulty and expense which would have attended his endeavors to perform this part of his contract, afford no excuse for his breach of it, even if, in a

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performed. Blundell *v.* Brettargh, 17 Ves. 232. And if, on a covenant to build a house, the transaction is, in its nature, loose and undefined, and it is not expressed distinctly, what the building is, so that the court could describe it as a subject for the report of the master, a specific performance will not be decreed. Mosely *v.* Virgin, 3 Ves. 185. See *ante*, p. 302, note.

case like this, any excuse could be admitted. But what is conclusive as to this point is, that the entry was in fact surveyed in 1786, without any danger or difficulty, so far as the record informs us.

The complainant alleges, that he was always ready and willing, whenever he might have been called upon for that purpose, to show the beginning other calls of the entry, and to give the necessary directions to the surveyor. This allegation is positively denied in the answer, which states, that the complainant declined making or attending to the survey, and that he advised the defendant to employ some other person to do the business.

Thus it appears, that the complainant has failed not only to prove the contract stated in the bill, but also, his performance of those acts which formed the consideration of the alleged promise on the part of the defendant. *The decree must, therefore, be reversed, and the bill dismissed with costs. [*345

Decree reversed.

The Eleanor: Donnell, Claimant.

Liability of captors.

A libel against the commander of a squadron, calling on him to proceed to adjudication, or to make restitution in value, of a vessel and cargo, detained for search, by the captain of a frigate belonging to the squadron, and lost while in his possession. Libel dismissed.

The commander of a squadron is liable to individuals for the trespasses of those under his command, in case of positive or permissive orders, or of actual presence and co-operation. But *quære?* how far is he responsible in other cases?

Where a capture has actually taken place, with the assent, express or implied, of the commander of a squadron, the prize-master may be considered as a bailee, to the use of the whole squadron, who are to share in the prize-money, and thus the commander may be made responsible; but not so as to mere trespasses, unattended with a conversion to the use of the squadron.

The commander of a single ship is responsible for the acts of those under his command; as are likewise the owners of privateers, for the conduct of the commanders appointed by them.

To detain for examination, is a right which a belligerent may exercise over every vessel, except a national vessel, which he meets with on the ocean.

The principal right necessarily carries with it all the means esssntial to its exercise; among these may, sometimes, be included the assumption of the disguise of a friend or an enemy, which is a lawful stratagem of war. If, in consequence of the use of this stratagem, the crew of the vessel detained abandon their duty, before they are *actually made prisoners of war, and the vessel is thereby lost, the captors are not responsible. [*346

Whenever an officer seizes a vessel as prize, he is bound to commit her to the care of a competent prize-master and crew; not because the original crew, when left on board (in the case of a seizure of the vessel of a citizen or neutral), are released from their duty, without the assent of the master, but from the want of a right to subject the captured crew to the authority of the captor's officer. But this rule does not extend to the case of a mere detention for examination, which the commander of the crusing vessel may enforce by orders from his own quarter-deck, and may, therefore, send an officer on board the vessel detained, in order more conveniently to enforce it, without taking the vessel out of the possession of her own officers and crew.

The modern usages of war authorize the bringing of the principal officers of the vessel detained, on board the belligerent vessel, with the papers, for examination.

Appeal from the Circuit Court for the district of Massachusetts. This schooner, with her cargo, the property of the claimant, on a voyage from Baltimore to Bordeaux, fell in with the President and Congress frigates, on the night of the 16th of October 1813. Commodore Rodgers was the commander of the President frigate, and the commodore and commander of the squadron composed of those two ships, then in company. Captain Smith,

deceased, and charged in the libel as a co-defendant, commanded the Congress.

On the Eleanor being discovered by the two frigates, she was chased by the Congress and overhauled. The President stood on her course, being out of sight, at the time she was overhauled, and when she was subsequently dismasted, and so continuing until the signal guns were fired from the schooner. The *master, supercargo and the officers and crew of the
*347] Eleanor, on seeing the frigates, considered them British cruisers, and when they found she could not escape them, concluded they were captured by the enemy. This produced a very general determination, on the part of the crew, to take no further concern in the navigation of the schooner. When boarded by Lieutenant Nicholson of the Congress, the schooner was in the state of confusion to be expected from such a determination. He ordered the master to take one of his mates, and his papers, and go on board the frigate. The master, after giving some orders to his second mate to adjust the sails of the schooner, which were not complied with, went, with his first mate and papers, in the frigate's boat, to the Congress. Lieutenant Nicholson, on being asked by a boy, what frigate it was, said it was the Shannon; immediately afterwards, he undeceived the supercargo, whom he recognised as an old acquaintance, but said, he was ordered not to make himself known, and therefore, requested the supercargo not to disclose it. Upon endeavoring to restore order, and to provide for the safe navigation of the schooner, he could get no assistance from the crew (who refused to obey his orders, considering him a British officer), except from the second mate, and on observing this, he disclosed the name of the frigate, and he, the supercargo and the mate, assuring the crew they were not prisoners, endeavored to prevail on them to return to their duty; they persisted in refusing; in consequence of which (the sea being tempestuous, and the weather squally), a flaw struck *the vessel and both her masts went over. Lieu-
*348] tenant Nicholson, the mate and supercargo endeavored to save the vessel, but the crew would not obey either of them. She was afterwards assisted, as far as possible, by the frigates, but finally abandoned and lost.

The libel was filed against Commodore Rodgers, and Captain Smith, alleging that the loss of said vessel and cargo was owing "to the deception unlawfully practised on her crew, by the officers of the said squadron, and through the want of care, inattention and gross negligence of the officer of said frigate Congress, in the navigating said schooner, of which he had taken, and then had command," and praying for a monition against them, to proceed to adjudication, or to show cause why restitution in value should not be decreed.

The district court considered this allegation supported by the proof, and that Commodore Rodgers was answerable, as commander of the squadron, and decreed against him for $43,250, the value of said vessel and cargo. The circuit court affirmed the decree *pro formâ*, and thereupon, the cause was brought by appeal to this court. After the filing of the libel, and before the decree in the district court, the death of Captain Smith, which had intervened, was suggested on the record.

March 12th. *Key*, for the appellant, made three points: 1st. That it was owing to the neglect and misconduct of the captured crew, the ves-

sel was lost. *2d. That this neglect and misconduct were in no degree owing to, or palliated by, the military stratagem practised by Captain Smith. 3d. That, at all events, Commodore Rodgers was not responsible in law.

The neglect of the captured crew, in refusing to do duty, is analogous to the case of *Virtue* v. *Bird*, 2 Lev. 196, where the plaintiff declared that he was employed by the defendant to carry a load of timber from W. to I., to be laid down where the defendant should appoint, and that he carried it; when the defendant, having appointed no place where it should be laid down, the plaintiff's horses were detained in the cold, by which some of them died, and the rest were spoiled; after a verdict for the plaintiff, judgment was arrested; for it was the plaintiff's own fault, that he did not take out his horses, and lead them about; or he might have unloaded the timber, in any proper place, and returned. So, also, in *Butterfield* v. *Forrester*, 11 East 60, which was an action on the case for obstructing a highway, by means of which the plaintiff, who was riding along the road, was thrown down with his horse, and injured; it appeared, that he was riding with great violence and want of ordinary care, without which he might easily have avoided the obstruction. It was, therefore, decided, that he could not recover; for that two things must concur to support the action: an obstruction in the road, by the fault of the defendant, and no want of ordinary care, to avoid it, on the part of the plaintiff. Upon the *principle of these cases, the appellant is exempted from all liability. [*350

Nor is he responsible, upon the ground of the liability of a master and principal for the misconduct of a servant and agent. Superiors, in these relations of life, are answerable only for acts in the ordinary line of the duty of the servant and agent, or in consequence of the special orders of the superior. But this principle, with its limitations, does not apply to the case of a commander of a squadron. He does not elect his officers, they are appointed by the government, and amenable only to a court-martial. No officer, military or naval, would undertake so frightful a responsibility; and to impose it upon the commander of a fleet or squadron, would be to incapacitate him from the performance of his duty. There is no testimony, positive or presumptive, that Commodore Rodgers gave any orders whatever to practise the stratagem in question. The authority of *The Mentor*, 1 Rob. 179, shows, that he is not liable, constructively, for the conduct of the officers under his command; nor is there any one case to show that he is, thus liable. *The Der Mohr*, 3 Rob. 129, 4 Ibid. 314, is, apparently only, such a case. It only proves that a superior officer may be placed in the same relation with that of a principal, in regard to his agent. In that case, the captors had a right of property in the captured vessel, inasmuch as by the law of England, captors have the entire interest in prizes; and any person may be appointed prize-master, and so become the agent of the whole squadron, the commander *of which would, consequently, be responsible. Public policy does not require the establishment of the principle contended for on the other side, since the injured party may have recourse to the actual wrongdoer and may seek redress, by complaining to the government of his misconduct. [*351

D. B. Ogden, contrà.—The case cited from Levinz is not parallel; and

that from East is one of gross folly and want of common prudence and caution on the part of the plaintiff. It is inapplicable, because it was not in the power of the libellant, in this case, to save his property from destruction. But the present question is not to be determined by the narrow principles of the common law; it is a marine trespass, which must be tried by the more liberal rules of the marine law. The right of visitation and search is not, and cannot be denied; but it is not essentially necessary to the due exercise of the right, that the master should be taken out of his vessel: it is only necessary to send a boarding-officer to make the proper examination and inquiries; but the belligerent cruisers have no right to proceed further, until they have determined to send in the vessel for adjudication. When this determination is made, a competent prize-master and crew, should be put on board, instead of leaving the original crew, without control or regulation. A belligerent has a right to practise deception, as a stratagem of war; but this right, which may cause a wrong to a neutral or fellow-citizen, must be exercised at the peril of the captors. Either the seizure of the
*352] Eleanor *was as prize, or she was detained for search. If the former, then the captors had no right to require the assistance of the crew of the captured vessel,(*a*) who were not bound to assist in navigating her. If the latter, then the captors had no right to take out the master and mate, leaving the crew without any regular chief, competent to navigate the vessel. The case of *The Der Mohr* was, indeed, determined on general principles of law; on the ground that the prize-master was constituted agent of the captors, and the vessel (which was innocent) was used as a vehicle to bring in the cargo, which last alone was liable to suspicion. But here, the trespass is joint; and the trespassers would have been joint sharers of the prize: *Qui sentit commodum sentire debet et onus.* The President was out of sight, at the time of the seizure; but she was present at the inception of the tort. They were cruising in conjunction, and under the orders of Commodore Rodgers, who saw the Congress frigate pursue the Eleanor, and did not prohibit the chase. The boarding-officer was a mere passive instrument in the hands of his superiors, to whom alone the injured party can look for indemnification.

Harper, on the same side.—The responsibility of the owners of privateers and the commanding officers of ships and squadrons, for the misconduct of their delegates, is a settled principle of law. The case of *Del Col*
*353] v. *Arnold*, 3 Dall. 333, is in point, where *this court decreed the owners of a privateer to make restitution in value, of a captured vessel lost by the misconduct of the prize-master. The case of *The Der Mohr*, which has been so often referred to, makes the senior officer responsible for the appointment of a prize-master by his junior officer, though there was no personal misconduct imputable to either. In the cause now before the court, the proximate cause of the loss was the refusal of the seamen to work. The ultimate cause was the deception practised by the captors, in representing themselves as enemies: and whether the crew were justifiable in refusing obedience, or not, their disobedience was a consequence of the stratagem practised by the captors, and they are responsible. On

(*a*) Wheaton on Capt. 100.

the first supposition, they are liable; because they ought to have put a prize-crew on board. On the second, because the stratagem was practised, at their peril, and it depended upon the event of the search, whether they would be justified; for this mode of warfare is not to be practised at the expense of individuals pursuing an innocent and lawful commerce. The case of *The Mentor*, 1 Rob. 179, is not, as has been contended, contrary to to our position. The claimant there had taken out a monition against the actual captor, which had been dismissed; it was, therefore, *res judicata;* and besides, the lapse of time which had intervened, was held to be an equitable limitation. It is true, that Sir WILLIAM SCOTT likewise lays hold of the circumstance that Admiral Digby was merely commander of the *North American station, and far off, at the time when the capture was made; but here, Commodore Rodgers was present, and associated in the act. The case of *The Charming Betsey*, 2 Cr. 64, shows, that innocence of intention alone in a commanding officer will not exempt him from the consequences of an illegal act. In substance and effect, this is a case between the government and the owner of the property which has been destroyed, who has become the victim of a rigorous prosecution of the rights of war and of military policy. *Respondeat superior!* We pursue him; let him, in turn, look for idemnification to his government, to which experience shows that he will not look in vain. [*354

Jones, for the captors, in reply, argued, on the facts, that the loss of the vessel was not a consequence, direct or indirect, of the conduct of the seizing officer; and that the right of visitation and search had been properly exercised. It is novel doctrine, that the right of search is to be exercised under the peril of being responsible for a wrong. Reason, morality and law all concur in imposing the loss (among innocent parties) upon him on whom the elements and the act of Providence throws it. It was entirely a question of military prudence, whether the papers should be examined by the boarding-officer or by his superior; and there is nothing in the principles of public law, to prevent the exercise of the right of visitation and search, either way. Neither are the crew of the vessel which is detained *for search, exempted from obedience, in consequence of the act of boarding. Until the capture is consummated, the former relations of the crew continue; and until then, the cruiser is not bound to send on board a competent prize-master and sufficient crew to navigate the captured vessel. [*355

The commander of a squadron cannot, on any principle of law or justice, be made responsible, constructively, for the acts of officers on board other ships. The principles and analogies which would make Commodore Rodgers a joint trespasser, must be those of municipal law. But his was not a civil connection with the officers of the other ship; all that he knew, or permitted, was the chase; and he cannot be made responsible for the subsequent supposed misconduct of his brother-officer. Here was a merely military act; no *animus lucrandi;* no appropriation as prize; and therefore, no civil constructive responsibility. In the case of *The Mentor*, Sir WILLIAM SCOTT expressly overrules the doctrine of the constructive responsibility of a commander-in-chief; apart from the other grounds of exception, the former adjudication, and the lapse of time which he likewise notices. *The Der Mohr* was a case of joint capture, as expressly stated by the court and the

reporter; and was determined on the just principle of joint participation in the wrong done, in the interest acquired by the capture, and in the appointment of the prize-master.

March 15th, 1817. JOHNSON, Justice, delivered the opinion of the court. —This case presents two questions, 1st. Are the appellees entitled to recover? *2d. Does their right of recovery extend to the commander of the squadron?

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In whatever view the case be considered, it is one of extreme hardship; both the claim and the defence are founded in the most rigid principles of the *strictum jus;* and it is impossible not to regret, if the libellant have no means of indemnity, or if that indemnity should be exacted of men whose characters and conduct were so far above all imputation of malice or oppression. Nor can this court altogether close its feelings against the claims to protection of that navy which has so nobly protected the reputation of the country. Yet, we mistake the character of the men who constitute it, if they would not be among the first to declare the government unworthy of their skill and valor, in which the rights of the meanest individual were not as much an object of earnest solicitude, as the rights of those whom their country delights most to honor.

Whether the commander of a squadron be liable to individuals, for the trespasses of those under his command, is a question on which it would be equally incorrect to lay down a general proposition, either negatively or affirmatively. In case of positive or permissive orders, or in case of actual presence and co-operation, there could not be a doubt of his liability. But on the other hand, when we consider the partial independence of each commander of a vessel, and that the association is not a subject of contract, but founded on the orders of their government, which leave them no election, it would be dangerous, indeed, and dampening to the ardor of enterprise, to trammel a commander *with fears of liability, where it is not possible, from the nature of the service, and the delicate rules of etiquette, for him always to direct or control the actions of those under his command. We feel no inclination to extend the principle of constructive trespass, and will leave each case to be decided on its own merits, as it shall arise. Where a capture has actually taken place, with the assent of the commodore, express or implied, the question of liability assumes a different aspect; and the prize-master may be considered as bailee, to the use of the whole squadron, who are to share in the prize-money. To this case there is much reason for applying the principle, that *qui sentit commodum sentire debet et onus;* but not so as to mere trespasses, unattended with a conversion to the use of the squadron.

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The case of the commander of a single ship varies materially from that of the commander of a squadron, and the rigid rules of liability for the acts of those under our command may, with more propriety, be applied to him. The liability of the owners of a privateer, for the acts of their commanders, has never been disputed. And it is, because they are left at large in the selection of a commander, and are not permitted to disavow his actions as being unauthorized by them. So, in the case of a commander of a ship, the absolute subordination of every officer to his command attaches to him the imputation of the marine trespasses of his subalterns on the property of

individuals, when acting within the scope of his commands. Orders even giving a discretion to a subordinate, in such cases, is no more *than adopting his actions as the actions of the commander; and placing [*358 him in a command which requires skill, integrity or prudence, makes the commander the pledge to the individual for his competence to discharge the duties of the undertaking.

With these views of the subject, we should have found no difficulty in deciding on the liability of Captain Smith, of the Congress, had he been a party to this libel, and the facts of the case had made out a marine trespass in himself or in Lieutenant Nicholson, or a want of competence or due care in the latter to discharge the command assigned him. But we are of opinion, that no one act is proven in the case, which did not comport with the fair, honorable and reasonable exercise of the rights of war. To detain for examination, is a right which a belligerent may exercise over every vessel, not a national vessel, that he meets with on the ocean. And whatever may be the injury that casually results to an individual from the act of another, while pursuing the reasonable exercise of an established right, it is his misfortune. The law pronounces it *damnum absque injuriâ*, and the individual from whose act it proceeds is liable neither at law nor in the *forum* of conscience. And the principal right necessarily carries with it also all the means essential to its exercise. Thus, in the present case, a vessel must be pursued, in order to be detained for examination. But if, in the pursuit, she had been dismasted, and upset or stranded, or run on shore and lost, it would have been an unfortunate case, but the pursuing vessel would have stood acquitted.

The counsel, in argument, *have not denied the general doctrine, [*359 but have endeavored to show that the commander of the Congress had unreasonably exercised the right of detention. 1st. By the deception, in passing himself off for an enemy, thereby reducing the crew to a state of insubordination. 2d. By taking out both the master and the mate, and thus removing the possibility of bringing the seamen back to their duty. 3d. By divesting the master of his command, without putting a competent crew on board to navigate her.

On the first of these grounds, it is only necessary to remark, that, to assume the guise of a friend or an enemy, is, in legitimate warfare, an act the most familiar and frequent in its occurrence. It is so ordinary a *ruse de guerre*, that it ought rather to be expected, than the display of real colors. And innumerable cases that have come before this court prove, that in the actual state of things, during the late war, it became as necessary to practice the deception upon our citizens, as upon a neutral or an enemy; we, therefore, see nothing reprehensible in this. But on what ground could the crew assume the right of judging for themselves on this subject, and of abandoning their duty, before they were actually made prisoners? Suppose, the frigate had been an enemy, it did not follow, that their vessel must be made prize, and they were, unquestionably, unpardonable, in abandoning their duty? Their doing so, was by no means a necessary consequence *of ordering their officers on board the frigate, nor ought the captain [*360 of the Congress to have anticipated such a state of things, as their vessel was reduced to, by their misconduct. They were bound to obey the second mate, in the absence of their other officers; and if they had done so,

this misfortune would not have happened. So far from actually divesting him of his command, it appears, that Nicholson's orders were addressed to him, and only addressed to the men, to try his personal influence in bringing them to order.

To the second and third grounds, the attention of this court has been drawn with peculiar force. Either of them appeared to be an irregularity, which the reasonable exercise of the right of search did not strictly justify. But upon a close examination of the testimony, we are of opinion, that neither of those grounds is supported by the evidence. It is true, that both the master and first mate were taken on board the frigate, and the master and supercargo say, they were both ordered on board. But Nicholson, the boarding-officer, who certainly knew best what orders he gave, swears, that he ordered the master to go on board, with "one of his mates," thus leaving it to his election to choose between them; he further swears, that these were the orders he received from the captain. And there is a fact in the case, which makes it probable, that the master of the schooner himself called on the first mate to attend him, for at that time, the second mate was stationed at the bow, in charge of sinking certain dispatches, in case of capture.

*361] Had the master remonstrated *against taking his first mate along with him, he would have done his duty, and perhaps, saved his vessel. On the third point, it is unquestionably true, that, whenever an officer seizes a vessel as prize, he is bound to commit her to the care of a competent officer and crew. Not that the original crew, when left on board, in case of seizure of the vessel, of a citizen or neutral, are released from their duty, without the assent of the master; for they are bound to attend the vessel, as she may be discharged, and pursue her original destination. But the obligation to man the prize, results from the want of a right to subject the crew of the captured vessel, to the authority of his own officer. If, then, this vessel had been seized as prize, and no one put on board but the prize-master, without any undertaking of the original ship's company to navigate her under his orders, it is very questionable, whether the appellants would not have been liable for any loss that followed, from the insubordination of the crew. For after capture, as before observed, the prize-master becomes the bailee of the squadron, who are to share in the partition of the proceeds.

But we are of opinion, that this was a mere case of detention for search; that the vessel was never actually taken out of possession of her own officers; that the captain of the Congress had a right to detain the vessel, by orders from his own quarter-deck, and that the officers of the schooner, at their peril, were bound to obey; that Lieutenant Nicholson was left on board for no other purpose, than to enforce, in a more convenient mode, the

*362] observance, on their *part, of the duty which the rights of war authorized the frigate to exact of her. And all the misfortunes which followed resulted to the appellees from the fault or folly of their own crew.

One argument, insisted on at the bar, it is proper for this court to notice, before we conclude. It was contended, that the master of the Eleanor ought not to have been removed from his vessel; that the right of search only authorized the sending of an officer on board to examine her papers. But we think otherwise. The modern usages of war authorize the bringing of one of the principal officers on board the cruising vessel, with his papers, for examination. To divest her of both her principal officers, without put-

ting on board her, for the time, a competent officer and crew, would certainly be irregular. But it is for the interest of the commercial world, that the investigation should be made by the commander himself, and not left to any subordinate officer. In that case, it would be absurd to require of the commander of the commissioned vessel to quit his command, for the purpose of making the necessary examinations.

We are, upon the whole, of opinion, that the court below erred; that the decree must be annulled, and the libel dismissed.(*a*)

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* Inglee *v.* Coolidge. [*363

Error to state court.

No writ of error lies to the highest court of law or equity of a state court, under the 25th section of the judiciary act of 1789, unless there is something apparent on the record, bringing the case within the appellate jurisdiction of this court.[1]

The report of the judge who tries the cause at *nisi prius*, containing a statement of the facts, is not to be considered as a part of the record;[2] the judgment being rendered upon a general verdict, and the report being mere matter *in pais* to regulate the discretion of the court as to the propriety of granting a new trial, the writ of error in such a case, will be dismissed.

This was a writ of error upon a judgment of the Supreme Judicial Court of Massachusetts, rendered in an action of *assumpsit*. The declaration contained three counts, to which the general issue was pleaded, and upon two of these counts, the jury found a general verdict for the defendant (the plaintiff in error), and upon the third count, a general verdict, with damages, for the original plaintiff. The cause was then continued, as the record states, "for the opinion of the whole court, upon the law of the case, as reported by the judge who tried the same." At a subsequent term, judgment was rendered by the whole court, for the plaintiff, upon the verdict found in his favor. The report of the judge who tried the cause came up in the record, annexed to the writ of error, with other proceedings and exhibits in the cause.

(*a*) *Vide* Appendix, note I.

[1] Lagrange *v.* Chouteau, 4 Pet. 287; Ocean Ins. Co. *v.* Polleys, 13 Id. 157; Armstrong *v.* Treasurer of Athens Co., 16 Id. 281; Poydras de la Lande's Heirs *v.* Louisiana, 18 How. 192; White *v.* Wright, 22 Id. 19; Attorney-General *v.* Federal Street Meeting-house, 1 Black 262; Boggs *v.* Merced Mining Co., 3 Wall. 304; Railroad Co. *v.* Rock, 4 Id. 177; Walker *v.* Villavaso, 6 Id. 124; Gibson *v.* Chouteau, 8 Id. 314. It must appear from the record, that an act of congress, or the constitutionality of a state law, was drawn on question. Miller *v.* Nicholls, 4 Wheat. 311; Willson *v.* Blackbird Creek Marsh Co., 2 Pet. 245; Wallace *v.* Parker, 6 Id. 680; Crowell *v.* Randell, 10 Id. 368; McKinney *v.* Carroll, 12 Id. 66; Ocean Ins. Co. *v.* Polleys, 13 Id. 157; Mills *v.* Bevan, 16 Id. 525; Smith *v.* Hunter, 7 How. 738; Grand Gulf Railroad and Banking Co. *v.* Marshall, 12 Id. 165; Carter *v.* Bennett, 15 Id. 354; Maxwell *v.* Newbold, 18 Id. 511; Christ Church *v.* Philadelphia, 20 Id. 26. It is not enough, that such question might have arisen, or been applicable; it must appear, that it did arise, and was applied. Chouteau *v.* Marguerite, 12 Pet. 507; Bank of Kentucky *v.* Griffith, 14 Id. 56; Coons *v.* Gallaher, 15 Id. 18; Commercial Bank *v.* Buckingham, 5 How. 317; Maxwell *v.* Newbold, 18 Id. 511; The Victory, 6 Wall. 382; Hamilton Co. *v.* Massachusetts, Id. 632; Worthy *v.* Commissioners, 9 Id. 611; Knox *v.* Exchange Bank, 12 Id. 379; Cockroft *v.* Vose, 14 Id. 5; Commercial Bank *v.* Rochester, 15 Id. 639.

[2] See Murdock *v.* Memphis, 20 Wall. 590; Edwards *v.* Elliott, 21 Id. 582; Moor *v.* Mississippi, Id. 636.

G. Sullivan, for the plaintiff in error, argued, that by the report of the judge, in the court below, it appeared, that the chief question in this cause involved a constructive application of the act of congress of the 18th of June 1812, declaring war against Great Britain, to the question, whether the purchase of a British license, to protect the property of a citizen, was a lawful consideration for the promissory note on which the action was brought. It is contended, by the defendant in error, that however this may be, this court cannot sustain the writ of error in the present case; because the report of the judge is no part of the record. To determine the question suggested by this objection, it becomes necessary to inquire of what a record consists. "A record," says Britton (ch. 27), "is a memorial or remembrance, an authentic testimony in writing, contained in rolls of parchment, and preserved in a court of record." But a more particular definition is given by Lord Coke (Co. Lit. 117 *a*, 360 *b*), who defines it to be "a memorial of the proceedings or acts of a court of record." In modern times, to avoid the delay incident to the preparation of a special verdict at the trial, a practice has grown up, of reserving the cause for the whole court, upon a special case, which is prepared by the counsel, or, as a substitute therefor, is made by the judge, and thrown into the form of a report, under a special agreement of the parties, that a nonsuit, a default, or even a different verdict may be entered, according to the decision of the court; such is the *practice in the supreme court of Massachusetts. Where *365] is the substantive difference between the "special case" and a report made under such understanding and agreement? Error lies upon a special case. The judgment of the court below in the case of *Hunter* v. *Martin*, 1 Wheat. 304, was founded on a statement of facts, as settled by a case agreed. But the report of the judge, in the present case, was a necessary proceeding or act of the court, upon which its decision on the merits was founded. It ascertained all the facts in the case; and what more does a special case or verdict? The position assumed on the other side narrows the ground of remedial process, in a manner inconsistent with a liberal application of the constitutional powers of this court.

Webster, for the defendant in error, contended, that the points on which the plaintiff relied could not be raised in this case. Nothing appears on the record of the judgment in Massachusetts, by which the court can pronounce that judgment to be erroneous. The general rule of law confines writs of error to matters arising on the record, and the statute expressly provides, that in cases where writs of error are brought in this court, to reverse judgments rendered in state courts, on the ground that such judgments were rendered against the validity, or on an erroneous construction of a statute of the United States, "no other error shall be assigned or regarded, as a ground of reversal, in any such case, than *such as appears on the face *366] of the record, and immediately respects the before-mentioned question of validity or construction." The judge's report of the evidence is no part of the record; still less are the depositions of witnesses. Nothing, therefore, appears on the face of this record, which, in any way, respects either the validity or construction of any statute of the United States. This is, in effect, an attempt to reverse the judgment of a court, for error in refusing to grant a new trial. If a party be dissatisfied with the direction of a judge

at *nisi prius*, in matter of law, there are two modes, in either of which he may ordinarily cause such direction to be reviewed. Without putting the question on the record, he may move for a new trial, on the report of the judge in that court out of which the record issues; or he may tender his bill of exceptions, the object of which is to put the question on the record, and then bring his writ of error. But he cannot pursue both courses. If he relies on his motion for a new trial, then his objection does not appear on the record, and of course, no writ of error lies. If he tender his bill of exceptions, the court where the record is, will not grant a new trial on the ground stated in the bill of exceptions, for the question is then on the record, and the error, if any, may be corrected by writ of error. *Fabrigas* v. *Mostyn*, 2 W. Bl. 929. The discussion of questions of law, on motions for new trials, is attended with the well-known consequence of giving up the right of proceeding further with the cause. The *effect of this, in England, [*367
on the jurisdiction of the House of Lords, has not escaped the notice of Lord Chancellor ELDON. *Smith* v. *Robertson*, 2 Doug. 480.(*a*) But this is for the consideration of the parties themselves. In this case, the plaintiff in error has made his election. He has chosen to trust to the success of his motion for a new trial in the court of Massachusetts. If that has failed, he can have no remedy here by writ of error.

March 13th, 1817. STORY, Justice, delivered the opinion of the court, and after stating the case, proceeded as follows:—

*A motion has been made to dismiss the writ of error, upon the [*368
ground, that there is nothing apparent upon the record, which brings the case within the appellate jurisdiction of this court, under the 25th section of the judiciary act of 1789. It is conceded, on all sides, that this is entirely correct, unless the report of the judge who tried the cause, which contains a statement of the facts, is to be considered as a part of the record. And we are unanimously of opinion, that it cannot be so considered. It is not like a special verdict or a statement of facts agreed of record, upon which the court is to pronounce its judgment. The judgment is rendered upon a general verdict, and the report is mere matter *in pais*, to regulate the discretion of the court as to the propriety of granting relief, or sustain-

(*a*) This was an insurance cause, appealed from the court of session in Scotland to the House of Lords, having been originally brought in the court of admiralty, in Scotland. In delivering the judgment of the house, affirming the decree of the court below, Lord ELDON stated, that "their Lordships were aware, and it was due to the court of session to mark the fact, that these cases were all heard there, in such a course, that there was no obstacle in point of form to prevent their coming before their Lordships. By the old mode of proceeding in Westminster Hall, forty years before he had set foot in it, the practice was, to have special verdicts found, and then the case might come up on error to the House of Lords. But this practice had been altered by Lord MANSFIELD, upon the whole, with considerable utility; and now, for the sake of expedition, instead of entering the matter at length upon the record, in a special verdict, special cases were made for the opinion of the court; and nothing appearing on the record but the general verdict, the subject might have no door by which to come into that house. But in the court of session, as he understood their practice, the cases were heard in such a form, that the subject could not be prevented from coming to their Lordships; and therefore, it was no discredit to the court of session, that so many of their decisions in these insurance causes were brought under the review of their Lordships."

ing a motion for a new trial. The writ of error must, therefore, be dismissed.

Wheaton, for the defendant in error, moved for costs.

MARSHALL, Ch. J.—The court does not give costs, where a cause is dismissed for want of jurisdiction.

Writ of error dismissed, without costs.(*a*)

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*369] *McCLUNY *v.* SILLIMAN.

Mandamus.

This court has not jurisdiction to issue a writ of *mandamus* to the register of a land-office of the United States, commanding him to enter the application of a party for certain tracts of land, according to the 7th section of the act of the 10th May 1800, "providing for the sale of the lands of the United States north-west of the Ohio, and above the mouth of Kentucky river;" which *mandamus* had been refused by the snpreme court of the state of Ohio, upon a submission by the register to the jurisdiction of that court, being the highest court of law or equity in that state.[1]

March 13th, 1817. *Harper* moved for a *mandamus* in this cause, to the defendant, as register of the land-office of the United States, at Zanesville, in the state of Ohio, commanding him to enter the application of the plaintiff, for certain tracts of land, according to the provisions of the 9th section of the act of congress, of the 10th May 1800, entitled, "an act providing for the sale of the lands of the United States, in the territory of the United States, north-west of the Ohio, and above the mouth of Kentucky river." A rule to show cause had been obtained in the supreme court of the state of Ohio (being the highest court of law or equity of that state); whereupon, the defendant appeared, and excepted to the jurisdiction of the court: but this plea was afterwards waived, and a case agreed between the parties, on which the court ordered the rule to be discharged.

*370] *Harper* now moved for a *mandamus* to issue from this *court, upon the ground, that the case was within the appellate jurisdiction of the court, under the equity of the judiciary act of 1789; that although the court had determined, that it had no original jurisdiction to issue writs of *mandamus* to persons holding office under the authority of the United States, yet it might have an appellate jurisdiction to issue a *mandamus* to such persons, where it had been refused by the highest court of law or equity of a state, in a case drawing in question the validity of a statute of, or an authority exercised under, the United States. The motion was denied by the court.

Motion denied.(*b*)

(*a*) Costs will be allowed upon the dismissal of a writ of error, for want of jurisdiction, if the original defendant be also defendant in error. Winchester *v.* Jackson, 3 Cranch 515.

(*b*) In the case of Marbury *v.* Madison, 1 Cranch 137, the court determined, that having, by the constitution, only an appellate jurisdiction (except in cases of ambassadors, &c.), and it being an essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause: that, although a *mandamus* may be directed to courts, yet to issue such a writ

[1] Kendall *v.* United States, 12 Pet. 526.

to an officer, for the delivery of a paper, was, in effect, the same as to sustain an original action for that paper, and therefore, seemed not to belong to appellate, but to original jurisdiction; and that, consequently, the authority given to this court by the 13th section of the judiciary act of 1789, to issue writs of *mandamus* to "persons holding office under the authority of the United States," was not warranted by the constitution. In McIntire *v.* Wood, 7 Cranch 504, it was decided, that the power of the circuit courts to issue writs of *mandamus*, is confined by the judiciary act of 1789, exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. That case was brought up from the circuit court of Ohio, upon a certificate, that the judges of that court were divided in opinion, upon the question, whether that court had the power to issue a writ of *mandamus* to the register of a land-office in Ohio, commanding him to issue a final certificate of purchase, to the *plaintiff, of certain lands in that state? In delivering the opinion of the court, Mr. Justice Johnson stated that, "Had the 11th section of the judiciary act covered the whole ground of the constitution, there would be much reason for exercising this power in many cases, wherein some ministerial act is necessary to the completion of an individual right, arising under the laws of the United States, and the 14th section of the same act would sanction the issuing of the writ for such a purpose. But although the judicial power of the United States extends to cases arising under the laws of the United States, the legislature has not thought proper to delegate the exercise of that power to its circuit courts, except in certain specified cases. When questions arise under those laws in the state courts, and the party who claims a right or privilege under them is unsuccessful, an appeal is given to the supreme court, and this provision the legislature has thought sufficient, at present, for all the political purposes intended to be answered by the clause of the constitution which relates to this subject." The power of the supreme court to issue writs of *mandamus* to the other courts of the United Statet, has been frequently exercised. United States *v.* Peters, 5 Cranch 115; Livingston *v.* Dorgenois, 7 Id. 577. But in the case of Hunter *v.* Martin's Lessee, 1 Wheat. 304, the court, in pronouncing its opinion upon its appellate jurisdiction, in causes brought from the highest court of law or equity of a state, deemed it unnecessary to give any opinion on the question, whether this court has authority to enforce its own judgments on appeal, by issuing a writ of *mandamus* to the state court, as the question was not thought necessarily involved in the decision of that cause. Id. 362.

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The London Packet: Merino, Claimant.

Prize.—Evidence.

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It is the practice of this court, in prize causes, to hear the cause, in the first instance, upon the evidence transmitted from the circuit *court, and to decide, upon that evidence, whether it is proper to allow further proof.

Affidavits to be used as further proof, in causes of admiralty and maritime jurisdiction, in this court, must be taken by a commission.

March 5th, 1817. In the argument of this cause, *Winder*, for the claimant, stated, that there was an affidavit annexed to the record, which was taken under the order for further proof, in the court below, but which, not arriving until after the decree of condemnation was pronounced, was ordered by the circuit court, to be transmitted, *de bene esse*, for the consideration of this court. He further stated, that he had additional proofs, taken since that time, to be used in this court; and he asked, whether he should now be permitted to read these proofs, in order to show what was the nature of the evidence which existed, to clear away any former doubts in the cause.

Marshall, Ch. J.—The court is of opinion, that the affidavit transmitted

from the circuit court may be now read. But as to the new proof now offered by the claimant, it is the practice of this court, to hear the cause, in the first instance, upon the evidence transmitted from the circuit court, and to decide, upon that evidence, whether it is proper to allow further proof. The new proof cannot, therefore, be now read; but as the opposite party wishes it, the counsel may state the nature of the proof, though not the con-
*373] tents thereof in detail. If the *case shall ultimately appear entitled to further proof, an order will be made for that purpose.

March 10th. Further proof was ordered in the cause.

March 13th. *D. B. Ogden*, for the claimant, offered to read affidavits, as further proof, which had not been taken under a commission. But they were rejected by the court; the cause was continued to the next term; and the further proof ordered to be taken under a commission, according to the rule of court of the present term.

Cause continued.(*a*)

Lenox *et al. v.* Roberts.

Equity.—Notice of non-payment.

Where all the property of the late Bank of the United States had been assigned, by a general assignment, in trust, to assignees, for the purpose of liquidating its affairs, *Quære?* Whether any action at law could be maintained by the assignees, on certain promissory notes, indorsed to, and the property of the bank, which had not been specially assigned nor indorsed to the assignees?

However this may be, it is clear, that a suit in equity might be maintained by the assignees against the parties to the notes.

*374] A demand of payment of a promissory note must be made of the maker, on the last day of grace; and where the indorser resides in a *different place, notice of the default of the maker should be put into the post-office, early enough to be sent by the mail of the succeeding day.[1]

This was a suit in chancery, brought by the appellants against the respondent, in the Circuit Court of the District of Columbia, for the county of Alexandria.

The complainants, in their bill, stated, that the president, directors and company of the Bank of the United States, by their deed, assigned to Thomas Willing, John Perot and James S. Cox, their executors, administrators and assigns, all and singular the mortgages, judgments, suits, bonds, bills, notes, debts, securities, contracts, goods, chattels, money and effects whatsoever, due or belonging to the bank; together with all the ways, means and remedies for the recovery of the same, upon the special trust in the deed expresssed. That Thomas Willing, John Perot and James S. Cox, afterwards assigned to the complainants, all and singular the debts included in the deed to them. The bill further stated, that one Elisha Janney, made and delivered to the defendant five promissory notes, dated and payable at Washington, and for the following sums, to wit, one note for $1000, payable in sixty days from the 22d February 1809, &c.; amounting in the whole, to $4020. That the

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(*a*) *Vide* Appendix, note I.

[1] Austen *v.* Miller, 5 McLean 153; s. c. 13 How. 218.

defendant discounted the said notes in the Branch Bank of the United States, at Washington, about the times they bear date, and indorsed the same at Washington. That Janney did not pay the notes when they became due, and that he was insolvent when the notes *became due. That the notes, being made and dated in the county of Washington, were sub- [*375 ject to the laws prevailing in Washington county, and the defendant bound to pay, on the failure of Janney to pay. The complainants claimed these debts as proprietors thereof; and called on the defendant specially to state, whether Janney was not insolvent, when the notes became due; whether the said notes were not duly protested for non-payment, and the defendant in due time notified thereof, and did not attempt to secure himself by some lien on Janney's property. The bill concluded by praying a decree against the defendant, for the amount of said notes.

The defendant, in his answer, did not admit that the complainants were duly authorized to recover and receive the debts due to the bank; but he admitted, that the notes were by him indorsed in blank, and delivered to Janney, but contended, that they were not obtained to be discounted in the Bank of the United States, nor were discounted for the benefit of the defendant, but for the use and benefit of Elisha Janney, who received the money from the bank. And that it was well known to the president and directors of the bank, that the said notes were indorsed by the defendant for the accommodation of the said Elisha Janney, without any value being received by the defendant. The defendant's answer further alleged, that due and legal notice was not given him of the non-payment of the notes; that no demand of payment of the notes was made of Elisha Janny, by the bank; that the notes were all dated at Alexandria; that Elisha Janney, on the *29th of May, conveyed all his property to Richard M. Scott, in [*376 trust for the payment of his debts, including the debt to the bank.

There was some contrariety of evidence as to the time when payment of the notes was demanded of the maker, and the time when notice to the defendant, as indorser, who resided in Alexandria, was put into the post-office at Washington. The bill was dismissed by the court below, on which the cause was brought by appeal to this court.

March 13th, 1817. The cause was argued by *Swann*, for the appellants, and by *Lee*, for the respondent.

March 15th. MARSHALL, Ch. J., delivered the opinion of the court.—The court will not give any opinion, whether any action can be maintained at law, upon any of the promissory notes in the record, by an assignee who does not claim the same by an indorsement upon the notes. For, in this case, there is no specific assignment of these notes; the only assignment is a general assignment, in trust, of all the property of the late Bank of the United States, and as the act of incorporation had expired, no action could be maintained at law by the bank itself. Under these circumstances, the court is clearly of opinion, that a suit may be maintained in equity against the other parties to the notes.

Another question arises in the cause, whether the indorsers have had due notice of the non-payment by the makers. As there is some *contra- [*377 riety of evidence in the record, the court will only lay down the rule. And it is the opinion of the court, that a demand of payment should

be made upon the last day of grace, and notice of the default of the maker be put into the post-office, early enough to be sent by the mail of the succeeding day.

Decree reversed.

Colson *et al. v.* Lewis.

Jurisdiction.

The jurisdiction of the circuit courts of the United States extends to a case between citizens of Kentucky, claiming lands, exceeding the value of $500, under different grants, the one issued by the state of Kentucky, and the other by the state of Virginia, but upon warrants issued by Virginia, and locations founded thereon, prior to the separation of Kentucky from Virginia. It is the grant which passes the legal title to the land; and if the controversy is founded upon the conflicting grants of different states, the judicial power of the courts of the United States extends to the case, whatever may have been the equitable title of the parties, prior to the grant.

March 14th, 1817. The opinion of the court in this cause was delivered by Washington, Justice.—This suit in equity was removed into the Circuit Court of Kentucky, upon the petition of the defendant, filed in the state court; and upon a motion made in the circuit court, to dismiss the suit from
*378] *that jurisdiction, the judges of that court were opposed in opinion, and caused the following facts to be stated, to enable this court to decide the question. Those facts are, that the value of the land in controversy exceeds $500; that the complainants are citizens of Virginia; and that the grant, under which they claim title, is derived from the state of Kentucky, by virtue of warrants issued from the land-office of Virginia, and locations upon the warrants, before the separation of Kentucky from Virginia: that the defendant's grant is from the state of Virginia, by virtne of a warrant issued from the land-office, and a location made thereon, before the separation of Kentucky.

The question referred to this court is, whether the circuit court for the district of Kentucky can take jurisdiction of the cause, because the grants for the land in controversy, lying in Kentucky, were issued, the one by the state of Virginia, and the other by the state of Kentucky, when both grants purport to be founded upon warrants and locations made under the authority of the laws of Virginia?

It is the opinion of this court, that the question which is referred to us, by the circuit court of Kentcky, is settled by the decision of this court, in the case of the *Town of Pawlet* v. *Clark and others*, 9 Cranch 292. The only difference between the two cases is, that in the case referred to, both parties claimed immediately under grants, the one from the state of Vermont, and the other from the state of New Hampshire, before the separa-
*379] tion, which grants were *the inception of title; and that, in this case, both parties claim under grants, the one issued by the state of Kentucky, and the other by the state of Virginia, but upon warrants issued by Virginia, and locations founded thereon, prior to the separation of Kentucky from Virginia. But where the controversy arises upon claims founded upon grants from different states, as the present case is understood to be, the principle decided in the case which has been cited, precisely governs this. The decision in that case is founded on the words of the consti-

tution of the United States, which 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 the grant which passes the legal title to the land, and if the controversy is founded upon the conflicting grants of different states, the judicial power of the courts of the United States extends to the case, whatever may have been the equitable title of the parties, prior to the grant.

Certificate accordingly.

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*Leeds *v.* Marine Insurance Company of Alexandria. [*380

Answer in chancery.

The answer of one defendant to a bill in chancery cannot be used as evidence against his co-defendant; and the answer of an agent is not evidence against his principal; nor are his admissions *in pais*, unless where they are a part of the *res gestæ*.

Where a cause is set down for hearing on the bill, answer and exhibits, without other pleadings, the whole of the answer must be considered as true.[1]

March 14th. This cause was argued by *Swann*, for the appellants, and by *Lee*, for the respondents.

March 15th, 1817. The opinion of the court was delivered by Washington, Justice.—This is a bill filed on the equity side of the circuit court of the district of Columbia, for the county of Alexandria, by the Marine Insurance Company of Alexandria, against Jedediah Leeds, praying for an injunction to a judgment obtained at law in that court, against the said company, by William Hodgson, for the use of George F. Straas and the said Jedediah Leeds. The judgment was obtained by Hodgson, on a policy of insurance, dated the 30th of September 1799, effected by him with the said company on the brig Hope, in his own name, for George F. Straas and others, of Richmond.[1]

The bill states, that in the year 1810, the above judgment was obtained for the use and benefit of *George F. Straas, and the respondent, [*381
Jedediah Leeds. That, previous to the said insurance, the said George F. Straas and Jedediah Leeds, being owners of the vessel called the Sophia, did, through the agency of the said William Hodgson, effect an insurance of the said vessel, the Sophia; for the premium on which, amounting to $2754, Hodgson gave his own note. That Straas paid $929 in part of the premium-note; and claiming a return of premium to the amount of the residue of the said note, he obtained an injunction in the court of chancery of Virginia, which was finally dissolved.

The ground on which that injunction is prayed, is, that the balance of the premium due upon the insurance of the Sophia ought to be set off, so far as it goes, aginst the judgment at law upon the policy of the Hope.

The answer of Leeds denies that he had any interest in the Sophia, at the time the insurance mentioned in the bill was effected, or that he was in any manner concerned in that insurance. He states, that within a few months after the insurance on the Hope was effected, and long before the

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[1] See 5 Cranch 100; 9 Id. 100; 7 Id. 333.

judgment in law was obtained, he had acquired, by purchase from Straas and a Mr. Trouin, the other owner of the Hope, all their interest in that vessel and in the policy of insurance which had been effected upon her. He, therefore, denies the allegation in the bill, that the judgment upon that policy was obtained for the use of Straas, or for that of any other person than himself. The answer refers to his agreements with the *other owners, which are annexed to the answer as parts thereof.

*382]

William Hodgson, who was made a defendant to this bill, states, in his answer, that he received an order, in November 1799, to effect an insurance on the Sophia and her cargo, for account of Straas and Leeds; in conformity with which order, he effected the said insurance with the complainants, and gave his own note for the premium. He adds, that he always understood from Leeds that he was interested with Straas in the said insurance.

A general replication was filed; but whether to both the answers, or to the answer of Hodgson alone, is not clear; and a *dedimus* was awarded to take depositions. No depositions, however, were taken; and the record states that the cause was set down for hearing on the bill, answer and exhibits, and was heard on those proceedings. The exhibits relied upon by the defendant below to prove his purchases from the other owners of the Hope, of their interest in that vessel, and in the insurance effected on her, were rejected by the circuit court. That court decreed a perpetual injunction as to the sum claimed by the complainants; from which decree, an appeal was prayed and allowed to this court.

The facts relied upon by the appellant, to induce a reversal of this decree, are, 1. That the interest of Straas in the insurance of the Hope was transferred to him, the appellant, for a full consideration, soon after the insurance was effected, and before the judgment at law was obtained. 2. That the appellant had no interest in the Sophia, at the time when *the insurance was effected upon her, the premium on which is claimed in this case as a set off against the above judgment; and that the insurance of the Sophia was not made for the account, or by the orders, of the appellant.

*383]

The fact last mentioned must be considered as fully established, because the answer, in which it is asserted, is responsive to a direct allegation contained in the bill, and is not contradicted by any evidence in the cause. The answer of Hodgson to this bill is not evidence against the appellant: the general rule which prevails in chancery is, that the answer of one defendant cannot be used as evidence against his co-defendant; and it is the opinion of the court, that this case does not furnish an exception to that rule. The answer of an agent is not evidence against his principal, nor are his admissions *in pais*, unless where they are a part of the *res gestæ*.

As to the other fact upon which the appellant relies, there is more difficulty. The bill states, that the judgment was recovered for the benefit of Straas and Leeds. This is denied in the answer, and thus far we may consider that fact as established in favor of the appellant. The answer goes further, and alleges that the recovery was for the sole benefit of the respondent. But this allegation is not proved, and there is no charge in the bill in relation to that fact, which the answer contradicts.

After all, it is very difficult to understand, from this record, by what rule this cause was tried and decided in the circuit court. It is stated in

the record, *that the cause was set down for hearing on the bill, answer and exhibits. Now, if this was the real state of the cause, there can be no doubt, but that the whole of the answer must be considered as true. But it appears on another part of the record, that a general replication was filed, and that a commission was allowed for taking depositions. These entries are totally inconsistent with each other, unless the latter entry should have been made in reference to Hodgson's answer, which it immediately follows.

Whether setting down the cause for hearing on the bill and answer amounted to a waiver of the replication, in case it was put in by both defendants, need not be decided in this case, because it is the opinion of this court, that the record exhibits the proceedings in a shape so irregular and equivocal, that no final decree can be made, which may not be productive of injustice to one or the other of the parties.

The decree of the circuit court, therefore, must be reversed, and the cause remanded, with directions to that court to allow the parties to amend the pleadings.

Decree reversed.

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*Raborg *et al. v.* Peyton. [*385

Action of debt.

An action of debt will lie by the payee or indorsee of a bill of exchange, against the acceptor, where it is expressed to be for value received.[1]

Debt will lie by the payee of a note against a maker, where the note is expressed to be for value received.

Error to the Circuit Court for the district of Columbia. This cause was argued by *Jones*, for the plaintiffs in error, and by *Taylor*, for the defendant in error.

March 15th, 1817. Story, Justice, delivered the opinion of the court.—This is an action of debt, brought against the defendant in error, as acceptor of a bill of exchange, by the plaintiffs in error, as indorsees. The declaration alleges that the bill was drawn, accepted and indorsed, for value received. The only question is, whether debt lies in such a case?

The general principle has been very correctly stated by Lord Chief Baron Comyn, that debt lies upon every express contract to pay a sum certain; and he adds also, that it lies though there be only an implied contract. (Com. Dig. Debt, A, 8; A, 9.) But it has been supposed, that this principle does not apply to an action on a bill of exchange, even where the suit is brought by the payee against the acceptor, *and *à fortiori*, not, where [*386
it is brought by the indorsee. It is admitted, that in Hardres 485, the court held, that debt does not lie by the payee of a bill of exchange against the acceptor. The reasons given for this opinion were, first, that there is no privity of contract between the parties; and secondly, that an acceptance is only in the nature of a collateral promise or engagement to pay the debt of another, which does not create a duty.

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[1] Kirkman *v.* Hamilton, 6 Pet. 20; Home *v.* Semple, 3 McLean 150; Vowell *v.* Alexander, 1 Cr. C. C. 33.

It is very difficult to perceive how it can be correctly affirmed, that there is no privity of contract between the payee and acceptor. There is, in the very nature of the engagement, a direct and immediate contract between them. The consideration may not always, although it frequently does, arise between them; but privity of contract may exist, if there be an express contract, although the consideration of the contract originated *aliunde*. Besides, if one person deliver money to another, for the use of a third person, it has been settled, that such a privity exists, that the latter may maintain an action of debt against the bailee. *Harris* v. *De Bervoir*, Cro. Jac. 687. And it is clear, that an acceptance is evidence of money had and received by the acceptor for the use of the holder. *Tatlock* v. *Harris*, 3 T. R. 174; *Vere* v. *Lewis*, Ibid. 182. It is also evidence of money paid by the holder to the use of the acceptor. (Ibid.; and Bailey on Bills 164, 3d ed.) A privity of contract, and a duty to pay, would seem, in such case, to be completely established; and wherever the common law raises a duty, debt lies.

*387] The other reason would seem not better founded. An acceptance *is not a collateral engagement to pay the debt of another; it is an absolute engagement to pay the money to the holder of the bill; and the engagements of all the other parties are merely collateral. *Primâ facie*, every acceptance affords a presumption of funds of the drawer in the hands of the acceptor; and is, of itself, an express appropriation of those funds for the use of the holder. The case may, indeed, be otherwise; and then the acceptor, in fact, pays the debt of the drawer; but as between himself and the payee, it is not a collateral, but an original and direct undertaking. The payee accepts the acceptor as his debtor, and he cannot resort to the drawer, but upon a failure of due payment of the bill. The engagement of the drawer, therefore, may more properly be termed collateral. Yet it has been held, that debt will lie in favor of a payee against the drawer, in case of non-payment by the acceptor. *Hard's Case*, 1 Salk. 23; *Hodges* v. *Steward*, Skin. 346; and see *Bishop* v. *Young*, 2 Bos. & Pul. 78.

The reasons, then, assigned for the decisions in Hardres are not satisfactory; and it deserves consideration, that it was made at a time when the principles respecting mercantile contracts were not generally understood.

The old doctrine upon this subject has been very considerably shaken in modern times. An *indebitatus assumpsit* will now lie in favor of the payee against the acceptor; and it is generally true, that where such an action lies, debt will lie. And a still stronger case is, that an acceptance is good

*388] evidence on a count upon an *insimul computassent* (**Israel* v. *Douglas*, 1 H. Bl. 239); which can only be upon the footing of a privity of contract.

But the most important case is that of *Bishop* v. *Young*, 2 Bos. & Pul. 78. It was there held, in opposition to what was supposed to have been the doctrine of former cases, that debt would lie by the payee of a note against the maker, where the note was expressed to be for value received. That decision was given with measured caution, and the court expressly declined to give any opinion upon any but the case in judgment. The case in Hardres was there discussed, and although its reasoning was not impugned, an authoritative weight was not attempted to be given to it. In general, the legal predicament of the maker of a note is like that of the acceptor of a

bill. Each is liable to the payee for the payment of the note or bill, in the first instance; and after indorsement, each incurs the same liabilities. And if an action of debt will lie in favor of the payee of a note against the maker, it is not easy to perceive any sound principle, upon which it ought to be denied against an acceptor of a bill. The acceptance of a bill is just as much an admission of a debt between the immediate parties, as the drawing of a note.

The case has been thus far considered, as if the action were brought by the payee against the acceptor. And this certainly presents the strongest view in favor of the argument. But in point of law, every subsequent holder, in respect to the acceptor of a bill, and the maker of a note, stands in the same predicament as the payee. An acceptance is as *much evidence of money had and received by the acceptor to the use of such holder, and of money paid by such holder for the use of the acceptor, as if he were the payee. 3 T. R. 172; Ibid. 184; *Grant* v. *Vaughan*, 3 Burr. 1515. [*389

Upon the whole, we do not think that the authority in Hardres can be sustained upon principle; and we see no inconvenience in adopting a rule more consonant to the just rights of the parties, as recognised in modern times. In so doing, we apply the well-settled doctrine, that debt lies, in every case, where the common law creates a duty for the payment of money, and in every case, where there is an express contract for the payment of money. We are, therefore, of opinion, that debt lies upon a bill of exchange by an indorsee of the bill against the acceptor, when it is expressed to be for value received. The case at bar is somewhat stronger; for the declaration expressly avers that the bill was drawn, indorsed and accepted for value received, and the demurrer admits the truth of the averment. This opinion must be certified to the circuit court of the district of Columbia.

From the view which has been taken of the case, it is unnecessary to consider, whether the statute of Virginia applies to it, or not.

Certificate accordingly.

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*Union Bank of Georgetown *v.* Laird.

Banking.

By the act of incorporation of the Union Bank of Georgetown, ch. 86, § 11, the shares of any individual stockholder are transferrible only on the books of the bank, according to the rules (conformable to law) established by the president and directors; and all debts due and payable to the bank, by a stockholder, must be satisfied, before the transfer shall be made, unless the president and directors should direct to the contrary: *Held*, that no person could acquire a legal title to any shares, except under a regular transfer, according to the rules of the bank; and if any person takes an equitable assignment, it must be subject to the rights of the bank, under the act of incorporation, of which he is bound to take notice.[1]

A creditor may lawfully take and hold several securities for the same debt, and cannot be compelled to yield up either, until the debt is paid; therefore, the bank has a right to take security from one of the parties to a bill or note discounted by it, and also to hold the shares of another party as security for the same.

Appeal from the Circuit Court for the district of Columbia. James Smith, on the 19th of March 1811, drew a bill, at sixty days sight, on James Patton, in favor of Andrew Smith, for $1800. This bill was accepted by Patton, and was discounted in the Union Bank of Georgetown, at the intance of Andrew Smith, and when it became due, another bill of the same tenor was drawn and accepted by Patton, and discounted for the purpose of paying the preceding acceptance. This last acceptance became due on the 14th and 17th of July, and was protested for *non-payment; and at the time that it became due, Patton held 50 shares of stock in the Union Bank, which the bank considered liable to the payment of this acceptance, under their act of incorporation.

*391]

At this time also, James Patton had another debt pending in the bank. Being one of the original subscribers to the bank, for the above-mentioned 50 shares of stock, he borrowed of the bank, in January 1811, the sum of $1500, and to enable him to obtain the loan, procured Marsteller & Young, and the defendant, Laird, to become his indorsers. This loan was renewed, from time to time, and was continued, without any default of payment, until about the 29th of July 1811.

On the 26th of March 1811, Patton obtained from the officers of the bank a certificate of his 50 shares of stock, and on that day, delivered it to the defendant, Laird, to secure him, as it was alleged, against his indorsement for Patton. On the 10th of July 1811, Patton executed a power of attorney, authorizing the defendant, Laird, to make a transfer of his stock; and on the 22d of August 1811, he executed a deed of assignment to the

[1] The executors of a stockholder cannot compel a transfer of his stock, without first paying a debt due to the bank from their testator, although it were not payable at the time of his decease. Brent *v.* Bank of Washington, 10 Pet. 596; S. P. Leggett *v.* Bank of Sing Sing, 24 N. Y. 283; Grant *v.* Mechanics' Bank, 15 S. & R. 140. And one who purchases bank-stock at a sheriff's sale, takes subject to the lien of the bank thereon. A by-law restraining the transfer of stock, by a stockholder in any way indebted to the bank, creates a valid lien, which is not in contravention of the bankrupt law. Ex parte Dunkerson, 4 Biss. 227; Ex parte Morrison, 10 Bank. Reg. 105; Ex parte Buckman, 12 Id. 223. A national bank, though forbidden to loan money on the pledge of its own stock, may make such by-law. Knight *v.* Old National Bank, 3 Cliff. 429; Pendergast *v.* Bank of Stockton, 2 Sawyer 108; contra, Evansville Bank *v.* Metropolitan Bank, 2 Biss. 527. And see Bank *v.* Lanier, 11 Wall. 376, which is reviewed and explained by Justice Clifford, in Knight *v.* Old National Bank, 3 Cliff. 437–38.

defendant, Laird, of his stock: but as this assignment was not made upon the books of the bank, it was not considered a valid assignment, according to the rules of the bank. Laird, considering himself entitled to the benefit of these shares, under the circumstances, applied to the bank to transfer the shares upon their books for his own benefit. But the bank, upon the ground that the acceptance which Patton had failed to pay, *operated as a lien upon those shares, refused to suffer the transfer to be made, until that debt was paid. [*392

Laird, some time after this refusal, to wit, on the 22d of February 1812, paid the $1500, for which he was indorser for Patton, reserving, nevertheless, his equitable claim upon the stock, and then instituted this suit in chancery, against the Union Bank, to compel them to suffer the transfer to be made on their books, for his benefit, and to account with him for the intermediate profits. He charged in his bill, that when Patton obtained the certificate of his shares of stock, it was with a view of pledging those shares with him for his indemnification, and that the officers of the bank had a knowledge of this fact. He also alleged, that the power of attorney was granted with the same view.

The directors of the bank filed their answer to this bill, and denied any knowledge of the object for which the certificate of shares was obtained: and alleged, that they knew nothing of any claim of Laird upon those shares, until after the protest of Patton's acceptance. The court below made a decree in favor of Laird, that the bank should suffer him to transfer the shares, for his own benefit, and have an account for the intermediate profits.

March 14th. The cause was argued by *Swann*, for the appellants, and by *Jones*, for the respondent.

March 15th, 1817. Story, Justice, delivered the opinion of the court.—*The principal question is, whether, under the circumstances of this case, Laird, the original plaintiff, has a right to a transfer from the bank, of the fifty shares of its capital stock, standing in the name of Patton, without paying the acceptance of Patton; or, in other words, whether Laird has a priority of lien upon these shares. By the 11th section of the act of incorporation (act of 18th February 1811, ch. 86), it is enacted, "that the shares of the capital stock, at any time owned by any individual stockholder, shall be transferrible only on the books of the bank, according to such rules as may, conformably to law, be established in that behalf, by the president and directors; but all debts actually due and payable to the bank (days of grace for payment being passed), by a stockholder, requesting a transfer, must be satisfied, before such transfer shall be made, unless the president and directors shall direct to the contrary." The certificate issued to Patton for the 50 shares held by him (which is in the usual form), declares the shares to be "transferrible at the said bank, by the said Patton, or his attorney, on surrendering this certificate." No person, therefore, can acquire a legal title to any shares, except under a regular transfer, according to the rules of the bank; and if any person takes an equitable assignment, it must be subject to the rights of the bank, under the act of incorporation, of which he is bound to take notice. The president and directors of the bank expressly deny, that they have waived, or ever intended to waive, the right of the bank to the lien for debts due to the bank, by the form of the certificate, [*393

and *that they ever directed any transfer to be made to Patton, which should stipulate to the contrary. Under such circumstances, it must be held, that the shares are responsible for the debts due to the bank.

The next inquiry is, whether the bank has done anything to deprive itself of the lien upon the shares, for the acceptance of Patton, since the same became due, and to let in the equitable title of the plaintiff. The acceptance is not yet paid; and nothing has been done by the bank, affecting its rights, unless the subsequent taking of security for the acceptance, from Smith, can be construed so to do. Certainly, the bank had a right to require additional security from the indorser of the acceptance; and it cannot be perceived, upon what principles this can be construed an extinguishment of its lien upon the shares of the acceptor. A creditor may lawfully take and hold several securities for the same debt from his joint debtors; and he cannot be compellable to yield up either, until his debt is paid. And in this case, there is no want of equity, in holding the shares of Patton, who is the immediate debtor to the bank, liable in the first instance, rather than resorting to the security of an indorser, who is only liable upon the default of the acceptor.

The decree of the circuit court must, therefore, be reversed, and the bill be dismissed.

Decree accordingly.

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*395] *United States v. Barker.

Jurisdiction in error.—Costs.

A writ of error does not lie, to carry to this court a civil cause which has been carried from the district to the circuit court, by writ of error.
The United States never pay costs.

March 15th, 1817. *Baldwin*, for the plaintiffs in error, moved to dismiss the writ of error, in this case, as having been improvidently allowed, the cause having been carried up from the district to the circuit court of New York by writ of error; and according to the former decisions of this court, a writ of error does not lie to carry to this court a civil cause, which has been carried from the district to the circuit court, by writ of error.(*a*)

D. B. Ogden, for the defendant, moved for costs.

Marshall, Ch. J.—The United States never pay costs.

Writ of error dismissed, without costs.

(*a*) United States *v.* Goodwin, 7 Cranch 108; United States *v.* Gordon, Id. 287; United States *v.* Tenbroek, *ante*, p. 248.

*Thelusson *et al. v.* Smith.

Priority of the United States.

T. brought a suit against C., in the circuit court of Pennsylvania, which was referred to arbitrators; an award was made in favor of T., and a judgment *nisi* entered, on the 20th May 1805; exceptions were filed, overruled, and judgment finally entered, on the 15th of May 1806; on the 22d May 1805, C. executed a conveyance of all his estate to trustees, for the payment of his debts, at which time, he was indebted to the United States, on several duty-bonds which became due at different periods subsequent to the 22d May 1805; suits were brought on the bonds, as they severally became due, and judgments obtained, and executions issued, under which a landed estate belonging to C. was levied upon and sold; T. brought an action against S. (the marshal of the district), who levied the executions, to recover so much of the funds in his hands, as would be sufficient to satisfy T.'s judgment; in this suit, the jury found a special verdict, that C. was insolvent on the 20th May 1805, but that it was not notoriously known; and the parties agreed that on the 22d May 1805, he was unable to satisfy all his debts, and that this fact should be considered part of the special verdict.

Held, that the word insolvency, mentioned in the duty act of 1790, § 45, and repeated in the act of 1797, § 5, and of 1799, § 65, means a legal insolvency, which, whenever it occurs, the right of preference arises to the United States as well as in the other specified cases to which the acts of 1797 and 1799 have extended the cases of insolvency.[1]

But if, before the right of preference has accrued to the United States, the debtor has made a *bonâ fide* conveyance of his estate to a third person, or has mortgaged it, to secure a debt, or if his property has been seized under an execution, the property is divested out of the debtor, and cannot be made liable to the United States.

A judgment gives to the judgment-creditor a lien on the debtor's lands, and a preference over all subsequent judgment-creditors; but the law defeats the preference, in favor of the United States, in the cases specified in the act of 1799, § 65.

Thelluson *v.* Smith, Pet. C. C. 195, affirmed.

*Error to the Circuit Court for the district of Pennsylvania. The plaintiffs in error instituted a suit in the circuit court for the district [*397 of Pennsylvania, against William Cramond, which, by the agreement of the parties, and the order of the court, was referred to arbitrators. An award was made in favor of the plaintiffs, and a judgment *nisi* was entered, on the 20th of May 1805. Exceptions were filed and overruled; and a judgment was finally entered on the 15th of May 1806. On the 22d of May 1805, Cramond executed a conveyance of all his estate to trustees, for the payment of his debts, at which time he was indebted to the United States, on several duty-bonds, which became due at different periods subsequent to the 22d of May 1805. Suits were instituted on these bonds, as they severally became due, and judgments were obtained and execution issued, under which a landed estate belonging to Cramond, called Sedgely, was levied upon and sold.

The plaintiffs, considering this property as being bound by their prior judgment of the 20th of May 1805, and that they were entitled to be first satisfied out of the money in the hands of the defendant (the marshal of the court), which he had raised under the above executions, issued in the name of the United States, they brought this action to recover so much of those funds as would be sufficient to satisfy their judgment.

Upon the trial of the cause in the circuit court, the jury found that Cramond was insolvent on the *20th of May 1805, but that it was not [*398

[1] Conard *v.* Atlantic Ins. Co., 1 Pet. 386; Conard *v.* Nicoll, 4 Id. 308; Beaston *v.* Farmers' Bank, 12 Id. 102; United States *v.* Clark, 1 Paine 629; United States *v.* King, Wall. C. C. 13; s. c. 2 S. & R. 336.

notoriously known ; subject to the opinion of the court upon a state of facts agreed between the parties, whether the plaintiffs were entitled to recover. The parties further agreed in writing, that on the 22d of May 1805, Mr. Cramond was unable to satisfy all his debts, and that this fact should be considered as part of the special verdict. The other facts referred to by the jury are, in substance, those which have been mentioned. The circuit court gave judgment against the plaintiffs below, and the cause was brought by writ of error to this court.

Hopkinson, for the plaintiffs in error.—1. It is now settled, that the insolvency of a debtor, which is to give a preference to the United States over the other creditors, must be, not a mere inability to pay debts, but a legal insolvency, testified by some act of notoriety. The question is, whether the United States were entitled to a priority of payment, out of this real estate, over a judgment rendered previous to the act of insolvency, with which, and by virtue of which, the right of priority originated and attached. Whatever may be the nature and effect of the priority given by the acts of congress to the United States, it has been distinctly decided, that it is not a lien (*United States* v. *Hooe*, 3 Cr. 90) ; and therefore, it is said, that a conveyance shall not be defeated by it, which would be to give it the effect of a lien. It is clear, the legislature did not consider the preference given to the *399] *United States to have the force of a lien on the real estate of the debtor, because the act of 1798, ch. 88, § 15, expressly gives to the United States a lien on the real estate of supervisors and other revenue-officers, from the time of the commencement of the suit against them. Certainly, it cannot be imagined, the United States intended to have a less security against the delinquency of their revenue-officers than in the case of ordinary debtors ; on the contrary, it is unquestionable, that by the law of 1798, they intended to increase their security against their revenue-officers ; and yet, if the mere right of priority has the force and effect now contended for, the law of 1798 was not only unnecessary, but has really diminished the security for the payment of moneys collected by and due from these officers. That law limits the responsibility of the real estate to the commencement of the suit ; whereas, the responsibility now claimed under the privilege of preference, has no limit. Should it be answered to this, that under the law of 1798, the United States are made secure, even against conveyances and mortgages, subsequent to the commencement of their suit, still, it shows that the legislature considered a lien on the real estate of the debtor as something of a nature and effect higher and better than the mere priority they before enjoyed ; and if it be so, it must hold the same rank in the hands of a citizen, and be considered superior to the priority of the United States : especially, when that priority attached after the lien was in full force and operation on the real estate of the debtor. If any argument may be drawn *400] from the reasoning of *the counsel of the United States in other cases, where the same doctrine was agitated, it will be found, that in the case of the *United States* v. *Fisher and others*, 2 Cr. 238, it was expressly declared, that this priority was not claimed with the creation of the debt ; nor while the debtor remained master of his own property : and such is now the admitted law. It follows, then, that in the present case, the right of the United States did not come into being, until the execution of the assign-

ment, on the 22d of May; and unless, therefore, it has a retrospective force and operation, it cannot destroy or disturb a judgment entered on the 20th of May, vesting an important and recorded right in the plaintiffs.

Supposing, then, that a mere right of priority of payment could, in any case, overreach a *bonâ fide* judgment, in relation to the real estate of the debtor, bound by that judgment, when the priority constitutes no lien upon it; still, the question remains, whether a subsequent right acquired by the United States can have a retrospective operation, so as to overreach and defeat a prior right vested fully and fairly in a citizen. To permit this, is so contrary to all practice and equity, and to the general policy of the law, that the court will not sanction it, unless bound by the most clear and imperious authority. What, then, is the provision of the act of congress, under which this high and extraordinary privilege is claimed? After the decisions that have taken place on this subject, we are warranted in saying, that nothing is given but a priority or preference *of payment to the United States, in case of the insolvency of their debtor; but no lien, [*401 general or specific, on any part of his property; nothing which interferes with his control over that property; which prevents his selling it altogether; or pledging it for a debt; or exercising, *bonâ fide*, any of the usual acts of ownership in relation to it. A man may be a debtor to the United States, and lawfully do all these things, to the moment of his legal insolvency; he may do them, when he is actually insolvent; that is, unable to pay all his debts. In the *United States* v. *Fisher*, 2 Cr. 390, this priority is declared not to affect a purchaser. In Wall. C. C. 22, a particular assignee is protected. In the *United States* v. *Hooe*, 3 Cr. 90, a mortgagee in trust, as well as a mortgagee generally. Then, on what principle of law, of justice, or equity, should not a judgment receive the same favor and protection?

2. In Pennsylvania, a judgment has always been considered a higher and better security than a mortgage; inasmuch as it has been supposed to give the same fixed, immovable lien, on all the real estate of the debtor, which a mortgage, which is also but a security for the payment of a debt, gives on a specified part of it. There is no event on which, and no means by which, the mortgagee can turn this conditional into an absolute conveyance. If the money is not paid, he must proceed to obtain a judgment on his mortgage; to take the mortgaged premises in execution; to sell them by the process and officer of the court; from whom he must receive *his debt, [*402 interest and costs, and the surplus belongs to the debtor, as in the sale of any other property taken in execution for the satisfaction of a judgment. On what principle can it be maintained, that every act of a debtor over his real estate, in favor of a purchaser or creditor, shall be available against this preference of the United States, except the most solemn of all acts, a public recorded judgment? That this priority is not a lien on the property of the debtor, has been expressly decided; and for this reason, it is not permitted to disturb a purchaser or mortgagee; it is, therefore, something less, in the estimation of the law, than a lien: how, then, can it overthrow the firmest of all liens, a judgment duly rendered? If a debtor, by a particular assignment, should appropriate his real estate to pay a debt, or a number of debts, the United States could not defeat the appropriation by their claim to a preference; and yet, when he makes the same appropriation by a judgment, or, what is perhaps stronger, the law does it for him, and he

certainly also intends to do it, the appropriation is invalid and ineffectual against the claim of the United States, resting on a priority arising, perhaps, years after the appropriation was thus solemnly made, and on the faith of which the innocent creditor may have trusted his all. Another strange consequence and incongruity grows out of this doctrine, so pregnant with inconvenience and injustice. A judgment has unquestionable preference over a subsequent conveyance, assignment or mortgage. The priority, then, of the United States *shall not affect the conveyance, an assignment or a mortgage, but it shall destroy that which is greater than them all. It overthrows the stronger security, while it cannot avail against the weaker. Further, when a debtor has secured the debt by a judgment, is it not a sound principle, that he cannot impair the security of his creditor, by any subsequent act of his own, by any contract or conveyance he may afterwards make? How, then, can he do so, by a bond given to the United States, by a contract afterwards made with them?

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3. The only distinction that can be drawn between a judgment and a mortgage is, that the latter is said to be a specific, and the former a general lien; or, in other words, the one covers the whole, and the other but a part of the real estate of the debtor. This has always been considered a circumstance to the advantage of the judgment; and it is by a singular course of argument, it should be now discovered to be precisely otherwise. In the first place, it may be asked, why should either a general or specific lien or right be overreached by a subsequent right? and why should not the one as well as the other? There is no difference, in justice or in law. A general lien, at law, is just as good and effectual as a specific lien. In equity, a general lien is sometimes made to yield to an equity which would not disturb a specific lien; as in the case where one agrees to purchase, and pays money on the contract, he has been permitted to prevail against a judgment, but not against a mortgage. But in this case, the purchaser must succeed on his equity; for if he has none, *as if he has paid a defective consideration, he will not prevail against a judgment. 1 P. Wms. 277. Further, the payment or advance of money, must have been on the specific land, to give the equity to his claim. Have the United States any such equity in this case? They have no equity of any sort; they have advanced nothing; they have trusted nothing on the faith of this land; on the contrary, the plaintiffs have advanced their money on the faith of it: money is often lent and no other security is taken for it than a judgment. But the claim of the United States is placed mainly, if not wholly, on the words of the act of congress. What, then, is to be found there, which recognises any distinction between the rights of a general and specific lien? There is nothing. The mortgagee has, therefore, been excepted, on general principles of law and justice; and the same principles afford an equal protection to the judgment-creditor.

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4. The acts of congress state particular occurrences, insolvency, for instance, from the happening of which the United States shall have a priority of payment over other creditors, out of the property of the debtor; out of the property which he has at the time of the happening of the fact, which gives the right; at the time of the insolvency, in the present case. This is the origin, the commencement, the creation of the right, even of priority;

and there is nothing in any of the acts of congress, to give a retrospective operation to this right, by which it shall *overreach other rights pre- [*405
viously vested. And as there is nothing in the words of the act to produce this effect; neither is there anything in the legal nature of the priority to do it, inasmuch as the court has decided it is no lien; and that it has no power to disturb a previous conveyance or mortgage. The law enacts, that in all cases of insolvency, where the estate in the hands of the assignee shall be insufficient to pay all the debts due, the debts due to the United States shall be first satisfied. And any assignee, who shall pay any debt due by the insolvent, out of his estate and effects, until the debts due to the United States are satisfied, shall be answerable in his own person and estate. But what, properly and legally speaking, is the estate of the insolvent, in the hands, that is, at the disposal of the assignee? Surely, nothing but the interest which remains in him, after discharging incumbrances legally imposed upon it.

5. But it is said, the assignee shall not pay any debt before that of the United States is satisfied; and that a judgment is a debt, and therefore, to be postponed. I would rather say a judgment is the security, or means to enforce the payment of a debt, than that it is the debt. But if it be a debt, it is also something more than a debt; it is a debt accompanied by a lien to secure its payment; and the question is not, whether the debt shall be postponed, but whether the lien shall be defeated. So, the money secured to be paid by a mortgage is a debt, appearing, and, indeed, created by a bond referred to in the mortgage. The difference between the cases, then, is only this, *that the one is a debt, secured by a judgment binding all [*406
the real estate; and the other is a debt, secured by a mortgage binding a part of that real estate. The supposed distinction between a general and specific lien has no influence on this point in the case; and if a judgment is to be cut out, on the effect of the words "any debt," in the act of congress, I know not what is to save a mortgage. It seems to be obvious, that the law, when it speaks of debts to be postponed to the United States, relates only to the case of a mere debt, standing on its own strength and security, and never intended to interfere with any collateral or additional act done in relation to the debt, which gives a new right to the creditor; but that right, whatever it may be, shall have its full and fair legal operation and efficacy. If, then, the debtor has pledged his property, or given a lien upon it, or any part of it, it was never intended to disturb this right. By taking preference of a mere debt, no injustice is done; at least, no rights are destroyed; because the debtor himself might have done the same in favor of any creditor, having it in his power to give preferences; and every creditor, knowing he has this power, cannot complain, if it is exercised. On this construction, therefore, the act of congress brings no loss upon the creditor but what he knew he was exposed to, and consented to take the chance of, when he trusted his debtor. There is a clear distinction between taking priority of payment of a debt, and overthrowing a security, a lien, a pledge, general or specific, given for the payment of the debt.

*_Jones_, contrà.—1. This case is within the very terms of the 65th [*407
section of the act of March 2d, 1799, ch. 128, for collection of duties. The debt was due by bond for duties; the debtor was insolvent, as well in

fact as in law, according to the legal intendment of insolvency, as explained in that section; his assignees, finding the estate in their hands insufficient to pay all the debts, have first satisfied that due to the United States, pursuant to the strict injunctions of the law, and under the peril of being chargeable, in their own persons, with the debt. The term *first*, in the section, relates simply to the antecedent "all debts." Then, the debt due to the United States shall be satisfied first of all debts; without distinction of the quality or dignity of the other debts, whether of record, by specialty or simple contract. So, the assignees are prohibited from paying any debt (without exception), before that due the United States, at the peril of being personally chargeable. The principle upon which this court, in the case of the *United States* v. *Hooe*, 3 Cr. 90, construed the assignment of property mentioned in another clause of this section, to intend an assignment of all the debtor's property, applies more directly and forcibly to give the United States a preference over all debts, without exception; indeed, it can scarcely be called a construction, but a plain reading. The plaintiffs contend, that one species of debt, a judgment, still maintains its former dignity and rights unimpaired; that they, as judgment-creditors, ought to have been *preferred to
*408] the United States. Before that pretension can be sustained, the plaintiffs must bring their case within some exception of the law, either express or necessarily implied. The former is out of the question; for the directions of the law are unqualified, and without exception. If there be any such implied, it must be so latent, and is to be inferred only from such remote premises, and by so refined and subtle a process of reasoning, as would present a strange anomaly in legislation. Surely, there is no defect of congruity or precision imputed by the counsel on the other side to our construction of the law which is, in any degree, comparable to that of leaving so important and prominent an exception from plain and positive terms of enactment, to be discovered only by the "optics keen" of the few gifted intellects capable of deep research and abstruse deductions. As regards the great body of the community, such a mode of legislation would be as unreasonable as that of the Roman despot, who posted his edicts so high that they could not be read, and then punished his subjects for their involuntary disobedience.

2. No exception of one description of creditor, any more than another, is either expressed or implied. 'Tis true, that the debt due to the United States can only be satisfied out of the property of the debtor himself, according to the terms of the law; consequently, there is no necessity for any constructive or implied exception from the general terms of the law: in order to save property in the hands of a *bonâ fide* purchaser, from being subjected to *the payment of the vendor's debts: it is excluded
*409] *ex vi termini*, nor could it have been brought within the purview of the law, without a substantive and positive provision to that effect. A mortgagee is a purchaser; the estate is divested from the mortgagor, to whom nothing remains but an equity of redemption, and to that equity of redemption must the United States resort for satisfaction. A judgment, on the contrary, operates no divesture of property, until carried into actual execution; and the debtor has the *jus disponendi* as completely after judgment as before; except that the purchaser takes *cum onere*, subject to the general lien created by the prior judgment. That lien vests no specific

interest or estate in the creditor; but is nothing more than an outstanding claim (which may or may not be enforced) to have the judgment satisfied out of the estate: let the judgment be, in any manner, released or satisfied, and the lien is, *ipso facto*, dissolved; the estate of the vendee is instantly discharged and exonerated from the claim, without any act whatever proceeding from the creditor of the vendor to the vendee. The mortgagee trusts the mortgagor, upon the faith of a contract which specifically vests in him the estate of the debtor, as a collateral security for the debt; the judgment-creditor, on the contrary, stands upon his legal rights, has trusted nothing to the faith of contracts, and has gained nothing by contract; his advantage, whatever it be, is gained by sheer coercion upon his debtor, and by mere operation of law. To the mere operation of law, therefore, let him look for his security. The principle *of affording greater protection to rights growing out of *bonâ fide* contracts, than those acquired by [*410 mere operation of law, is not confined to the cases of general and specific liens, as differently affected by the principle of relation incident to a state of bankruptcy, or by a prior equity; for it is a settled rule of equity, to afford relief as against assignees coming into the legal estate by operation of law; when relief would be refused as against assignees or purchasers under contract for valuable consideration.

3. In order to ascertain the state of insolvency, in the lifetime of the debtor, upon which the preference of the United States is to be enforced, three tests are adopted; any one of which is sufficient; and all of which must be presumed equal between themselves: 1st. An assignment of property for the benefit of creditors, at a time when the debtor has not sufficient for the payment of all his debts. 2d. His absconding, concealment or absence, followed by attachment of his effects; and 3d. An act of legal bankruptcy committed. This last (inasmuch as the bankrupt law of the United States was not passed until afterwards) is presumed to comprehend, as well acts of legal bankruptcy or insolvency under state laws, as under the subsequent act of congress. Now, it must be presumed, that congress intended all those enumerated instances of insolvency to be equivalent; and to be followed by precisely the same consequences in relation to the rights of the United States. Then, if the debtor had become insolvent, under the law of Pennsylvania, ever so long after the rendition of judgment, the prior lien would have been overreached *and annulled, by relation, and all the creditors reduced to a perfect equality; and such also, unquestionably, [*411 would have been the case under the bankrupt law of the United States. In either case, could the preference of the United States over all the creditors, thus reduced by operation of law to perfect equality, admit of doubt? A substantial distinction between the consequences attached to "an act of legal bankruptcy," and those attached to any other of the equivalent acts of insolvency enumerated in the 65th section, is altogether inconceivable. The enumeration, among those acts, of attachments against absconding debtors, shows what little regard was had to the strongest of all liens produced by mere process of law, and not arising *ex contractu*, in the nature of a *bonâ fide* alienation of property.

4. As to the argument that has been so much pressed, to prove, that because the preference of the United States does not overreach these conveyances and incumbrances, is it not in the nature of a lien created with the

debt *ab initio;* it may be safely admitted (and indeed it is now settled), that it is not, technically speaking, a lien: yet the inference that it is, therefore, less than a lien, is not so obvious. The legislature, when it is contemplated to defeat one lien, is under no necessity to effect the object through the instrumentality of another lien. Nor is there anything absurd or incongruous, in making that paramount, which, according to pre-existing rules of positive institution, was inferior. It is perfectly competent for the legislature to exalt the humble, and humble the exalted; and to declare the less to be
*412] *greater, when the relative magnitudes of the two objects are not, from the nature of things, but the mere creatures of law. Then, whatever success may attend the effort to establish a specific difference between a lien, technically so called, and the right of preference claimed by the United States, the law is express, that the latter shall prevail, to place the United States first in the order of payment of all debts. It may have been deemed adequate to all the purposes of reasonable security, without attaching any specific lien upon the debtor's property, that every person who happens to be charged, either ministerially, or under trust, with the administration of the insolvent's effects, is bound, at his peril, to regard the established preference in favor of the United States.

5. It is objected, that our construction gives the United States a more extensive and coercive remedy against an ordinary debtor for duties, than was deemed necessary against defaulting supervisors and other officers of the revenue, upon whose estates the lien commences only with the commencement of the suit, according to the provisions of the act of 1798. This objection would be entirely inconclusive, if it were well founded; but, in truth, it has no foundation: for not only is the commencement of suit made equivalent to attachment by the law of 1798, and any alienation whatever of the defaulting officers' estate thenceforth prevented; but that is cumulative on the general preference secured to the United States, by the 5th section of the act of the 3d of March 1797, ch. 74.

6. The distinction insisted on, between a mere debt and a debt accom-
*413] panied by a lien; between *postponing a debt, and defeating a lien, is conceived to be utterly unsubstantial. The general lien, incidental to a judgment, is the means of securing to the judgment-creditor a preference over other creditors: take away his preference; postpone him to another creditor, and all the incidents by which his preference was secured are necessarily destroyed.

C. J. Ingersoll, on the same side.—1. The court will not fail to perceive, that the question involved in this case arises, not out of the obnoxious act of the 3d of March 1797, ch, 74, the 5th section of which gives universal and unqualified preference to the government "where any revenue-officer, or other person, becomes indebted to the United States, by bond or otherwise," but out of the act of 2d of March 1799, ch. 128, which affords priority to the government over individual creditors, only in the case of custom-house bonds and duties. Even the constitutionality of the law of 1797 has been questioned, though always maintained; and its policy has been the theme of severe animadversion. But the constitutionality of the law of 1799 has seldom, if ever, been drawn into doubt; and its policy is sufficiently obvious. Government could, if it would, exact payment of duties in money, or in a

portion of the article imported, at the time of importation, instead of bonding the duties for future and contingent liquidation. For the accommodation of merchants, the 62d section, at their option, substitutes bonds, giving time, on security for payment, instead of exacting it, on the permit to land, and delivery of the goods; for *which indulgence, the priority asserted, with notice to all the world, by the same law, is nothing [*414 more than a fair and reasonable equivalent. This priority has been established by law, ever since the present government of the United States. The acts of the 31st of July 1789, ch. 5; of the 4th of August 1790, ch. 35, § 45; of the 2d of March 1792, § 18; and of the 2d of March 1799, ch. 128, § 65, have maintained it an uninterrupted series of legislation, uniformly sustained by this court, and by the state courts. *United States* v. *Fisher*, 2 Cr. 358; *United States* v. *Hooe*, 3 Ibid. 73; *Harrison* v. *Sterry*, 5 Ibid. 289; *Prince* v. *Bartlett*, 8 Ibid. 431; *Mc Clean* v. *Rankin*, 3 Johns. 365; *Tinker* v. *Smith*, 2 Day 236.

2. The question in the case in controversy is, whether an individual judgment-creditor, without execution, and of course, having nothing in possession, nor by specific lien, is entitled to a preference, priority and advantage, superior to that "reserved and secured," by the act in question, to the public. The Sedgely estate, in dispute, was taken in execution, at the suit, and by the marshal, of the United States, before Thelusson could levy his execution. The controversy, therefore, is between a foreign individual creditor, who never had, and never could have, possession of the property, and who is fortified with no particular or specific lien against it, on the one hand; and the United States on the other hand, from whose custody and possession he alleges a superior right to take it, notwithstanding their statutory priority of apparent right, and their legal *priority of [*415 actual possession. The whole effect of the private creditor's judgment, at all events, goes no further than to ascertain his debt, and give him a general, not specific, lien. Upon this judgment, there could be no execution until on the *quarto die post*, to wit, on the 24th May; and in that *interim*, to wit, on the 22d May, the general assignment took effect; intercepted the operation, destroyed all the advantages of the judgment; and created the very case which the law provides for.

3. According to the law of Pennsylvania, a judgment-creditor, without execution executed, is entitled to come in only as a simple-contract creditor. *Gibbs* v. *Gibbs*, 1 Dall. 373. And, in fact, a judgment is considered as no more than a debt deprived of all attributes of lien, and merely put in a course of distribution. *Moliere's Lessee* v. *Noe*, 4 Dall. 450. These decisions then, dispose at once of all the argument that is introduced upon the general doctrine of the dignity of judgments; and serve, moreover, to show the fallacy of many of the ingenious difficulties with which the opposite counsel's view of the subject would embarrass the determination of the circuit court. The practice of the law does not conform to the theory he imputes to it. The judgment binds the land—as whose property? As the debtor's. But the mortgage transfers the proprietary interest to the mortgagee; and though, in point of relative rank or dignity, the judgment-creditor may conceive himself entitled to the first place, yet, certainly, the mortgagee *is much better fortified against the law in question; because, in [*416 the one case, the property is still in the original debtor, liable to the

future operations of a judgment; whereas, in the other case, the property has been, in legal contemplation, conveyed away from the original debtor to his creditor, with a clause of defeasance, in the event of certain conditions complied with. A particular appropriation of the estate in payment of the debt, would not defeat the public preference, unless that appropriation were followed up by a conveyance of the estate, and the actual change of ownership; in which case, it would be no longer the property of the public debtor.

4. The law contemplates the three cases of, 1st, death; 2d, insolvency; and 3d, attachment; to which may, perhaps, be added a 4th, that of legal bankruptcy; though this is nearly similar to the 3d. Now, in the case of death and insufficiency of assets, there can be no doubt. If Cramond had died on the 21st of May 1805, the United States would clearly have enjoyed the preference secured to them over the plaintiffs. And why not, in like manner, in the case of insolvency? All the policy and all the hardship that can be imagined for the second case, are just as applicable to the first. But because a line, which it is not necessary to contest, has been drawn, in the decisions on this subject, between the case of popular insolvency, or mere inability to pay debts and meet engagements, and of legal or technical insolvency, or a public acknowledgment of that inability; efforts have been *417] made to extricate insolvency *from the law, when no reason can be given for it, that is not equally applicable to death. The last illustration in this section is the case of legal bankruptcy; and it is well known, that under the bankrupt system, a bankruptcy cuts out a prior judgment on which no execution has been levied; and that the judgment-creditor is entitled to no more than his ratable proportion, and mere dividend, in common with other creditors having no security. But the reply is, that we have no bankrupt system. Still, however, a secret act of bankruptcy is within our law; and, on the score of hardship, is, at least, as severe a case as any that can be set up. When a mortgagor pays a debt, or it is paid for him, this is not *any debt* within the law; because it is specifically secured, and in legal contemplation, paid, by the transfer of a certain portion of the debtor's real estate, which the creditor holds, as it were, possession of. It is true, that in order to receive payment of the money, the mortgagee must pursue the forms and process indicated by law for that purpose; but neither the mortgagor, nor any other person, can prevent his taking possession of the property mortgaged, otherwise than by paying him the money by which it is specifically pledged. The difference between such a lien and that of a mere unexecuted judgment, is perfectly obvious, and indeed, is most emphatically recognised in the case from Pere Williams, cited on the other side. The 65th section of the act of 1799, makes no exceptions. It prohibits the payment of any debt by an assignee, under the penalty of personal accounta- *418] bility. Nor can the court *incorporate exceptions in the law. But where the property is no longer in the debtor's hands, as in the cases of a mortgage, a *bonâ fide* sale, or a *fi. fa.* levied, the property is taken out of the debtor's hands; and the court will not permit the public to carry their priority into the possession of an innocent third person. Up to the period of his assignment, Cramond continued in possession of the Sedgely estate. At that period, the Thelussons had no specific power or control over that estate. Unless, therefore, it became, from that moment, liable to the public preference, what is that preference, and what does it amount to?

To nothing more, says the opposite counsel, than a claim upon what is left after satisfying all incumbrances. If so, the law was framed (as it evidently was) with great pains, to very little purpose indeed.

5. As to the argument drawn from the supposed admission of counsel *arguendo* in the case of the *United States* v. *Fisher*, it is true, that while the debtor remains master of his property, the priority cannot dispossess him, on the plea of a popular insolvency, or inability to pay his debts. It is equally true, that the priority has no pretensions to be deemed a lien. But it, nevertheless, may have force enough to operate, whenever the insolvency is announced, by intercepting the mere prospective security of a judgment-creditor, without execution. But this is no retrospective operation.

6. As to the comparative equities, the surety or assignee, who pays the bond, on the faith of this act of congress, has at least as much to recommend him on that score, as the mere judgment-creditor, of the nature of whose debt nothing is known; *and since the various, the decided, and the consistent determinations of different courts, both state and national, [*419 in support of this law, there can be no question on which side the hardship preponderates.

Hopkinson, in reply.—1. It is said, that the Sedgely estate was taken in execution at the suit of the United States, before Thelusson could levy his execution; who, therefore, never could have possession of the property, and yet endeavors to take it from the custody and possession of the United States. I do not apprehend that this is a question on the right of possession in the property taken in execution; nor is it at all material, at whose suit the property was so taken and sold. Neither party ever had a possession, either actual or legal. If the possession, asserted to have been held by the United States, under their execution, gives them a right which cuts out the antecedent judgment, it is needless to resort to the protection and power of the act of congress to strengthen it; and any other creditor, obtaining the same sort of possession, would have the same right, and might assume the same preference over antecedent judgments. It does not appear by the special verdict, when the execution at the suit of the United States was taken out and levied; and therefore, there is no foundation in the record, for saying it was done before Thelusson could levy his execution. The decision of the question must turn on the statutory priority of the United States; and not on their legal priority of actual possession—they never have had any such possession.

*2. It cannot surely be imagined, that the assignment of Cramond, made on the 22d of May, because it happened before the expiration [*420 of four days after the date of our judgment, did, therefore, *per se*, interrupt the operation or destroy the advantages of the judgment. If so, then the effect has been produced by virtue of the assignment, and not by the provisions of the act of congress. The fact, however, is not so; the date of the assignment is material only to fix the period of the insolvency; of the circumstance which gave right to the preference of the United States, whatever it is: but whether it shall take preference of the judgment, is the matter to be decided by the act of congress, and not by the legal force or operation of the assignment; which, to all the purposes of this argument, is the same, whether made three days or thirty days after the judgment. The

time when you may issue an execution under a judgment is no limitation of the power of the judgment to bind the real estate; otherwise, a sale made within the four days would be valid and effectual.

3. The case of *Gibbs* v. *Gibbs*, 1 Dall. 371, was that of a judgment-creditor, without an execution; another judgment-creditor, with an execution executed; and then a legal bankruptcy; there being at that time, a regular bankrupt law in Pennsylvania. The question was between the two judgments. Did the second judgment-creditor pretend to take priority by
*421] virtue of its execution, or by that "actual possession" which is *set up in our case? No! The second judgment-creditor claimed, because the words of the bankrupt law expressly included the case of his opponent, taking away his right, and did not so include or affect his own judgment or right. The question arose under the 30th section of the bankrupt law, which expressly declares "that every creditor, having security for his debt by judgment, &c., whereof there is no execution served and executed upon the lands, goods and estate of the bankrupt, &c., shall not be relieved for any more than a ratable proportion of their debts," &c. The creditor, therefore, in that case, whose judgment was unexecuted, was expressly excluded; and he whose judgment was executed, was as expressly saved by the terms of the act. The reason given for this construction of the bankrupt law, does not apply to our case. It is, that the estate vested in the commissioners, by the act of bankruptcy; but so far is this from being the effect of an act of insolvency, by the act of congress, that it has been decided, that the right acquired by the United States, by the insolvency, is a mere right of priority of payment, without even creating a lien on the real estate to secure it. The case of *Moliere's Lessee* v. *Noe*, 4 Dall. 450, arose under the intestate laws of Pennsylvania. These laws authorize a sale of the real estate of an intestate, under certain circumstances, by the administrator, by the order and sanction of the orphans' court. A house and lot of an intestate had been thus sold. Certain judgments had been obtained against the
*422] intestate in his lifetime; *and the question was between these judgment-creditors and the purchaser from the administrator, under the order of the orphans' court. The decision is made in favor of the latter, on a review of the several laws of the state on the subject, and the clear intention of the legislature. No principle is affirmed, at all applicable to our case. The court say, that the word "debts," in its most general sense, and as used in those acts of assembly, includes a judgment; and that general words will not be restrained to particular cases, unless to avoid absurdity, contradiction or flagrant injustice. They then observe, that neither will occur in their case. No inconvenience; "because the lands will sell better for being discharged from liens; and it makes no odds to the judgment-creditors, by whom they are sold, provided they are sold fairly, and the proceeds faithfully applied." The court then go on to declare, that in the application of the proceeds, the judgment-creditors shall have their preference, and all the benefit of their lien; and that it would be monstrous injustice, were it otherwise. This case gives no countenance to the suggestion, that in Pennsylvania, a judgment is considered as no more than a debt deprived of all attributes of lien, and merely such in the course of distribution.

4. In Pennsylvania, it is the constant practice, for the mortgagor to keep possession, not only of the land, but of all the deeds and instruments of

title; that he sells and disposes of the property, and delivers possession to the purchaser, who holds it, subject, indeed, to the mortgage, as he would do *to a judgment; and in no respect differently; and that a judg- [*423 ment is specific enough in its force and operation to have preference of a subsequent mortgage; which a mere debt by simple contract, or by specialty, would not do. Why, then, shall it not have the same preference over a mere priority of payment arising after its date?

5. The equality to which a bankruptcy reduces a judgment-creditor with the other creditors of the bankrupt, is greatly relied upon by the defendant; but it is the effect of the positive provision of the statute, meeting the case in terms, and founded on the peculiar policy of that system; neither of which is found in the act of congress now under consideration. It is said, there is no difference, in reason, between the effect of a bankruptcy, and a legal insolvency; and as the former would destroy the right and lien of a judgment, so should the latter. The answer is obvious. The bankruptcy does it, by virtue of the express terms and provisions of the statute; and if the same authority can be found in the case of insolvency, it will stand on the same reason, or, rather, the same right. No case has been shown, where a judgment-creditor has been deprived of his right, his lien, his interest in the land, his preference, by construction; by the use of general terms: and in the case of *Moliere's Lessee* v. *Noe*, his right of priority of satisfaction out of the proceeds of the estate, is expressly recognised, and the contrary doctrine held to be "monstrous injustice."

March 18th, 1817. WASHINGTON, Justice, delivered the opinion of *the court, and after stating the facts, proceeded as follows:—Two [*424 questions were made in the circuit court. 1st. At what time a judgment *nisi*, on an award of arbitrators, made under an order of court, binds the real estate of the defendant against whom the award is made; whether on the day it is rendered, or on the *quarto die post*, if no exceptions be filed? or on the day when the exceptions, if any are filed, are overruled? 2d. If from the time when the judgment *nisi* is entered; then, whether, in this case, the United States are entitled to be paid, in preference to the judgment creditor? The first question was not decided by the court below, and is not contested in this court. In considering the second question, it will be assumed, for the sake of argument, that the judgment *nisi* binds the real estate of the debtor from the time it is rendered.

This question did not arise in the case of the *United States* v. *Fisher*, 2 Cr. 358, nor in that of the *United States* v. *Hooe*, 3 Ibid. 73. The point decided in those cases was, that a mere state of insolvency or inability in a debtor to the United States to pay all his debts, gives no right of preference to the United States, unless it is accompanied by a voluntary assignment of all the property for the benefit of his creditors. There can be little doubt but that the word insolvency, mentioned in the act of 1790, ch. *35, [*425 § 45, and repeated in the act of 1797, ch. 74, § 5, and of 1799, ch. 128, § 65, means a legal insolvency, which, whenever it occurs, the right of preference arises to the United States, as well as in the other specified cases to which the acts of 1797 and 1799 have extended the cases of insolvency. In this case, the conveyance of Cramond, on the 22d of May 1805, was of all his property; at which time, he was unable to pay all his debts; it is,

therefore, a case precisely within the law, and within the principle decided by the above cases.

But the question still remains to be decided, whether this right of preference, which accrued on the 22d of May, can cut out a prior judgment-creditor? The law declares, "that in all cases of insolvency, &c., the debts due to the United States shall be first satisfied, and if the assignees, &c., shall pay any debt due by the person or estate from whom or for which they are acting, previous to the debts due to the United States from such person or estate being first duly satisfied, they shall become answerable for the same in their own persons and estates." These expressions are as general as any which could have been used, and exclude all debts due to individuals, whatever may be their dignity. The assignees are made personally responsible to the United States if, in case of insolvency, they pay any debt previous to those due to the United States. The law makes no exception in favor of prior judgment-creditors; and no reason has been, or, we think, can be, shown to warrant this court in making one.

*426] *Exceptions there must necessarily be as to the funds out of which the United States are to be satisfied, but there can be none in relation to the debts due from a debtor of the United States to individuals. The United States are to be first satisfied; but then, it must be out of the debtor's estate. If, therefore, before the right of preference has accrued to the United States, the debtor has made a *bona fide* conveyance of his estate to a third person, or has mortgaged the same to secure a debt, or if his property has been seized under a *fi. fa.*, the property is divested out of the debtor, and cannot be made liable to the United States. A judgment gives to the judgment-creditor a lien on the debtor's lands, and a preference over all subsequent judgment-creditors. But the act of congress defeats this preference, in favor of the United States, in the cases specified in the 65th section of the act of 1799.

The judgment of the circuit court, therefore, is to be affirmed with costs.

Judgment affirmed.(*a*)

(*a*) The above is the opinion delivered by Mr. Justice WASHINGTON, in the circuit court, and which he was directed to deliver as the opinion of this court.

APPENDIX.

NOTE I.

Additional Note on the Principles and Practice in Prize Causes.

In the Appendix to the first volume of these reports (Note II.), a summary sketch was attempted of the practice in prize causes, in some of its most important particulars. It has been suggested, that a more enlarged view of the principles and practice of prize courts might be useful, and in case of a future war, save much embarrassment to captors and claimants. With this view, the following additional sketch is submitted to the learned reader.

As preliminary to the subject, it may be observed, that the ordinary prize jurisdiction of the admiralty extends to all captures made on the sea, *jure belli* (The Two Friends, 1 Rob. 271, 284);(*a*) to captures in foreign ports and harbors (Lindo *v.* Rodney, 2 Doug. 613 note); to captures made on land by naval forces, and upon surrenders to naval forces either solely or by joint operations with land forces (Lindo *v.* Rodney, *ut supra;* Chinsurah, 1 Acton 179); and this, whether the property so captured be goods, ships or mere *choses in action* (Ibid.); to captures made in rivers, ports
*2] and harbors of the *captor's own country (W. B. *v.* Latimer, 4 Dall. App'x, 1; Le Caux *v.* Eden, 2 Doug. 606; Lindo *v.* Rodney, Ibid. 613, note); to money received as a ransom or commutation on a capitulation to naval forces alone, or jointly with land-forces (Ships taken at Genoa, 4 Rob. 388); and to ransoms upon captures at sea, generally. Anthon *v.* Fisher, 2 Doug. 649, note 1; Maisonnaire *v.* Keating, 2 Gallis. But the admiralty, merely by its own inherent powers, never exercises jurisdiction as to captures or seizures as prize, made on shore, without the co-operation of naval forces, whether made in our own, or in a foreign territory. The Two Friends, 1 Rob. 271, 284; The Emulous, 1 Gallis. 563. Whenever such a jurisdiction is exercised, it is by virtue of powers derived *aliunde.* And though, when the jurisdiction has once attached, it may be lost by a hostile re-capture, escape or voluntary discharge (Hudson *v.* Guestier, 4 Cranch 293); yet it remains notwithstanding the goods are landed, for it does not depend on their local situation after capture; but the court will follow the goods or their proceeds with its process, wherever they may be found, or under whatever title acquired. Home *v.* Camden, 2 H. Bl. 533; 4 T. R. 388; Willis *v.* Commissioners of Prize, 5 East 22; The Noysomhed, 7 Ves. 593; The Louis, 5 Rob. 146; The Two Friends, 1 Ibid. 271; The Eliza, 1 Acton 336; Smart v. Wolff, 3 T. R. 223; The Pomona, 1 Dods. 25. Therefore, where the property is carried into a foreign port, and there delivered upon bail, by the captors, the prize court does not lose its jurisdiction, but may proceed to adjudication and enforce the stipulation. The Peacock, 4 Rob. 185.

(*a*) Connoîtront (les juges de l'amirauté) des prises faites en mer, &c. Ordonnance de 1681, liv. 1, tit. 2, *de la Competence*, Art. 3. Cette attribution à l'Amirauté pour les prises, est encore d'aussi ancien date que celle de l'etablissement de sa Jurisdiction. Ordonnance de 1400, art. 4, et suiv. de 1517, art. 3, et suiv. de 1543, art. 20, et de 1584, art. 33. Valin, Id.

So, if a prize be lost at sea, the court may, nevertheless, proceed to adjudication, either at the instance of the captors or of the claimants. The Susanna, 6 Rob. 48. So, although the property may be actually lying within a foreign neutral territory, the court may proceed to adjudication. Hudson *v.* Guestier, 4 Cranch 293; The Christopher, 2 Rob. 209; The Henrick and Maria, 4 Ibid. 43; The Comet, 5 Ibid. 285; The Victoria, Edwards 97. So, although the property has been sold by the captors, or has passed into other hands. The Falcon, 6 Rob. 194; The Pomona, 1 Dods. 25. But it
*3] rests in *the sound discretion of the court, whether, when property has been sold or converted by the captors, it will proceed to adjudication in their favor; for it is only in cases where the same has been justifiably or legally converted by the captors, that they can claim its aid. The court will withhold that aid, where there has been a conversion by the captors, without necessity or reasonable cause. L'Eole, 6 Rob. 220; La Dame Cecile, Ibid. 257; The Arabella and Madeira, 2 Gallis. 367.(*a*)

When once the prize court has acquired jurisdiction over the principal cause, it will exert its authority over all the incidents.(*b*) It will follow, as has been already observed, prize proceeds into the hands of agents or other persons holding them for the captors, or by any other title; and in proper cases, will decree the parties to pay over the proceeds, with interest upon the same for the time they have been in their hands.
*4] Smart *v.* Wolff, 3 T. R. 323; Home *v.* Camden, 2 H Bl. 533; *4 T. R. 382; Jennings *v.* Carson, 4 Cr. 1; The Two Friends, 1 Rob. 273; The Princessa, 2 Ibid. 31; The Louis, 6 Ibid. 146; Willis *v.* Commissioners of Prize, 5 East 22; The Noysomhed, 7 Ves. 593. It may also enforce its decrees against persons having the proceeds of prize in their hands, notwithstanding no stipulation, or an insufficient stipulation, has been taken on a delivery on bail; for it may always proceed *in rem* where the *res* can be found, and is not confined to the remedy on the stipulation. *Per* Buller, J., in 3 T. R. 323; *Per* Grose, J., in 5 East 22; The Ponoma, 1 Dods. 25; The Herkimer, Stew. 128; s. c. 2 Hall's Law J. 133. And in these cases, the court may proceed upon its own authority, *ex officio*, as well as upon the application of parties. The Herkimer, *ut supra*. Nor is the court *functus officio*, after sentence pronounced; for it may proceed to enforce all rights, and issue process therefor, so long as anything remains to be done touching the subject-matter. (Home *v.* Camden, 2 H. Bl. 533, and cases *ubi supra.*)

The prize court has also exclusive jurisdiction as to the question who are the captors, and joint captors, entitled to share in the distribution, and its decree is conclusive upon all parties. Home *v.* Camden, 2 H. Bl. 533; 4 T. R. 382; The Herkimer, Stew. 128; s. c. 2 Hall's Law Journ. 133; Duckworth *v.* Tucker, 2 Taunt. 7. It has the same exclusive authority as to the allowance of freight, damages, expenses and costs, in all cases of captures. Le Caux *v.* Eden, 2 Doug. 594; Lindo *v.* Rodney, Ibid. 613; Smart *v.* Wolff, 3 T. R. 223; The Copenhagen, 1 Rob. 289; The St. Juan Baptista, 5 Ibid. 33;

(*a*) S'il y a aucun qui rompe coffre, balle ou pippe ou autre marchandise que nostredit admiral ne soit présent en sa personne pour luy, il forfera sa part du butin et si sera par ice luy admiral puny selon le meffaict. Ordonnance de 1400, Art. 10, Coll. Mar. 79. Ordonnance de 1584, art. 38, Id. 111. Défendons de faire aucune ouverture des coffres, ballots, sacs, pipes, barriques, tonneaux et armoires, de transporter ni vendre aucune marchandises de la prise; et à toutes personnes d'en acheter ou recéler, jusqu'à ce que la prise ait été jugée, ou qu'il en ait été ordonné par justice; à peine de restitution de quadruple, et de punition corporelle. Ordonnance de 1681, liv. 3, tit. 9, *Des Prises*, art. 20. Quatre Juin 1783, jugement en dernier ressort de l'amirauté de Dunkerque, contre les auteurs du pillage du navire l'Amitié, qui les condamne à la restitution du prix des choses pilleés, les prive de leur part aux prises, et prononce le banissement contre l'un d'eux, avec injunction au capitaine du corsaire capteur, d'être plus circonspect à l' avenir. Code des Prises, tom. 1, p. 118, par Guichard.

(*b*) M. l'amiral et les commissaires connoîtront aussi des partages des prises et de tout ce qui leur est incident, même des liquidations, et comptes des dépositaires lorsqu'ils le jugeront à propos, comme aussi des échouements des vaisseaux ennemis qui arriveront pendant la guerre, circonstances et dépendances. Réglement du 23 Avril 1744, Art. 5. 2 Valin, *Sur l'Ordonnance*, 318.

Die Fire Damer, 5 Ibid. 357; The Betsey, 1 Ibid. 93; Duckworth *v.* Tucker, 2 Taunt. 7; Jennings *v.* Carson, 4 Cr. 2; Bingham *v.* Cabot, 3 Dall. 19; United States, *v.* Peters, Ibid. 121; Talbot *v.* Jansen, Ibid. 133; 2 Bro. Civ. & Adm. Law 208. And though a mere maritime tort, unconnected with capture *jure belli*, may be cognisable by a court of common law; yet it is clearly established, that all captures, *jure belli*, and all torts *connected therewith, are exclusively cognisable in the prize court. [*5

And the prize court will not only entertain suits for restitution, and damages in cases of wrongful capture, and award damages therefor; but it will also allow damages for all personal torts, and that, upon a proper case laid before the court, as a mere incident to the possession of the principal cause. And in such a case, it will not confine itself to the actual wrongdoer; but will apply the rule of *respondeat superior*, and decree damages against the owners of the offending privateer. Del Col *v.* Arnold, 3 Dall. 333; The Anna Maria, *ante*, p. 327; Bynk. Q. J. Pub. lib. 1, ch. 19, Du Ponceau's translation, 147. And where the captured crew have been grossly ill-treated, the court will award a liberal recompense. The St. Juan Baptista, 5 Rob. 33; Die Fire Damer, Ibid. 357; The Lively, 1 Gallis. 315.

As the prize court has an unquestionable jurisdiction to apply confiscation, by way of penalty, for falsity, fraud and misconduct of citizens as well as of neutrals (The Johanna, 6 Rob. 72; Oswell *v.* Vigne, 15 East 70); so it may, in like manner, decree a forfeiture of the rights of prize against captors, where they have been guilty of gross irregularity, or criminal neglect, or wanton impropriety and fraud. It is a part of the ancient law of the admiralty, independent of any statute, that captors may, by their misconduct, forfeit the rights of prize; and in such cases, the property is condemned to the government generally. And this penalty has been frequently enforced, not only where the captors have been guilty of fraud (8 Cr. 421; The George, *ante*, p. 278); but also where they have violated the instructions of government relative to bringing in the prize-crew, and have proceeded, without necessity, to dispose of the property before condemnation. La Reine des Anges, Stew. 9. So, where the captors have rescued a prize-ship from the custody of the marshal, after a monition duly served. The Cossack, Stew. 513. In short, the court is the constitutional guardian of the public interests in relation to matters of prize; and wherever there is any deviation from the regular course of proceedings, it expects to have a sufficient reason *shown for that deviation, before it will give the captors any of the ordinary benefits of prizes captured by them.(*a*) [*6

The usual course of the court is by way of monition, and if that process be dis-

(*a*) Et si aucuns des desdicts preneurs en leur voyage en especial auoient commis faute telle qu'ils fussent attaints d'auoir enfondré aucuns navires, ou voyez les corps des prisonniers descendus à terre en aucune loingtaine coste, pour céler le larrecin et meffaict, voulons que sans quelque délay, faueux ou déport, nostredit admiral en face faire punition et iustice selon le cas. Ordonnance de 1400, art. 7. Si aucuns si trouvent avoir commis faute en leur voyage, soit d'avoir mis a fonds aucun navires, ou robbé des biens d'iceux, ou noyé les corps des marchands, maistres, conducteurs, et autres personnes desdits navires, ou iceux descendus à terre en aucune loingtaine coste, pour celer le larcin et malfait, ou bien quand il adviendroit comme il a fait quelques fois, qu'aucuns d'eux se trouvans les plus forts viendront à ranconner à argent les navires de nos subjects, ou d'aucuns nos amis et alliez: Voulons que sans quelque delay, faveur ou deport, le dit admiral en face ou face faire justice et punition, telle que ce soit exemples à tous autres, deues informations des cas preallablement faites, et selon qu'il sera cyaprès ordonné. Et pour ce que souventes fois quand une prise estoit faite sur nos ennemis, les preneurs estoyent si coustoumiers de user de leur volontez pour leur profit, qu'ils ne gordoyent l'usage toujours et de toute ancienneté sur ce ordonné et observé, mais sans crainte de justice, comme innobediens et pilleurs, eux estans encore sur mer rompent les coffres, balles, boujettes, malles, tonneaux et autres vaisseaux, pour prendre et piller ce qu'ils peuvent des biens de la prise, en quoy ceux qui ont equippé et mis sur les navires a gros despens sont grandement foullez, dont advient souvent de grandes noises, débats et contentions. Nous prohibons et deffendons à tous chefs, maistres, contre maitres, patrons, quarteniers, soldats, et compagnons, de ne faire aucune ouverture des coffres et balles, etc., ny autres vaisseaux

obeyed, an attachment issues against the *parties in contempt. But the court may, in all cases, proceed in the first instance, by warrant of arrest of the person or property, to compel security to abide its decree.

Having said so much on the subject of prize jurisdiction, as seemed necessary to explain the practice of the court, we may now pass to the consideration of the rights and duties of captors in relation to property captured in war.

To enable a vessel to make captures, which shall inure to the benefit of the captors, it is necessary that she should have a commission of prize. But non-commissioned vessels of a belligerent nation may not only make captures in their own defence, but may, at all times, capture hostile ships and cargoes, without being deemed by the law of nations to be pirates; though they can have no interest in prizes so captured. 2 Bro. Civ. & Adm. Law, 524; Casaregis, Disc. 24, No. 24; 2 Wooddes. Lect. 432; Consolato del Mare, ch. 287, 288; 3 Bulst. 27; 4 Inst. 152, 154; Zouch, Adm. Jurisd. ch. 4, 101; Com. Dig., Admiralty, E. 3; The Georgiana, 1 Dods. 397; The Diligentia, Ibid. 403; The Emulous, 8 Cr. 131; The Nereide, 9 Ibid. 449; The Dos Hermanos, *ante*, p. 76.(*a*) But every capture, whether made by commissioned or non-commissioned ships, is at the peril of the captors. If they capture property, without reasonable or justifiable cause, they are liable to a suit for restitution, and may also be
*8] mulcted *in costs and damages.(*b*) If the vessel and cargo, or any part thereof be good prize, they are completely justified. And although the whole property may, upon a hearing, be restored, yet, if there was probable cause of capture, they are not responsible in damages. Opinion of M. Portalis, in the case of The Statira, 2 Cranch 102, note; but, on the other hand, they may, under circumstances, according to the degree of doubt or suspicion thrown upon the case, either from defects of the papers, the nature of the voyage, or the conduct of the captured crew, be entitled to receive their costs and expenses in bringing in the property for adjudication. It is not within the object of this note, to enumerate all the various circumstances which have been adjudged to constitute probable cause for captures. But, in general, it may be observed, that if the ship pretend to be neutral, and has not the usual documents of such ship on board (The Anna, 5 Rob. 332); if the cargo be without any clearance (Ibid.); if the destination be untruly stated; if the papers respecting the ship or cargo be false or colorable, or be suppressed or spoliated; or if the neutrality of the cargo does not distinctly and fully appear (Report of Dr. Lee, &c., Chitty's Law of Nations, App'x, 303, Wheat. on Capt. App'x, 320); if the voyage be from or to a blockaded port

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de quelques prises qu'ils facent, ny aucunes choses des dits prises receler, transporter, vendre, ny eschanger, ou autrement alliener, ains ayent a representer le tout desdites prises, ensemble les personnes conduisans le navire, audit admiral, ou vice-admiral, le plustost que faire se pourra, pour en estre fait et disposé selon qu'il appartiendra, et comme contiennent nos presentes ordonnances, et ce sur peine de confiscation de corps et des biens. Ordonnance de 1584, art. 35, 37.

(*a*) Aucun ne pourra armer un vaisseau en guerre, sans commission de l'admiral. Ordonnance de 1681, liv. 8, tit. 9, *Des Prises*, art. 1. Il est tellement vrai qu'il n'y a que ceux qui ont commission de l'admiral, qui sont en droit de faire à leur profit des prises sur l'ennemi, que si le capitaine d'un vaisseaux marchanda été attaqué en mer par un vaisseaux ennemi dont il s'est rendu maitre dans le combat, la prise qu'il a faite du vaisseaux ennemi ne lui appartient pas, mais appartient à l'amiral qui est à cet égard aux droits du roi: l'amiral a coutume d'en gratifier pour le tout ou pour partie celui qui a fait la prise, sans tirer à conséquence. Pothier, *de Proprieté*, No. 93; Valin, *Sur l' Ordonnance*, *ubi supra*.

(*b*) Lesdits preneurs empeschans aucuns marchands, navire ou marchandise sans cause raisonnable, ou qu'ils ne soyent nos adversaires, nostredit admiral sera deuement restituer le dommage, et ne permettra plus l'vsage qu'ont à ce contre raison tenuë, iceux preneurs, en quoy ils ont faict et donné de grands dommages à aucuns de nos alliez par feinte, ou fausse couleur qu'ils mettoyent de non cognoistre s'ils estoyent nos aduersaires, ou non, qui est chose bien damnable, contre raison et iustice, que homme soubs telle couleur deust porter dommage, ou destourbier. Ordonnance de 1400, art. 8. See the opinion of M. Portalis in the case of The Pigou, 2 Cranch 98, note.

(The Frederick Molke, 1 Rob. 86); or not legal to the parties engaged in the traffic (The Washingham Packet, 2 Ibid. 77; The Hoop, 1 Ibid. 196; The St. Antonius, 1 Acton 113); if the cargo be of an ambiguous character as to contraband (The Endraught, 1 Rob. 22; The Ringende Jacob, Ibid. 89. The *Jonge Margaretha, Ibid. 189; The Twende Broder, 4 Ibid. 33; The Frau Margaretha, 6 Ibid. 92; The Ranger, Ibid. 125); and generally, if the case be a case of further proof; all or any of those circumstances furnish a probable cause for capture, and justify the captors in bringing in the ship and cargo for adjudication. [*9

Whenever the captors are justified in the capture, they are considered as having a *bonâ fide* possession, and are not responsible for any subsequent losses or injuries arising to the property from mere accident or casualty, as from stress of weather, re-capture by the enemy, shipwreck, &c. The Betsey, 1 Rob. 93; The Catharine and Anna, 4 Ibid. 39; The Carolina, Ibid. 256; Del Col v. Arnold, 3 Dall. 333. They are, however, in all cases, bound for fair and safe custody; and if the property be lost from want of proper care, they are responsible to the amount of the damage; for subsequent misconduct may forfeit the fair title of a *bonâ fide* possessor, and make him a trespasser from the beginning. The Betsey, 1 Rob. 93; The Catharine and Anna, 4 Ibid. 39. Therefore, if the prize be lost by the misconduct of the prize-master, or from neglecting to take a pilot, or to put on board a proper prize-crew, the court will decree restitution in value against the captors. The Der Mohr, 3 Rob. 129; The Speculation, 2 Ibid. 293; The William, 6 Ibid. 316; Del Col *v.* Arnold, 3 Dall. 333; Wilcocks *v.* Union Ins. Co., 2 Binn. 574. But although, in general, irregularity of conduct in captors makes them liable for damages, yet in case of a *bonâ fide* possession, the irregularity, to bind them, must be such as produces irreparable loss, as, for instance, such as may prevent restitution from an enemy who re-captures the property. The Betsey, 1 Rob. 93. And in cases of gross misconduct, the court will hold the commission of the captors forfeited. The Marianne, 5 Rob. 9. But if the injured parties lie by, for a great length of time, the court will not issue a monition to the captors, to proceed to adjudication, even when misconduct is laid as the ground of the application. The Purissima Conception, 6 Rob. 45.

When a ship is captured, it is the duty of the captors, to send her into some convenient port for adjudication. The Huldah, *3 Rob. 235; The Madonna del Burso, 4 Ibid. 169; The Saint Juan Baptista, 5 Ibid. 33; The Wilhelmsberg, Ibid. 143; The Elsebe, Ibid. 173; The Lively, 1 Gallis. 315.(*a*) And a convenient port is such a port as the ship may ride in with safety, without unloading her cargo. The Washington, 6 Rob. 275; The Principe, Edwards 70. And the captors are bound to put on board the captured ship a sufficient prize-crew to navigate the vessel into such a port, unless the captured crew consent to navigate her (which in general they are not bound to do); but if they consent, they cannot afterwards impute any fault to the captors. Wilcocks v. Union Ins. Co., 2 Binn. 574; The Resolution, 6 Rob. 13; The Pennsylvania, 1 Acton 33; The Alexander, 1 Gallis. 532; s. c. 8 Cranch 169. And in case of the capture of a neutral ship, the crew ought not to be handcuffed or put in irons, unless in extreme cases; for if unnecessarily done, the prize court will decree damages to the injured parties. The St. Juan Baptista, 5 Rob. 33; Die Fire Damer, Ibid. 357. Captors are not bound to explain the cause of capture, but it is highly proper so to do, as the master may explain it away. The Juffrow Maria Schroeder, 3 Rob. 147. They may chase under false colors; but the maritime law does not permit them to fire under false colors. The Peacock, 4 Rob. 185.(*b*) *They have no right to make any spoliation or damage to the captured ship; or to embezzle or convert the property; [*10 [*11

(*a*) Enjoignons aux capitaines qui auront fait quelque prise, de l'amener ou envoyer, avec les prisonniers, au port où ils auront armé, à peine de perte de leur droits et d'amende arbitraire; si ce n'est qu'il fussent forcés par la tempête ou par les ennemis, de relâcher en quelque autre port, auquel cas ils seront tenusd'en donner incessament avis aux interressés á l'armement. L'Ordonnance de 1681, liv. 3, tit. 9, *Des Prises*, art. 7. See also the ordinance of 1584, art. 43, Coll. Mar. 113.

(*b*) Sa Majesté a ordonné, et ordonne, que

or to break bulk, or to remove any of the property from the ship, unless in cases of necessity, or where obvious reasons of policy, or the urgency of the occasion, justify them in so doing. The Concordia, 2 Rob. 102; L'Eole, 6 Ibid. 220; The Washington, Ibid. 275; Clerke's Praxis 163; Del Col *v.* Arnold, 3 Dall. 333. And in every case of a removal of property from a captured ship, the court expects to be satisfied as to the propriety of the removal, before it will proceed to adjudication. But if any of the captured property be shown to be missing, without any default on their part, as where it is lost by robbery or burglary, after unlivery, they are not responsible for the loss. The Maria, 4 Rob. 348; The Rendsberg, 6 Ibid. 142. And if captors, acting *bonâ fide*, and for the benefit of the parties, under peculiar circumstances, land or even sell the prize goods, this irregularity if not injurious to the parties, will not be held to deprive them of the effects of a lawful possession. The Princessa, 2 Rob. 31.

If the capture is made without probable cause, the captors are liable for damages, costs and expenses, to the claimants. Sir W. Scott and Sir J. Nichol's letter to Mr. Jay, Wheat. on Capt., App'x, 312; Opinion of M. Portalis, in the case of The Pigou, 1 Cr. 101, note; Del Col *v.* Arnold, 3 Dall. 333; The Charming Betsey, 2 Cr. 64; Maley *v.* Shattuck, 3 Ibid. 458; The Triton, 4 Rob. 78; Camden *v.* Hone, 4 T. R. 385; Fallijeff *v.* Elphinstone, 5 Bro. P. C. 343; Clerke's Prax. 162; The Lively, 1 Gallis. 315.(*a*) And if the captors unjustifiably neglect to proceed to adjudication, the court will, in case of restitution, decree demurrage against them. The Corier Maritimo, 1 Rob. 287; The Madonna del Burso, 4 Ibid. 169; The Peacock, Ibid. 185;
*12] *The Anna Catharina, 6 Ibid. 10. So also, if the captors agree to restitution, but unreasonably delay it, demurrage will be allowed against them. The Zee Star, 4 Rob. 71. After an acquittal, a second seizure may be made by other captors, but it is at the peril of damages and costs, in case of failure (The Mercurius, 1 Rob. 80); and although a spoliation of papers be made, yet, if it be produced by the misconduct of captors, as by firing under false colors, it will not protect them from damages and costs. The Peacock, 4 Rob. 185. Nor is it an objection, in the prize court, against awarding damages and costs, that the ship is not navigated by a proper proportion of seamen of her own country, according to its navigation laws; for that is an irregularity which must be referred to another branch of the admiralty jurisdiction. The Nemesis, Edw. 50.

As to the time within which a suit may be brought in the admiralty, for damages for an illegal capture, it may be observed, that as the statute of limitations does not apply to prize causes, there is no time, during the existence of the prize commission, in which captors may not be legally called on to proceed to adjudication, for the purpose of awarding damages against them. The Mentor, 1 Rob. 179; The Huldah, 3 Ibid. 235. But the court will extend, by equity, the principles of the statute of limitations to prize causes; and therefore, it will not, after a great lapse of time, compel the captors to proceed to adjudication, or entertain a suit for damages for a supposed illegal capture. The Susanna, 6 Rob. 48.

In respect to the measure of damages, where the vessel and cargo are actually lost, it is usual to allow the actual value of the property. Del Col *v.* Arnold, 3 Dall. 333; Maley *v.* Shattuck, 3 Cr. 458; The Anna Maria, *ante*, p. 327. And where a prize had been illegally condemned by a vice-admiralty court, erected by the commanders in the

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tous les capitaines commandans ses vaisseaux ou ceux armés en course par ses sujets, seront tenus d'arborer pavillon français avant de tirer le coup d'assurance ou de semonce. Défenses très-expresses leur sont faites de tirer sous pavillon étranger, à peine d'être privés, eux et leur armateurs, de tous le provenu de la prise, qui sera confisqué au profit de Sa Majesté si le vaisseau est jugé ennemi; et en cas que la vaisseau soit jugé neutre, les capitaines et armateurs seront condamnés aux dépens, dommages et intérêts des proprietaires. Ordonnance de 17 Mars, 1696.

(*a*) Si la prise étoit évidemment mauvaise, de maniere, qu'il n'y eût rien qui fût capable d'excuser le corsaire; nul doute alors que la mainlevée n'en fût ordonnée, non-seulment avec exemption de tous frais: mais encore avec tous dépens, dommages et intérêts contre l'armateur. 2 Valin, *Sur l'Ordonnance*, 336.

West Indies, under a misapprehension that they possessed an authority to erect such courts, and afterwards, restitution in value was dereed by the high court of admiralty in England, the court allowed the invoice value, ten per cent. profit and freight, as well where the ship and cargo belonged to the same persons as where they were separately owned. The Lucy, 3 Rob. 208. Indeed, what items may properly form a part of the damages, depends *upon the nature and circumstances of the case ; and for guides to direct his judgment, the learned reader is referred to the following [*13 cases. Le Caux *v.* Eden, 2 Doug. 594, 596 ; Talbot *v.* Jansen, 3 Dall. 133, 170 ; Cotton *v.* Wallace, Ibid. 302, 304; The Charming Betsey, 2 Cr. 64; Maley *v.* Shattuck, 3 Ibid. 458; The Narcissus, 4 Rob. 20; The Zee Star, Ibid. 71; Corier Maritimo, 1 Ibid. 287; The St. Juan Baptista, 5 Ibid. 33; Die Fire Damer, Ibid. 357; The Anna Catharina, 6 Ibid. 10; The Driver, 5 Ibid. 145; The Lively, 1 Gallis. 315; The Anna Maria, *ante*, p. 327. Where damages and costs are allowed, if, after they are assessed, payment is delayed, the court will allow interest upon the principal sum, from the time of assessment, although it includes interest as well as principal. The Driver, 5 Rob. 145.

As to the mode of assessing damages, it is usual for the court to refer the subject to commissioners, to make inquiry, and return a regular report to the court, of the several items and amount of damages. But in their report, they should state the principles upon which they proceed in making allowances, where the items do not explain themselves, and not report a gross sum without specification or explanation. The Charming Betsey, 2 Cr. 64; The Lively, 1 Gallis. 315.

In respect to the persons who are liable for costs and damages, it may be observed, that the general rule, in respect to public ships, is, that the actual wrongdoer, and he alone, is responsible. The Mentor, 1 Rob. 179. It is not meant by this, that the crew of the capturing ship are responsible for the seizure made in obedience to the commands of their superior; for by the prize law, the act of the commander is binding upon the interests of all under him, and he alone is responsible for damages and costs. The Diligentia, 1 Dods. 404. The meaning of the rule is, that the person actually ordering the seizure is liable for the damages, and not his superior in command (who has not concurred in the particular act), simply from the fact, that the seizer is acting within the scope of his general orders. The Mentor, 1 Rob. 179. Therefore, a suit cannot be maintained against an admiral upon a station, who is not privy to the act of seizure. Ibid. Nor a commodore, who commands the *squadron, but gives no orders for [*14 the capture. The Eleanor, *ante*, p. 346. In short, the actual wrongdoer is the person to answer in judgment, and to him responsibility is attached by the court. He may have other persons responsible over to him, and that responsibility may be enforced; as, for instance, if a captain make a wrongful seizure under the express orders of his admiral, that admiral may be made answerable in the damages occasioned to the captain by the improper act. But it is the constant and invariable practice of the prize court, to have the actual wrongdoer the party before the court; and the propriety of the practice is manifest, because, if the court was once to open the door to complaints, founded on remote and consequential responsibility, it would be difficult to say where it is to stop. The Mentor, 1 Rob. 179. The principles applicable to this class of cases, are fully developed in the opinion in the case of The Eleanor, *ante*, p. 346, to which the reader is respectfully referred.

In the case of private armed vessels, the owners, as well as the master, are responsible for the damages and costs occasioned by illegal captures, and this, to the extent of the actual loss and injury, even if it exceeds the amount of the bond usually given, upon the taking out of commissions for privateers. Bynk. Q. J. Pub. lib. 1, ch. 19, Du Ponceau's ed. p. 147; Talbot *v.* Three Brigs, 1 Dall. 95; s. c. 1 Hall's Law J. 140; Die Fire Damer, 5 Rob. 357; The Der Mohr, 3 Ibid. 129; 2 Bro. Civ. & Adm. Law 140; Del Col *v.* Arnold, 3 Dall. 333; The Anna Maria, *ante*, p. 327.(*a*) But the

(*a*) Pothier holds, that the owner of the privateer may entirely discharge himself from the responsibility, beyond the amount of the penalty in his bond, by abandoning the vessel to

sureties to the *bond are responsible only to the extent of the sum in which they are bound. Du Ponceau's Bynk. p. 149; 2 Valin, *Sur l'Ordonnance*, 223. And if a person appear in behalf of the captain of a private ship of war, and gives security in his own name, with sureties, instead of the captain, he is liable in the same manner as the captain, as a principal in the stipulation. King *v.* Fergusson, Edw. 84. And a part-owner of a private armed ship is not exempted from being a party to a suit, on a monition to bring in the prize proceeds, and proceed to adjudication, in consequence of having made compensation for his share to the claimant, and received a release from him; for the claimant has a right to the answer of all parties, even supposing that the decree ought not to be enforced against such part-owner. The Karasan, 5 Rob. 291. And in the court of the law of nations, a person may be held a part-owner of a privateer, although *his name has never been inserted in the bill of sale, or the ship's register. The Nostra Signora de los Dolores, 1 Dods. 290.

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Where the captors, from any cause whatsoever, as from loss of the property, or from fraud or negligence, omit to bring the case before the court for adjudication, the claimant may apply to the court for a monition to the captors, to proceed forthwith to adjudication (The William, 4 Rob. 214); and upon their neglect so to do, after service and return of the monition, the court will, if a proper case is laid before it, proceed to award restitution with damages and costs. The Huldah, 3 Rob. 235; The Susanna, 6 Ibid. 48. It is the usual practice, for a party to give in his claim in the first instance, before calling upon the captors to proceed to adjudication; but it will not necessarily vitiate the process, if there has been no claim. If it should, in any manner, come to the knowledge of the court, that a seizure had been made, in the nature of prize, and that no proceedings had been instituted, it would be the duty of the court to direct proceedings to be commenced. The William, 4 Rob. 214. The same object is often effected by the claimants, by an original suit for restitution, on a petition, setting forth all the facts, and praying for a decree of restituiion either *in rem* or in value, with damages. Del Col *v.* Arnold, 3 Dall. 333; Maley *v.* Shattuck, 3 Cr. 458; Jennings *v.* Carson, 4 Ibid. 2; The Anna Maria, *ante*, p. 327; The Eleanor, *ante*, p. 347. Whether the proceeding be in the one form or the other, the rights of all parties remain the same. The burden of the neutrality of the property rests on the claimants, and when that is shown, the existence of probable cause of capture is to be established by the other

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the injured party. *De Propriètè*, No. 92. But Valin decides, that the prize law controls, in this respect, the provision of the municipal law of France, by which the owners of merchant vessels are discharged from their responsibility, by abandoning the ship and freight, in like manner as they are by the British statute, 9 Geo. II., ch. 15. "En conformité desdits règlemens de 1704 et 1744 (giving costs and damages to neutrals wrongfully seized), il faut donc tenri, aujourd'hui sans égard à la disposition de l'art, 3 du titre des propriétaires, &c., et du présent article, en tant qu'il limite le cautionnement à la somme de 15,000 liv. que l'armateur répondra indéfinèment de tous les dommages et intérêts résultans des delits et déprédations des gens de son corsaire, et des prises irrégulieres par eux faites; sans pouvoir même s'en defendre, en payant la somme de 15,000 liv. pour laquelle il aura donné caution, et en declarant en même temps qu'il abandonne outre cela son navire avec tous ses agrêts, apparaux et autres dependances, relativement à l'art. 2, du même titre des propriétaires, &c., dont la disposition n'est plus applicable en matiere d'armement en course, que celle de l'art. 3, attendu ces mêmes réglemens qui forme une decision particuliere à cet egard." *Sur l'Ordonnance*, liv. 3, tit. 9, *des Prises*, art. 2. Such appears to have been the former law of France, but it was changed by the new commercial code. "Les propriétaires des navires équipés en guerre, ne seront toutefois responsables des délits et déprédations commis en mer, par les gens de guerre qui sont sur leur navires, ou par les equipages, que jusqu'a concurrence de la somme pour la quelle ils auront donné caution, à moins qu'ils n'en soint participans ou complices." Code de Commerce, art. 217. But as our laws not only contain no such provision, but have not even adopted the British statute, by which the owners are discharged in ordinary cases, by abandoning the vessel and freight to the injured party, there can be no doubt, that the responsibility of the owners of privateers is not limited, either to the penalty of the bond or the value of the vessel.

side; and each party has a right to the answer of the other, upon all proper interrogatories supported by oath. Maley *v.* Shuttuck, 3 Cr. 458.

*As soon as the captors have brought the property in for adjudication, and the preparatory examinations are taken, the captors, and if they neglect or refuse, the claimants, apply to the proper court for adjudication. In either case, the property is immediately taken into the custody of the court; for in all proceedings *in rem*, the court has a right to the custody of the thing in controversy; and as soon as libelled, it is always deemed in the custody of the law. Jennings *v.* Carson, 4 Cr. 2; Home *v.* Camden, 2 H. Bl. 533. In the United States, a warrant immediately goes to the marshal, to take possession of the property; and he is bound to keep it *salvâ et arctâ custodiâ;* and if any loss happens by his negligence, he is responsible for it to the court. In England, though the property is now usually put into the hands of the captors, yet it still remains, in contemplation of law, in the custody of the public. Formerly, it actually did remain in its custody, as is still the case in other foreign countries. It is merely for the convenience of the captors, that the English admiralty permits them to take possession of the property. But it must be remembered, that it is so held by them, as agents of the court, and not in right of property; and therefore, their possession may be divested by the act of the court, either *ex officio*, or on the application of the parties interested, showing good cause for taking it out of their hands; *per* Sir W. Scott, *arguendo*, in Smart *v.* Wolff, 3 T. R. 323, 329; The Herkimer, Stew. 128; 2 Hall's Law J. 133. And the property still remains in the custody of the court, notwithstanding an unlivery and deposit in public warehouses. The Maria, 4 Rob. 348. In fact, in England, where the property is so unlivered, if it has been captured by a public or private commissioned vessel, it is, *de facto*, under the joint locks of the government and the captors, although in the legal possession of the marshal, under the tenor of his writ for unlivery; and if captured by a non-commissioned vessel, it is a *droit*, where the king, in his office of admiralty, being the captor, it is under his locks alone. The Rendsberg, 6 Rob. 142, 174. In the United States, the marshal holds the custody, at all times, for the court; and the latter is the guardian of the public rights and revenue, as well as of the rights of the captors *and claimants, in all cases of prize. It is, indeed, usual and proper, for the collector of the customs to keep an officer on board, for the protection of the revenue, until the duties are duly secured, which the captors may secure, if they please; but since it cannot be ascertained, until a decree of condemnation, whether the property be good prize or not, many cases may occur, in which it would be highly inconvenient for them to adopt this course. If the property be restored specifically, and exported from the country, by the claimants, it is held not liable to duties; and if sold under an interlocutory order of sale, it is the duty of the court to reserve out of the proceeds the amount of duties which then attach upon it, and direct them to be paid over to the collector. The Concord, 9 Cr. 387; The Nereide, 1 Wheat. 171. It is true, that the prize act of last war (act of the 26th June 1812, ch. 107, § 14), seems to contemplate, that the duties may be paid or secured in prize cases, in the same manner as goods ordinarily imported. But this clause is, in terms, applied only to goods of British growth, produce or manufacture, or imported from British ports; and is, at all events, inapplicable to cases where it cannot be ascertained whether the goods are imported or not, until after a judicial decision. And the subsequent act of the 27th January 1813, ch. 155, manifestly contemplates, that the payment of the duties is, in cases of condemnation, to be made by the marshal, out of the proceeds of prize sales. And it has been repeatedly held in the circuit court for the first circuit, that no forfeiture accrued for not securing the duties upon prize goods, before condemnation; and that the court might, at any time, direct an unlivery and sale; and upon such sale, would deduct the amount of duties, and direct them to be paid to the collector.

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It has already been stated, that when the marshal has possession of the property, he is bound for safe and fair custody; and if any loss be sustained, it is, at least, his duty to be prepared to show that it was not lost by any default of his. The Hoop, 4 Rob. 145. If, therefore, property be pillaged, while under his care, the court will hold him responsible for its value, if it arose from his negligence. If, indeed, upon

an application to enforce their responsibility, he, by his answer, deny any negligence
*19] *and loose custody, the court may, perhaps, think it no more than a legal and proper confidence in its own officer, to throw the burden of proof of culpable negligence or fraud on the other party. The Rendsberg, 6 Rob. 142, 157. And where the property is lost, while actually under the locks of the government, the marshal will not be liable, although he may still be considered as constructively having the legal custody. Ibid.

In prize causes, it is not usual, to file any special allegation of the particular circumstances on which the captors found their title to condemnation. The libel is, and always ought to be, the mere general allegation of prize, such as is used in undoubted cases of hostile property. The act of bringing the vessel in, and proceeding against her, allege her, generally, to be a subject of prize rights, and the captors are not called upon to state, at the commencement of the suit, the particular grounds on which they contend she is so. They have a right to institute the inquiry, and take the chance of the benefit of any fact that may be produced in the course of that inquiry. The Adeline, 9 Cr. 244; The Fortuna, 1 Dods. 81. This is a great advantage on the side of the captors, but is controlled by their liability to costs and damages, if the inquiry produce nothing; and is fully balanced by the advantage given to the claimant, in this species of proceeding, that no evidence shall be admitted against him, but such as proceeds from himself, from his own documents, and from his own witnesses, the captors not being permitted, except in cases marked by peculiar circumstances, to furnish any evidence whatever. The Fortuna, 1 Dods. 81. Considerations of this nature render it very important for proctors to adhere, with the greatest care, to the established form; and it is a great irregularity, equally evincing want of skill and judgment, to deviate from it.

Upon filing the libel, the usual practice is, immediately to issue a monition, citing all persons who are interested, to appear at a given day, and show cause why the property should not be condemned as prize; and this process, in the United States,
*20] *usually includes a warrant to take possession of the property. But where the prize has been first seized in port, a monition issues, in the first instance, to bring in the papers, if they are in the possession of a subject or citizen. The Conqueror, 2 Rob. 303. The usual monition is directed to the marshal, and in England, is served, by posting up a copy at the Royal Exchange, in the city of London. In former times, fourteen days were allowed between the service of the monition and the day of hearing the cause; but in most of the later prize acts in England, twenty days are allowed after the execution of the monition. Robinson's Coll. Mar. 89, note; Mariott's Formulary 187. In the United States, the return-day of the monition depends upon the discretion of the district judge; but it is, usually, twenty days, at least, after the issuing of the process; and it is served, usually, by posting up a copy on the mast of the prize-vessel, and at such other public places as the judge may direct; and also by publication in the newspapers printed in or near the principal place or port of the district into which the prize is brought. This proceeding by monition and service, by public notice, is borrowed from the Roman law, by which, when it became impracticable to serve the party with a personal citation, recourse was had to this method, which is called a citation *per edictum*. Dig. lib. 5, tit. 1, § 68; Robinson's Coll. Mar. 88, note.

At the return-day of the process, if no claim be, at that time, or previously, interposed, and upon proclamation made, no person appear to claim, the default is entered on the record; and the court will then proceed to examine the evidence, and if proof of enemy's property clearly appear, it will immediately decree condemnation; if the case appear doubtful, it will postpone a decision. It is not now usual to condemn goods, for want of a claim, until a year and a day has elapsed, after the service of the process, except in cases where there is a strong presumption and reasonable evidence to show that the property belongs to an enemy. Rob. Coll. Mar. 89; The Harrison, 1
*21] Wheat. *298; The Staat Embden, 1 Rob. 26, 29. And if no claim be interposed, within that period, the property is condemned, of course, and the question of

former ownership is precluded for ever, the owner being deemed in law to have abandoned it. The Staat Embden, *ut supra;* The Henrick and Maria, 4 Rob. 43, 44; The Harrison, *ut supra;* Rob. Coll. Mar. 89, note; The Avery, 2 Gallis. 386.

If, at or before the return-day of the process, a claim be interposed, the cause is then to be heard in its proper order, upon the ship's papers and the preparatory examinations. Accompanying every claim must be an affidavit which is called the test-affidavit, and which regularly 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; and if there be any special circumstances in the case, these should be added. The Adeline, 9 Cr. 244. See The Sally, 3 Rob. 300, note. In respect to the manner of interposing claims, and the rules by which their admission or rejection are governed, it does not seem necessary to do much more than refer the reader to what is said on that subject in the appendix to the preceding volume (p. 500), and the case of The Adeline, 9 Cr. 244, 286. It may, however, be added, that a party, to be entitled to assert a claim in the prize court, must be the general owner of the property; for a person who has a mere lien on the property for a debt due, whether liquidated or unliquidated, is not so entitled. The Eenroom, 2 Rob. 1, 5; The Tobago, 5 Ibid. 218; The Frances, Thompson's claim, 8 Cr. 335; Ibid., Irvin's claim, 8 Cr. 418; The Marianna, 6 Rob. 24. And the same rule has been applied to a mortgage, where the mortgagor is left in possession. Bolch *v.* Darrel, Bee 74. The rule that a claimant is not admitted to claim, who is engaged in a traffic prohibited by the municipal laws of the country, is applied only to citizens or subjects, and not to foreign neutral proprietors. The Recovery, 6 Rob. 341. But to citizens or subjects, the rule equally applies, whether the transaction is between original contractors or under a sub-contract. The Cornelis and Maria, 5 Rob. 28. And an inactive or sleeping partner cannot receive restitution, in a transaction in which he *could not be lawfully engaged as a sole trader. The Franklin, 6 Rob. 127, 131. [*22
If enemy's property be fraudulently blended in the same claim with neutral property, the latter is liable to share the fate of the former. The St. Nicholas, 1 Wheat. 481.

An appearance by a proctor for the claimants, duly entered, cures all defects of process, such as the want of a monition or of due notice. Penhallow *v.* Doane, 3 Dall. 54. And even assuming that one partner has no authority to appoint a proctor for all the partners, yet a general appearance for all, by a proctor is good and legally binding. Hills *v.* Ross, 3 Dall. 231. In cases of captures by government ships, the proceedings, in England, are exclusively carried on by the officers of the goverment, and no other persons can interfere to support or pursue a suit, where they do not consent. The Elsebe, 5 Rob. 173. Whether the same exclusive authority exists in the United States, has never been made the subject of question in the supreme court.(*a*)

*It has been already stated in the former note, that the cause is to be heard, [*23
at the first hearing, upon the ship's papers and the preparatory examinations, and that the *onus probandi* rests on the claimant. And see the Rosalie, 2 Rob. 343; The Countess of Lauderdale, 4 Ibid. 283. If, upon such hearing, the cause appear doubtful, and the parties have not forfeited their title to further proof, it is then in the

(*a*) In England, it is also held, that the power of the crown to direct the release of property seized as prize, before adjudication, and against the will of the captors, is not taken away by any grant of the prize, conferred in the order of council, the proclamation, or the prize act. The Elsebe, 5 Rob. 155. And in France, the captors cannot, after the prize is brought in for adjudication, terminate the proceedings, by a private arrangement with the claimants. Such an arrangement, to be valid, must be communicated to the *procureur-general*, and approved by the court; because the rights and interests of the state, of the officers and crew of the capturing vessel, and of the subjects of neutral powers, might be compromitted by such an arrangement. See the opinion of M. Portalis on this question (*Code des Prises, par* Guichard, tom. 2, p. 533). He distinguishes this case from that of ransoms, which are regulated by peculiar laws, but never favored; and he cites, in support of his opinion, several ancient *arrêts* of council, and rescripts of the admiral.

discretion of the court, to allow further proof, either to the claimants alone, or to the captors as well as the claimants. The manner in which the preparatory examinations are taken, and the cases in which further proof is allowed or denied, have been briefly stated in the former note, and the standing interrogatories on which these examinations are taken, will be found in a subsequent note to this volume. (*Infra*, note 3.) It may not, however, be useless to glance at a few particulars which are either omitted, or not distinctly stated in the former note. Although the ship's papers, found on board, are proper evidence, yet they are so, only when properly verified; for papers by themselves prove nothing, and are a mere dead letter, if they are not supported by the oaths of persons in a situation to give them validity. The Juno, 2 Rob. 120, 122.(*a*) And even upon the original hearing, papers found on board another captured ship, may be invoked into the cause, and used by the captors. But if the papers are taken from a vessel, not so captured and carried in, they can only be used upon an order for further proof. The Romeo, 6 Rob. 351; The Maria, 1 Ibid. 340. But the authenticity of papers, thus invoked, must be verified by affidavit, and otherwise, to the satisfaction of the court. The Romeo, *ut supra*. So also, the depositions of the
*24] claimant in a former case, in which he was *owner and master, were permitted to be invoked by the captors, to prove his domicil. The Vriendschap, 4 Rob 166. But where nothing appears in the original evidence, which lays a foundation for prosecuting the inquiry further, it must be under very particular circumstances indeed, that the court will be induced to admit extraneous evidence. The Sarah, 3 Rob. 330. If the instructions found on board of a prize are transmitted from the department of state for foreign affairs to the prize court, they are considered as sufficiently authenticated, as having been found on board, without further proof to that effect. The Maria, 1 Rob. 340. A person skilled in nautical affairs may be called to called to examine the log-book of the captured ship, and to give his opinion as to the verity of the statement in respect to destination, &c., from the courses, winds, &c. The Edward, 4 Rob. 68.

The examinations of the prize-crew are to be taken in the manner which has been already alluded to; but if the prize be carried into a foreign port, where there is no commission, their affidavits, taken in such port, will be admitted in evidence. The Peacock, 4 Rob. 185; The Arabella and Madeira, 2 Gallis. 367.

In the prize court, as in every other judicial tribunal, there are certain presumptions which legally affect the parties, and are considered as of general application. Possession is presumptive evidence of property. Miller *v.* The Resolution, 2 Dall. 19. If there be a total defect of evidence, to establish the proprietary interest, it is presumed to belong to an enemy. Sir Walter Scott and Sir. J. Nicholl's letter to Mr. Jay, *ubi supra*. The Magnus, 1 Rob. 31. So, goods found in an enemy's ship are presumed to belong to the enemy, unless a distinct neutral character, and documentary proof, accompany them. *Res in hostium navibus presumuntur esse hostium donec contrarium probetur*. Loccenius, lib. 2, ch. 4, n. 11; Grotius, de Jur. Bel. et Pac. lib. 3, ch. 6, § 6; Bynk. Q. J. Pub., lib. 1, ch. 13. And in cases where the property falls within the general character of contraband, if the claimant would avail himself of the favorable distinction that it is the produce of his own country, the *onus* of establishing that fact is on him.
*25] The Twee Juffrowen, *4 Rob. 242. *Primâ facie*, a merchant is taken to be acting for himself, and upon his own account; but if a person is not a merchant, that may give a qualified character to his acts. The Jonge Pieter, 4 Rob. 79. If, in the ship's papers, property in a voyage from an enemy's port be described "for neutral account," this is such a general mode as points to no designation whatever; and under such a description, no person can say, that the cargo belongs to him, or can entitle himself to the possession of it as his property. In such a case, further proof is indispensable. The Jonge Pieter, 4 Rob. 79. When a ship has been captured and

(*a*) Il y a plus, et parceque les pieces en forme trouvées à bord peuvent encore avoir été concertées en fraude, il a été ordonné par Arrêt du Conseil du 26 Octobre 1692, que les depositions contraires des gens de l'équipage pris, prévaudroit à ces pieces. Valin, *sur l'Ordonnance*, liv. 3, tit. 9, *des Prises*, art. 6.

carried into an enemy's port, and is afterwards found in possession of a neutral, the presumption is, that there has been a regular condemnation, and the proof of the contrary rests on the party claiming the property against the neutral possessor. The Countess of Lauderdale, 4 Rob. 283. Where a treaty expressly provides for the removal of persons who happen to be settled in a ceded port, the burden of proof rests on the other party, to show that they did not intend to remove, for the presumption is already to be taken in their favor. The Diana, 5 Rob. 60. Where the master of a captured ship is not fairly discredited, his testimony as to destination is generally conclusive on that point. The Carolina, 3 Rob. 75; The Convenientia, 4 Ibid. 200. So, his testimony of the ill-treatment of his crew, if uncontradicted. Die Fire Damer, 5 Rob. 357. Where the voyage is from the port of one enemy, to the port of another enemy, and further proof is required, the double correspondence of the shipper and consignee should be produced; for there is a double interest to be rebutted; but if the voyage be to a neutral port, the correspondence with the shipper is all that is usually required. The Vreede, 5 Rob. 231.

In respect to the persons who may be witnesses in prize causes, it is very clear, that an alien enemy, as such, is not, in general, disabled to be a witness. The Falcon, 6 Rob. 194; and, indeed, in ordinary cases, the prize crew, whether national, neutral or hostile, are the necessary witnesses in the cause. *The Henrick and Maria, 4 Rob. 43. And upon further proof ordered, the attestations of the claimant and [*26 his clerks, and the correspondence between him and his agents are admissible evidence, and proper proofs of property. The Adelaide, 3 Rob. 281. And upon further proof, the affidavits of the captors, even without a release, are good evidence of facts within their own knowledge. The Maria, 1 Rob. 340; The Resolution, 6 Ibid. 13; The Sally, 1 Gallis. 401. But under peculiar circumstances, the affidavits of captors are not received in our prize courts. The Henrick and Maria, 4 Rob. 57, note *a;* The Grotius, 9 Cr. 368; The Sally, 1 Gallis. 401; The Haabet, 6 Rob. 54; The Glierktigheit, Ibid. 58, note *a;* The Charlotte Caroline, 1 Dods. 192, 199. Upon allegations of joint capture, the affidavits of any of the joint-captors are not received, unless they are discharged of all interest, by a release, for in such questions, the general rules of law as to competency prevail. And where a witness declares, that he expects to share from the bounty of the joint captors, he is competent; but it is otherwise, if he says that he thinks himself entitled in law. The Drie Gebroeders, 5 Rob. 339, 343, note *a;* The Anna Catharina, 6 Ibid. 269. And the log-book of asserted joint-captors is inadmissible evidence, since it goes to establish their interest. Le Niemen, 1 Dods. 9. Where further proof is ordered, affidavits taken in foreign countries, before notaries-public, whose attestations are properly verified, are, in general, proper evidence. But in the supreme court of the United States, it is, by a rule of the court, required, that all such evidence shonld be taken under a commission from the court. The London Packet, *ante*, p. 371. And this practiee is certainly more conformable to the general purposes of justice, and less liable to abuse, than any other. It seems, however, to be a general rule of the prize court, not to issue any commission to be executed in the enemy's country. The Magnus, 1 Rob. 31; The Diana, 2 Gallis. 93.

The questions which are most ordinarily discussed in prize *courts, at the hearing of the cause, respect the national character of the property; and this [*27 depends sometimes upon the habits and trade of the ship, upon the nature of the voyage or of the cargo, or upon the legal or illegal conduct of the parties themselves; but, ordinarily, it depends upon the national domicil of the asserted proprietor, or upon the nature of the title which he asserts over the property. In all these cases, where the property is condemned, it is, by fiction, or rather, by intendment of law, deemed the property of enemies, that is, of persons who are so to be considered in the particular transaction, and is condemned *eo nomine.* The Elsebe, 5 Rob. 173; The Nelly, 1 Ibid. 219, note to The Hoop; The Alexander, 8 Cr. 169; The Julia, Ibid. 181; The Thomas Gibbons, Ibid. 421; The St. Lawrence, 1 Gallis. 532; The Joseph, Ibid. 545. It is beside the purpose of this note, to discuss these topics at large, with all the distinctions which belong to them. Indeed, such a discussion would of itself require a very con-

siderable treatise. It may, however, be of some use, to give a rapid sketch of the leading principles which regulate the decisions of prize courts on some of these subjects.

In respect to the question who are to be considered enemies or not, the general principle is, that every person is to be considered as belonging to that country where he has his domicil, whatever may be his native or adopted country. The Vigilantia, 1 Rob. 1; The Endraught, Ibid. 19; The Sarah Christina, Ibid. 237; The Indian Chief, 3 Ibid. 23; The President, 5 Ibid. 277; The Neptunus, 6 Ibid. 403; The Venus, 9 Cr. 253; The Frances, Gillespie's claim, 1 Gallis. 614; The Mary and Susan, Richardson's claim, 1 Wheat. 46, 55 n.; McConnel *v.* Hector, 3 Bos. & Pul. 113; Bynk. Q. J. Pub. ch. 3, Du Ponceau's ed., p. 19, 25.(*a*) And the masters and crews of ships are deemed
*28] to possess *the national character of the ships to which they belong, during the time of their employment. The Endraught, 1 Rob. 21; The Bernon, Ibid. 101. See The Embden, Ibid. 17; The Frederick, 5 Ibid. 8; The Ann, 1 Dods. 221. And even if a person goes into a belligerent country originally for temporary purposes, he will not preserve his neutral character, if he remain there several years, paying taxes, &c. The Harmony, 2 Rob. 322; The Embden, 1 Ibid. 17. And a neutral consul, resident and trading in a belligerent country, is, as to his mercantile character, deemed a belligerent of that country. The Indian Chief, 3 Rob. 22; The Josephine, 4 Ibid. 25. And the same rule applies to the subject of one belligerent country, resident in the country of its enemy, and carrying on trade there. The Citto, 3 Rob. 38; McConnel *v.* Hector, 3 Bos. & Pul. 113. But a character acquired by mere domicil ceases upon removal from the country. The Indian Chief, 3 Rob. 12. The native character easily reverts, and it requires fewer circumstances to constitute domicil, in the case of a native, than to impress the national character on one who is originally of another country. La Virginie, 5 Rob. 98. And in his favor, a party is deemed to have changed his domicil, and his native character reverts, as soon as he puts himself *in itinere* to return to his native country *animo revertendi.* The Indian Chief, 3 Rob. 12; The St. Lawrence, 1 Gallis. 467.

In general, a neutral merchant, trading in the ordinary manner, with a belligerent country, does not, by the mere accident of his having a stationed agent there, contract the character of the enemy. The Anna Catharina, 4 Rob. 107, 121. But it is otherwise, if he be not engaged in trade upon the ordinary footing of a neutral merchant, but as a privileged trader of the enemy; for then it is in effect a hostile trade. The Anna Catharina, *ut supra.* So, if the agent carry on a trade from the hostile which is not clearly neutral. Ibid. And if a person be a partner in a house of trade,
*29] in the enemy's country, *he is, as to the concerns and trade of that house, deemed an enemy, and his share is liable to confiscation, as such, notwithstanding his own residence is in a neutral country; for the domicil of the house is considered in this respect as the domicil of the partners. The Vigilantia, 1 Rob. 1, 14, 19; The Susa, 2 Ibid. 255; The Indiana, 3 Ibid. 44; The Portland, Ibid. 41; The Vriendschap, 4 Ibid. 166; The Jonge Klassina, 5 Ibid. 297; The Antonia Johanna, 1 Wheat. 159; The St. Joze Indiano, 2 Gallis. 268. But if he has a house of trade in a neutral country, he has not the benefit of the same principle; for if his own personal residence be in the hostile country, his share in the property of the neutral house is liable to condemnation. Ibid.; and The Frances, 1 Gallis. 618; s. c. 8 Cr. 348. However, where a neutral is engaged, in peace, in a house of trade in the enemy's country, his property so engaged in the house is not, at the commencement of war, confiscated; but if he continues in the house,

(*a*) On n'aura aucun égard aux passe ports accordés par les princes neutres ou alliés, tant au propriétaires qu'aux maîtres des navires sujets des états ennemis, s'ils n'ont été naturalisés, et n'ont transféré leur domicile dans les états desdits princes avant la déclaration de la présente guerre: Ne pourront pareillement lesdits propriétaires et maitres des navires ou sujets des états ennemis, qui auront obtenu lesdites lettres de naturalite, jouir de leur effet, si depuis qu'elles ont été obtenues ils sont retournés dans les états ennemis pour y continuer leur commerce. Réglement du 21 Octobre 1744, art. 11. Dec. 26 Juillet 1778, art. 6.

after knowledge of the war, it is liable, as above stated, to confiscation. The Vigilantia, 1 Rob. 1, 14, 15; The Susa, 2 Ibid. 251, 255. It is a settled principle, that traffic alone, independent of residence, will, in some cases, confer a hostile character on the individual. Ibid.; The Susa, 2 Rob. 252, 255; The Vriendschap, 4 Ibid. 166. And if a neutral be engaged in the enemy's navigation, it not only affects the particular vessel in which he is employed, but all other vessels belonging to him, that have no distinct national character impressed upon them. The Vriendschap, *ut supra.*

Ships are deemed to belong to the country under whose flag and pass they navigate, and this circumstance is conclusive upon their character. The Vigilantia, 1 Rob. 1, 19, 26; The Vrow Anna Catharina, 5 Ibid. 161; The Success, 1 Dods. 131. So, even if purchased by a neutral, if they are habitually engaged in the trade of the enemy's country. The Vigilantia, *ut supra;* The Planter's Wench, 5 Rob. 22; even though there be no sea-port in the territory of the neutral. Ibid. But in general, and unless under special circumstances, the national character of ships depends on the residence of the owner. Ibid.; The Magnus, 1 Rob. 31. When, however, it is said, that the flag and pass is conclusive on the character of the ship, the *meaning is this, [*30
that the party who takes the benefit of them is himself bound by them; he is not at liberty, when they happen to turn to his disadvantage, to turn round and deny the character which he has worn for his own benefit, and upon the credit of his own oath or solemn declarations. But they do not bind other parties, as against him: other parties are at liberty to show that these are spurious credentials, assumed for the purpose of disguising the real character of the vessel; and it is no inconsiderable part of the ordinary occupation of a prize court, to pull off this mask, and exhibit the vessel, so disguised, in her true character of an enemy's vessel. The Fortuna, 1 Dods. 87; The Success, Ibid. 131. Ships and cargoes engaged in the privileged and peculiar trade of a nation, under a special contract, and the sanction of the government, are considered as affected by the character of the nation, and if it be hostile, the trade is stamped with the same character. The Princessa, 2 Rob. 49; The Anna Catharina, 4 Ibid. 197; The Rendsborg, Ibid. 121; The Vrow Anna Catharina, 5 Ibid. 161; The Commercen, 1 Wheat. 382. See 5 Rob. 5, note *a.* And the produce of an estate situated in a hostile colony, is so impressed with the character of the soil, that although the owner of the estate be resident in a neutral country, his interest in the produce is deemed enemy's property. The Phœnix, 5 Rob. 20; The Vrow Anna Catharina, Ibid. 161; The Dree Gebroeders, 4 Ibid. 232; Bentzon's claim, 9 Cr. 191.

In respect to the transfers of enemies' ships, during war, it is certain, that purchases of them by neutrals is not, in general, illegal; but such purchases are liable to great suspicion, and if good proof be not given of their validity, by a bill of sale, and payment of a reasonable consideration, it will materially impair the validity of the neutral claim (The Bernon, 1 Rob. 102; The Sechs Gedchwistern, 4 Ibid. 100); and if the purchase be made by an agent, his letters of procuration must be produced and proved. The Argo, 1 Rob. 158.(*a*) And if, after such transfer, the ship *be employed habit- [*31
ually in the enemy's trade, or under the management of a hostile proprietor, the sale will be deemed merely colorable and collusive. The Jemmy, 4 Rob. 31; The Omnibus, 6 Ibid. 71. But the right of purchase, by neutrals, extends only to merchant ships of enemies (The Minerva, 6 Rob. 396, 399); for the purchase of ships of war belonging to enemies, is held to be invalid. The Minerva, *ut supra.* And a sale of a merchant ship, made by an enemy to a neutral, during war, must be an absolute, unconditional sale. The Packet de Bilboa, 1 Rob. 133; The Noydt Gedecht, Ibid. 137, note *a.* Anything tending to continue the interest of the enemy in the ship vitiates a contract of this description altogether. The Sechs Gedchwistern, 4 Rob. 100.

(*a*) Que tout vaisseau qui sera de fabrique ennemie, ou qui aura eu originairement un propriétaire ennemi, ne pourra être censé neutre, s'il n'en a été fait une vente pardevant les officiers publics qui doivent passer cette sorte d'actes, et si cette vente ne se trouve à bord et n'est soutenue d'un pouvoir authentique donné par le premier propriétaire, lorsqu'ille ne vend pas lui-même. Règlement du 17 Février 1694; Du 12 Mai 1696.

Practice in Prize Causes.

In respect to proprietary interests in cargoes, though, in general, the rules of the common law apply, yet there are many peculiar principles of prize law to be considered. It is a general rule, that during hostilities, or imminent and impending danger of hostilities, the property of parties belligerent cannot change its national character, during the voyage, or, as it is commonly expressed, *in transitu*. The Dankebaar Africaan, 1 Rob. 107; The Herstelder, Ibid. 114. This rule equally applies to ships and cargoes; and it is so inflexible, that it is not relaxed even in favor of owners, who become subjects, by capitulation, after the shipment and before the capture. Ibid. But if the ship sails before hostilities, when there is a decided state of amity between the two countries, and before the capture, the owner again becomes a friend, and at the time of the capture, and also at the time of adjudication, he is in a capacity to claim; the prize courts will, then, give him the benefit of the principle, that the national character cannot be altered *in transitu*, and will restore to him. Ibid. The same distinction is applied to purchases made by neutrals, of property *in transitu;* if purchased during a *32] state of war existing, or imminent and impending danger *of war, the contract is held invalid, and the property is deemed to continue as it was at the time of shipment, until the actual delivery. It is otherwise, however, if the contract be made during a state of peace, and without contemplation of war; for, under such circumstances, the prize courts will recognise the contract, and enforce the title acquired under it. The Vrow Margaretha, 1 Rob. 336; The Jan Frederick, 5 Ibid. 128. And property is still considered *in transitu*, if it be ultimately destined to the hostile country, notwithstanding it has arrived at a neutral port, and the ship is there changed. The Carl Walter, 4 Rob. 207. The reason why courts of admiralty have established this rule as to transfers *in transitu*, during a state of war, or expected war, is asserted to be, that if such a rule did not exist, all goods shipped in the enemy's country would be protected by transfers, which it would be impossible to detect. The Vrow Margaretha, 1 Rob. 336.

The same public policy has established the rule of the prize courts, that property going, during war, to be delivered in the enemy's country, and under a contract to become the property of the enemy, immediately on arrival, if taken *in transitu*, is to be considered as enemy's property. The Sally, 3 Rob. 300, note *a*. And all contracts of purchase effected on the part of the belligerent, where the payment is executory and contingent on delivery at an ulterior port, at the risk of the neutral vendor or shipper, are considered as contracts in fraud of the prize law, and the goods, if captured *in transitu*, are condemned as the absolute property of the enemy. The Atlas, 3 Rob. 299; The Anna Catharina, 4 Ibid. 107, 113, note. But when the contract is made in time of peace, and without any contemplation of war, no such rule exists. Ibid. But the rule is applied, where such a contract is originally made between allies in the war, if a party to it becomes neutral, after the contract, and before the execution of it, and the shipment is made afterwards. The Anna Catharina, 4 Rob. 107, 112. A contract by a neutral, with a privileged company of the enemy, with a view to the transportation of the whole produce of a colony, or of the company itself, if made during war, or in *33] contemplation of war, is pronounced illegal, and the property is liable to *condemnation as hostile property. The Rendsborg, 4 Rob. 121; The Jan Frederick, 5 Ibid. 128. But if a neutral, during peace, and without contemplation of war, purchase goods in a colony, from a regular privileged company there, and it is agreed, that they shall be transported and sold in the mother country, by the company's agents, for the benefit of the neutral, the contract is good, and the property remains neutral, during its transit, notwithstanding an intervening war of the mother country. The Vrow Anna Catharina, 5 Rob. 161.

In ordinary shipments of goods, unaffected by the foregoing principles, the question of proprietary interest often turns on minute circumstances and distinctions, the general principle being, that if they are going for account of the shipper, or subject to his order or control, the property is not divested *in transitu*. If there be any condition annexed to the delivery of the goods to the consignee, the proprietary interest remains in the shipper, notwithstanding the goods are sent in pursuance of the orders of the

consignee. Thus, if a merchant in H. send goods to A., in another country, by order of B., and on account of B., but with directions not to deliver them, unless satisfaction could be given for the payment, the property is not divested from the shipper, but remains his *in transitu:* cited in The Aurora, 4 Rob. 319. The same principle applies, where goods are shipped to the order of the shippers, but to be delivered by their agents to the consignee, upon the agents being satisfied for the payment. The Aurora, 4 Rob. 218; The Merrimack, Kimmel & Albert's claim, 8 Cr. 317. See The Marianna, 6 Rob. 24. So, even if the goods are stated in the invoice to belong to the claimants; yet if these papers are inclosed to the consignee, as agents to the shippers, and are to be delivered to the claimants, only upon conditions, in the discretion of the agent, the property remains in the shippers. The Merrimack, 8 Cr. 317. But if the goods are consigned to an agent of the shippers, but the invoice, &c., show them to be for the account of the claimants, and the invoice, &c., are, by the shippers, sent directly to the claimants, the possession of these documents gives them a title, and establishes the intention of the shipper to vest the property in the claimants at the time of the shipment. The Merrimack, Messrs. *Wilkins' claim, 8 Cr. 317. So, if the goods are shipped to the consignee unconditionally, for the use of the claimants. Ibid., [*34 Messrs. McKean & Woodland's claim, 8 Cr. 317. But if the goods are consigned to the agent of the shippers, and there are discretionary orders given, but no direction for an absolute delivery to the claimants, the property remains in the shippers. The St. Joze Indiano, Lizaur's claim, 2 Gallis. 268; s. c. 1 Wheat. 208. In all these cases, the goods are supposed to have been purchased, in pursuance of the orders of the claimants; for if they are sent by the shippers, without orders, or contrary to, or different from orders, either in quantity or kind, the proprietary interest remains in the shipper, during the transit, notwithstanding they are sent by direct consignment to the consignee. The Venus, 8 Cr. 253; The Frances, Dunham & Randolph's claim, 1 Gallis. 445; s. c. 8 Cr. 354; 9 Ibid. 183; The Frances, French's claim, 8 Ibid. 359.

It is certainly competent for an agent abroad, who purchases goods in pursuance of orders, to vest the proprietary interest in his principal, immediately on the purchase. This is the case, when he purchases exclusively on the credit of the principal, or makes an absolute appropriation and designation of the property for his principal. But where he sells his own goods, or purchases goods on his own credit (and thereby in reality becomes the owner), no property in such goods vests in his correspondent, until he has done some notorious act to divest himself of his title, or has parted with the possession, by an actual and unconditional delivery for the use of such correspondent. The St. Joze Indiano, 2 Gallis. 268; s. c. 1 Wheat. 208. But such delivery or appropriation to the use of his correspondent, need not be by a direct act, but it may constructively arise from the circumstances of the case, even where the shipper has made an intermediate assignment of the goods. The Mary and Susan, 1 Wheat. 25.

In all these cases, the material question is, whether the shipper retains or possesses any control over the property (independent of the mere right of stoppage *in transitu*, in cases of insolvency), or has parted with the possession, and all authority *over [*35 it. For if an enemy's shipper consign goods or money to his correspondent at H., for the purpose of answering drafts of his correspondent in A., without any letter of advice or document making it the absolute property of such correspondent, or putting it out of his own control, it still remains the property of the shipper, for he may, at any time, countermand the order, or give the goods, or money, a new direction. In substance, it is the same transaction, as if a person send a sum of money to his private banker, directing him to hold it subject to the order of A.; in which case, if, on the next day, and before any such order had been given, or even the fact of lodgment known to the other party, he had changed his purpose, and directed a conversion of the money, to another object, it is clear, that the bankers could not resist with effect. The Josephine, 4 Rob. 25.

In respect to questions of illegal trade, little is necessary to be said, in addition to the observations and cases cited in the former volume. It is a fundamental principle of prize law, that all trade with the enemy is prohibited, to all persons, whether natives,

naturalized citizens or foreigners domiciled in the country, during the time of their residence, under the penalty of confiscation. The Vigilantia, 1 Rob. 1, 14, 26; The Hoop, Ibid. 196; Potts *v.* Bell, 8 T. R. 548; The Rapid, 8 Cr. 155; s. c. 1 Gallis. 295; The Alexander, 8 Cr. 169; s. c. 1 Gallis. 532; The Joseph, 8 Cr. 451; s. c. 1 Gallis. 545.(*a*)

*36] *The same penalty is applied to subjects of allies in the war, trading with the common enemy. The Nayade, 4 Rob. 251; The Neptunus, 6 Ibid. 403; Bynk, Q. J. Pub. ch. 10, Du Ponceau's ed., p. 81. But a citizen of a belligerent country, domiciled in a neutral country, may lawfully trade with the enemy of his native country (The Danaos, 4 Rob. 255, note), with the exception of the case of trade in articles contraband of war. The Neptunus, 6 Rob. 403; The Ann, 1 Dods. 221 And if the party intends to trade with the enemy, but during the voyage, the port becomes neutral, the penalty is saved, for there must be the act as well as the intention. The Abby, 5 Rob. 251. And even assuming, that after the knowledge of a war, a citizen, domiciled in the enemy's country, may lawfully withdraw his property, without a license from his government (which has been denied, The Mary, 1 Gallis. 620), at all events, it must be done in a reasonable time, and ten months after the war is too late, and the party will then be deemed engaged in a trade with the enemy. The St. Lawrence, 1 Gallis. 467; s. c. 9 Cr. 120. And if a vessel take on board a cargo from an enemy's ship, under the pretence that it is ransomed, it is an illegal traffic. Even admitting the ransoming of captured property to be legal, it cannot be admitted to be made at any distance of time, and by any new voyages undertaken for this special purpose. The Lord Wellington, 2 Gallis. 103. And sailing under the enemy's license is deemed, *per se*, an efficient cause of condemnation. The Julia, 1 Gallis. 549; s. c. 8 Cr. 181; The Aurora, Ibid. 203; The Hiram, Ibid. 444; s. c. 1 Wheat. 440; The Ariadne, *ante*, p. 143.

These observations on the subject of proprietary interests, may be concluded, with the remark, that to entitle the claimant to sustain his claim in the prize court, the property must be proved to be neutral, at all periods from the time of shipment, without intermission, to the arrival and subsequent sale in the port of the enemy. The Atlas, 3 Rob. 299; The Sally, 4 Ibid. 92, note *a*. And if it be hostile at the time of shipment,

*37] it is (as has been already stated), a universal rule, to condemn it, *although the owner has become a friend or subject. The Boedes Lust, 5 Rob. 233.

In this connection, we might treat of the principles of international law respecting blockade, contraband of war (*vide* 1 Wheat. 38–9; Ibid. 394 n.), engagements in the coasting and colonial trade of an enemy (*vide* 1 Wheat. 507, app'x, note III.), the right of search, the effect of resistance or rescue of neutral ships, and the circumstances of unneutral conduct, which are visited with a forfeiture of the ship or cargo, or both. These topics would lead us into a very enlarged inquiry, incompatible with the object of this summary sketch; but they deserve the attention of all students of the law of prize, and it is to be hoped, that some eminent jurist will, hereafter, examine them with a diligence and learning proportioned to their importance. It may, however, be useful here to consider how far the illegal acts of the master bind the interests of the owner of the ship or cargo.

It is a general principle, that the act of the master, at all events, binds the owner of

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(*a*) Au surplus, l'intention de l'ordonnance en exigeant que la police contienne, le nom et le domicile de celui qui se fait assurer—les effets sur lesquels l'assurance sera faite—le nom du navire, du lieu où les marchandises seront chargées et déchargées, est encore de connoître en temps de guerre, si malgre l'interdiction de commerce qu'emporte toujours toute déclaration de guerre, les sujets du Roi ne font point commerce avec les ennemis de l'Etat, ou avec des amis ou alliés, par l'interposition desquels on feroit passer aux ennemis des munitions de guerre et de bouche, ou d'autres effets prohibés: car tout cela étant défendu comme préjudicable à l'Etat, seroit sujet à confiscation, et à être déclaré de bonne prise, étant trouvé, soit sur les navires de la nation, soit sur ceux des amis et allies, comme il sera observé sur le tit. des Prises. Valin, Sur l'Ordonnance, liv. 3, tit. 6, *Des Assurances*, art. 3; Ibid. tit. 9, *Des Prises*, art. 7.

the ship, as much as if the act were committed by himself. The Vrow Judith, 1 Rob. 150. If, therefore, the master deviate into a blockaded port, the owner is bound by the act, and is not permitted to aver his ignorance of the act, or that the master acted against his orders. The Adonis, 5 Rob. 256. And the same principle is applied to the case of carrying goods contraband of war. The Imina, 3 Rob. 167. But Grotius (*de Juri Belli ac Pacis*, lib 3, ch. 6, § 6), Loccenius (*de Jur. Mar.* lib. 2, ch. 4, no. 12), Pothier, (*de Proprieté*, No. 103), and Bynkershoek, *Q. J. Pub.* lib. 1, ch. 12, p. 97, Du Ponceau's ed.), all contend for a favorable distinction, where the owner is ignorant of the fact of unlawful goods being on board. They are, however, contradicted by Valin (*Sur l' Ord.* tom. 2, p. 253), and Emerigon (*Des Assurances*, tom. 1, p. 449), whose doctrine is followed in the practice of prize courts. The law, indeed, is established, that the principal is answerable for the acts of his agent (and the master *is the accredited agent of the ship-owner), not only civilly, but penally, to the amount of the property intrusted to his care. The Mars, 6 Rob. 79, 87. It [*38 would be impossible for a court of prize to affect the proprietor in any other way: and whatever the hardship may be, it is very much softened, by recollecting, that if he has sustained any injury by the fraudulent and unauthorized acts of his agent, he will be entitled to his remedy against him. The Mars, *ut supra.* But the act of the master does not, in general, bind the owner of the cargo, unless he be owner of the ship, or conusant of the intended violation of law, or the master be his agent. The Vrow Judith, 1 Rob. 150; The Imina, 3 Ibid. 169; The Rosalie and Betty, 2 Ibid. 343, 351; The Alexander, 4 Ibid. 93; The Elsebe, 5 Ibid. 173. In cases of blockade, the deviation into the blockaded port is presumed to be in the service of the cargo, and therefore, the owner is bound by it, unless where there was no notice of the blockade, at the time the ship sailed. The Alexander, 4 Rob. 93; The Shepherdess, 5 Ibid. 256. And if the master, at the time of sailing, put his ship under convoy, whose instructions he is presumed to know, the act is illegal, and binds both the ship and cargo. The Elsebe, 5 Rob. 173. It is not considered like the case of an unforeseen emergency happening to a 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, the owners of the cargo should 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; 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 a possibility of meeting it, however prepared. The court, therefore, applies the strict principle of law, 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, 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 indemnification. [*39 The Elsebe, 5 Rob. 173, 175. Whether a like principle ought not to be applied to the owner of the cargo, in cases where the ship originally sails on the voyage, under an enemy's license, has not been decided. The point was made in the supreme court in a recent case; but knowledge being brought home to the actual agent of the owners of the cargo, it became unnecessary to decide the more general principle. The Hiram, 1 Wheat. 440. There are many other cases, in which the act of the master will bind the owner of the cargo as well as the ship; such are resistance of the right of search, suppressing or fraudulently destroying the ship's papers, rescue by the neutral crew, after capture, &c. The Elsebe, 5 Rob. 173; The Dispatch, 3 Ibid. 279; The Nereide, 9 Cr. 388, 451. But though the act of a *neutral* master, in resisting search, binds both ship and cargo, yet it has been solemnly settled by the supreme court, that the resistance of a *belligerent* master does not bind a neutral shipment, unless the proprietor has co-operated in the resistance. The Nereide, 9 Cr. 388. In a very recent case, however, Sir W. Scott has asserted the contrary doctrine. The Fanny, 1 Dods. 443. But the act of the agent or consignee of the cargo, whether he be the master or not, is

conclusive upon the owner of the cargo. The Vrow Judith, 1 Rob. 150. And the act of a general agent of the cargo, in covering the enemy's property, in the same shipment with his principal's property, affects the whole with condemnation, although the principal had no knowledge of the illegal act. The St. Nicholas, 1 Wheat. 417; Phœnix Ins. Co *v.* Pratt, 2 Binn. 308. And the same principle is applied in the case of simulated papers; for the carrying of simulated papers is an efficient cause of condemnation. Oswell *v.* Vigne, 15 East 70. But in peculiar circumstances, the act of an agent of the cargo will be liberally construed in favor of his principal. As, if the agent be a belligerent, and has received orders to purchase goods, before the war, or before a blockade, his acts in making the shipment, during a blockade, are not binding on his principal, unless he had had an opportunity to countermand the orders, and neglected it; for the agent, in such cases, may have a personal interest in exporting
*40] *the goods. The Neptunus, 1 Rob. 173; Cases cited in The Hoop, Ibid. 196. The Dankbaarheit, 1 Dods. 183. But the act of the master will not bind even the owner of the ship, unless it be in cases within the scope of his ordinary authority. If, therefore, the master of a non-commissioned merchant ship make a capture, the owner is not responsible in damages, if it turn out to be illegal. Bynk. Q. J. Pub., lib. 1, ch. 19, Du Ponceau's ed. p. 147, 153.

It frequently turns out, on examination of the claims and evidence in the prize court, that the case is of one mere re-capture; and questions arise, whether the original belligerent owner is entitled to restitution or not, and if so entitled, what is the compensation to be allowed by way of salvage? Bynkershoek asserts, that by the general maritime law, if, after capture, the ship and cargo be carried *infra præsidia* of the enemy, or of his ally, or of a neutral, the title of the original belligerent proprietor is completely gone, and is not revived by a re-capture. Q. J. Pub. lib. 1, ch. 5, Du Ponceau's ed. p. 36. And in this he stands supported by learned authorities. The Ceylon, 1 Dods. 105; L'Actif, Ibid. 185. But see Martens on Re-captures, ch. 3, p. 107. In most of the states of Europe, municipal regulations have been made, which settle the rights of their own subjects. Bynk. *ubi supra;* Valin, *Des Prises*, ch. 6, p. 84; Azuni, part 2, ch. 4; Martens on Re-captures, ch. 3, § 2, p. 146; The Adeline, 9 Cr. 244,
*41] 288.(*a*) And in *England, the right of postliminy is, by statute, as between subjects, preserved for ever, except where the vessel, after capture, has been fitted out by the enemy for war; so that the original owner may, in all other cases, claim restitution, upon the payment of a stipulated salvage. Horne's Compend. ch. 4, p. 34; Marshall on Ins. b. 1, ch. 12, § 8; The Sedulous, 1 Dods. 253. In cases, however, not governed by municipal regulations, although all nations agree, that to change the property by capture, a firm and secure possession is necessary, yet the practice of nations is so various, that it seems difficult to collect a general rule, as to what constitutes such firm and secure possession, which might properly be asserted to be the law of nations. The Santa Cruz, 1 Rob. 49; L'Actif, 1 Dods. 185; The Ceylon, Ibid. 105. The rule of bringing *infra præsidia*, or, in proper cases, the rule of pernoctation, or twenty-four hours' possession, seems generally recognised by the most eminent jurists on the continent of Europe. The Ceylon, 1 Dods. 105; L'Actif, Ibid. 185 (see the Santa Cruz, 1 Rob. 50); and it appears to have been anciently the doctrine of the British

(*a*) Si aucun navire de nos sujets pris par nos ennemis, a été entre leurs mains jusques à vingt quatre heures, et après, qu'il soit recous et repris par aucuns de nos sujets, la prise sera déclarée bonne: mais si ladite reprise est faite auparavant les vingt-quatre heures, il sera restitué avec tout ce qui étoit dedans, et en aura toutefois le navire de geuerre qui l'aura recous et repris, le tiers. Ordonnance de 1584, art. 61; Emérigon, *Des Assurances*, tom. 1, p. 495. Si aucum navire de nos sujets est repris sur nos ennemis, aprés qu'il aura demeuré entre leurs mains pendant vingt-quartre heures, la prise en sera bonne: et si elle est faite avant les vingt-quatre heures, il sera restitué au propriétaire avec tout ce qui étoit dedans, à la réserve du tiers qui sera donné au navire qui aura fait la recousse. Ordonnance de 1681, liv. 3, tit. 9, *Des Prises*, art. 7. Ibid. Ordonnance du 15 Juin 1779. Emérigon, *ubi supra.*

law. Ibid.(*a*) According, however, to the present law in Great Britain, property captured is not deemed to be changed so as to bar the owner, in favor of a vendee or re-captor, until there has been a sentence of condemnation; and therefore, until that period, the title of the original owner is not divested, and he is entitled to *restitution, in the hands of whoever he may find the property. Le Caux *v.* Eden, [*42 2 Doug. 613, 616; Goss *v.* Withers, 2 Burr. 694; The Flad Oyen, 1 Rob. 134; The Santa Cruz, Ibid. 49; The Fanny and Elmira, Edw. 117; The Ceylon, 1 Dods. 105; L'Actif, Ibid. 185. If such sentence of condemnation is passed, it is a sufficient title to a vendee (The Purissima Conception, 6 Rob. 45; The Victoria, Edw. 97); and would also have entitled a re-captor to condemnation of the property, if the statute had not stepped in, and as to British subjects, revived the *jus postliminii* of the original owner, on payment of salvage. As to the interests of British subjects, a condemnation by an incompetent court is a mere nullity (The Flad Oyen, 1 Rob. 134); though, as to the interests of other parties, the British prize courts will not inquire into the sufficiency of the sentence. The Cosmopolite, 3 Rob. 333. A condemnation by an enemy's consul, in a neutral port, is deemed invalid. The Flad Oyen, 1 Rob. 134. But a condemnation of a prize ship, while lying in a neutral port, by a regular court of admiralty, in the hostile country, is clearly valid. The Henrick and Maria, 4 Rob. 43; The Christopher, 2 Ibid. 207; The Victoria, Edw. 97; Hudson *v.* Guestier, 4 Cr. 293; s. c. 6 Ibid. 281; The Arabella, 2 Gallis. 368. A condemnation, originally defective, from the incompetency of the court, may be made good by the valid decree of an appellate court. The Falcon, 6 Rob. 194. And a title, originally defective, being acquired under the sentence of an incompetent court, is cured by an intervening peace, which has the effect of quieting all titles of possession arising from the war. The Schooner Sophie, 6 Rob. 138. Where a party has purchased a captured ship, under an invalid title, but which was not notoriously bad, the court, on decreeing restitution to the original owner, will allow the party for any amelioration beyond the ordinary repairs, but not for ordinary repairs. The Kierlighett, 3 Rob. 96; The Perseverance, 2 Ibid. 239; The Nostra de Conceicas, 5 Ibid. 294. And where a ship has been captured and carried into a hostile port, and is afterwards sold to a neutral, a presumption arises, that she has been regularly condemned, *and the proof of the contrary rests on the claimant, and [*43 not the purchaser. The Countess of Lauderdale, 4 Rob. 283.

In the United States, cases of re-capture have been the object of several legislative provisions, which, so far as they apply, supersede all discussions upon the principles of general law. The act of congress of the 3d March 1800, ch. 14 (2 U. S. Stat. 16), directs, that in cases of re-captures of vessels or goods belonging to persons resident within, or under the protection of, the United States, the same not having been condemned as prize by competent authority, before the re-capture, shall be restored, on payment of salvage of one-eighth of the value, if re-captured by a public ship, and one-sixth, if re-captured by a private ship; and 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-capture, then the salvage to be one moiety of the value. If the re-captured vessel belong to the government, and be unarmed, the salvage is to be one-sixth, if re-captured by a private ship, and one-twelfth, if re-captured by a public ship; if armed, then the salvage to be one moiety, if re-captured by a public ship. In respect to public armed ships, the cargo pays the same rate of salvage as the vessel, by the express words of the act; but in respect to private ships, the rate of salvage (by some probable omission in the act) is the same on the cargo, whether the vessel be armed or unarmed. The Adeline, 9 Cr. 244.

(*a*) Quoiqu'il en soit, ce délai de vingt-quatre heures adopté par ladite ordonnance de 1584 et par celle-ci, passé lequel la prise par recousse est bonne, et exclut la réclamation du propriétaire du vaisseau pris et repris, ne peutêtre regardé que comme un sage réglement, puisqu'il est du droit commun de l'Europe, comme Loccenius l'atteste, de jure maritimo, lib. 2, cap. 4, n. 4 *et* 8, fol. 157, 162 *et* 163: où il dit que c'est l'usage observé en France, en Espagne, en Hollande, et chez les autres nations commerçantes par mer. Valin, sur l'Ordonnance, liv. 3, tit. 9, *Des Prises*, art. 8.

Practice in Prize Causes.

What constitutes a setting forth as a vessel of war, within the act, has not been settled by any adjudications in the United States; but the same question has been decided by the British prize courts, in cases arising under a similar clause in the British prize acts, which, indeed, seems recognised as a part of their common law of prize. The Ceylon, 1 Dods. 105, 119. And it has been there settled, that where a ship was originally armed for the slave-trade, and after capture, an additional number of men were put on board, but there was no commission of war, and no additional arming, it was not a setting forth as a vessel of war, under the prize act. The Horatio, 6 Rob. 320. But a commission of war is decisive, if there be guns on board. The Nostra Signora del Rosario, 3 Rob. 10; The Ceylon, 1 *Dods. 105. And where the *44] vessel has, after the capture, has been fitted out as a privateer, it is conclusive against her, although when re-captured, she is navigating as a mere merchant ship; for where the former character of a captured vessel had been obliterated by her conversion into a ship of war, the legislature meant to look no further; but considered the title of the former owner for ever extinguished. L'Actif, 1 Dods. 185. Where it appeared, that the vessel had been engaged in the military service of the enemy, under the appointment of the minister of marine, it was held a sufficient proof of a setting forth as a vessel of war. The Santa Brigada, 3 Rob. 56. So, where she is armed, and is in the public military service of the enemy, by those who have competent authority so to employ her, although she be not regularly commissioned. The Ceylon, 1 Dods. 105. But the mere employment in the military service of the enemy, is not a sufficient setting forth for war; but if there is a fair semblance of authority in the person directing the vessel to be so employed, and nothing upon the face of the proceedings to invalidate it, the court will presume that he is duly authorized; and the commander of a single ship may be presumed to be vested with this authority, as a commander of a squadron. The Georgiana, 1 Dods. 397. The valuation of the property, when restored under the acts respecting re-capture, is to be made upon its value at the place of restitution, and not of re-capture. The Progress, Edw. 210, 222.

In respect to re-captures of the ships and cargoes of allies or co-belligerents, from the hands of a common enemy, the general rule is, to apply the principle of reciprocity; and if they, under like circumstances, restore on salvage, or condemn generally, to deal out to them the same measure of reciprocal justice. The Santa Cruz, 1 Rob. 50.(*a*) If there should exist a country having no rule on the subject, then the re-capturing country applies its own rule, as to its own subjects, to the case, and rests on the presumption that the same rule will be administered in the future practice of the other party. The Santa Cruz, 1 Rob. 50; The San Francisco, Edw. 179. The act *of *45] congress of the 3d March 1800, ch. 14, adopts the same regulation. The Adeline, 9 Cr. 244.

Salvage is not, in general, allowed on the re-capture of neutral property, unless there be danger of condemnation, or such unjustifiable conduct on the part of the government of the captors, as to bring the property into jeopardy. The War Onskan, 2 Rob. 299; The Eleonora Catharina, 4 Ibid. 156; The Carlotta, 5 Ibid. 54; The Huntress, 6 Ibid. 104; The Acteon, Edw. 254; The Sansom, 6 Rob. 410; Talbot *v.* Seeman, 4 Dall. 34; s. c. 1 Cr. 1.(*b*) But even if, in such a case of re-capture, the re-captors have entitled themselves to salvage, they may forfeit the claim, by the irregularity of their conduct. The Barbara, 3 Rob. 171.

It is no objection to an allowance of salvage on a re-capture, that it was made by a non-commissioned vessel; for no letters of marque are necessary for this purpose, nor is a re-capture at all made under the authority of prize. It is the duty of every citizen, to assist his fellow-citizens in war, and to retake their property out of the possession of

(*a*) Vide Valin, *Sur l'Ordonnance*, tom. 2, p. 262.

(*b*) Sa Majesté a jugé pendant la derniere guerre, que la reprise du navire neutre, faite par un corsaire Français (lorsque le navire n'était pas chargé de marchandises prohibées ni dans le cas d'être confisqué par l'ennemi), était nulle. Code des Prises, ed. 1784, tom. 2. See also the opinion of M. Portalis, in the case of The Statira, 1 Cr. 102, note.

the enemy; and no commission is necessary to give a person so employed a title to the reward, which the law allots to that meritorious act of duty. The Helen, 3 Rob. 224. And if a convoying ship actually re-capture one of her convoy, which has been previously captured by the enemy, it entitles her to salvage. The Wight, 6 Rob. 315. But a mere rescue of a ship associated in the same common enterprise, gives no right to salvage. The Belle, Edw. 66.

To entitle a party to salvage, as upon a re-capture, there must have been an actual or constructive capture; for military salvage will not be allowed, in any cases where the property has not been actually rescued from the enemy. The Franklin, 4 Rob. 147. But it is not necessary, that the enemy should have *actual possession; it is sufficient, if the property be completely under the dominion of the enemy. [*46 The Edward and Mary, 3 Rob. 305; The Pensamento Felix, Edw. 115. If, however, a vessel be captured going in distress into an enemy's port, and is thereby saved, it is merely a case of civil and not of military salvage. The Franklin, 4 Rob. 147. But to constitute a re-capture, it is not necessary, that the re-captors should have a bodily and actual possession; it is sufficient, if the prize be actually rescued from the grasp of the hostile captor. The Edward and Mary, 3 Rob. 305.

Where a hostile ship is captured, and afterwards is re-captured by the enemy, and is again re-captured from the enemy, the original captors are not entitled to restitution, on paying salvage, but the last captors are entitled to all the rights of prize, for, by the first re-capture, the whole right of the original captors is divested. The Polly, 4 Rob. 217, note *a*. The Astrea, 1 Wheat. 125.(*a*) And where the original captors have abandoned their prize, and she is subsequently captured by other persons, the latter are solely entitled to the property. The Lord Nelson, Edw. 79; The Diligentia, 1 Dods. 404. But if the abandonment be involuntary, and produced by the terror of superior force, and especially, if produced by the act of the second captors, the rights of the original captors are completely revived. The Mary, *ante*, p. 123. And where the enemy has captured a ship, and afterwards deserted her, and she is then re-captured, it is not to be considered as a case of derelict, for the original owner never had the *animus derelinquendi;* and therefore, she is to be restored on the payment of salvage; but as it is not strictly a re-capture within the prize act, the rate of salvage is discretionary. The John and Jane, 4 Rob. 216; The *Gage, 6 Ibid. 273; The Lord Nelson, Edw. 79.(*b*) But if the abandonment by the enemy, be produced by the terror [*47

(*a*) Veut et entend Sa Majesté que les prises des navires ennemis, faites par ses vaisseaux ou par ceux de ses sujets armés en course, recousses par les ennemis, et ensuite reprises sur eux, appartiennent en entier au dernier preneur. Arret du Conseil d'Etat du 5 Novembre 1748. Valin, *Sur l'Ordonnance*, tom. 2, p. 257, 258, 259; *Traité des Prises*, ch. 6, § 1. Pothier, *De Propriété*, No. 99.

(*b*) Si le navire, sans être recous est abandonné par les ennemis, ou si par tempête ou autre cas fortuit, il revient en la possession de nos sujets, avant qu'il ait été conduit dans aucun port ennemi; il sera rendu au propriétaire qui le réclamera dans l'an et jour, quoiqu'il ait été plus de vingt-quatre heures entre les mains des ennemis. Ordonnance de 1681, liv. 3, tit. 9, *des Prises*, art. 9. Pothier is of the opinion, that these words, *avant qu'il soit entré dans aucun port ennemi*, are to be understood, not as restricting the right of restitution on payment of salvage, to the particular case mentioned, of a vessel which is abandoned by the enemy, before being carried into port, which case is mentioned merely as an example of what ordinarily happens, parce que c'est le cas ordinaire auquel un vaisseau échappe à l'ennemi qui l'a pris, ne pouvant plus guere lui échapper lorsqu'il a été conduit dans ses ports. *De Propriété*, No. 99. But Valin holds, that the terms of the ordinance to be literally construed, and that the right of the original proprietor is completely divested by the carrying into an enemy's port. *Sur l'Ordonnance*, Ibid. He is also of the opinion, that this species of salvage is to be analogized to the case of shipwreck, and that the re-captors are entitled to one-third of the value of the property saved. Ibid. But Azuni contends, that the rate of salvage in this case is not regulated by the ordinance, but is discretionary, to be proportioned to the nature and extent of the service performed, which can never be equal to the rescue of property from the hands of the enemy, by military force, or to the recovery of goods lost by shipwreck. Part 2, ch. 4, § 8, 9. Emerigon is also opposed

of hostile force, it is a re-capture within the terms of the prize act. The Gage, 6 Rob. 273. Where the captors abandon their prize, and she is afterwards brought into port by neutral salvors, it has been held, that the neutral court has jurisdiction to decree salvage, but cannot restore the property to the original belligerent owners; for, by the capture, the captors acquired such a right of property as no neutral nation could justly impugn or destroy, and consequently, the proceeds (after deducting salvage) belong to
*48] the original captors, and neutral nations *ought not to inquire into the validity of a capture as between belligerents. The Mary Ford, 3 Dall. 188. But if the captors make a donation of the captured vessel to a neutral crew, the latter are entitled as salvors, but after deducting salvage, the remaining proceeds will be decreed to the original owner. The Adventure, 8 Cr. 227; s. c. 1 Wheat. 128 n. And it seems to be a general rule, liable to but few exceptions, that the rights of capture are completely divested by a hostile re-capture, escape or a voluntary discharge of the captured vessel. Hudson *v.* Guestier, 4 Cr. 293; s. c. 6 Ibid. 281; The Diligentia, 1 Dods. 404. And the same principle seems applicable to a hostile rescue; but if the rescue be made by a neutral crew of a neutral ship, it may be doubtful, how far such an illegal act, which involves the penalty of confiscation, would be held, in the courts of the captor's country, to divest his original right, in case of a subsequent re-capture.

As to re-captors, though their right to salvage is extinguished by a subsequent hostile re-capture, and regular sentence of condemnation, carried into execution, divesting the owners of their property, yet, if the vessel be restored upon such re-capture, and resumes her voyage, either by an acquittal in court, or a release of the sovereign power, the re-captors are redintegrated in their right of salvage. The Charlotte Caroline, Dods. 192. And re-captors and salvors have a legal interest in the property, which cannot be divested by other subjects, without an adjudication in a competent court; and it is not for the government's ships or officers, or for other persons, upon the ground of superior authority, to dispossess them, without cause. The Blendenhall, 1 Dods. 414.

In all cases of salvage, where the rate is not fixed by positive law, it is in the discretion of the court, as well upon re-captures, as in other cases. Talbot *v.* Seeman, 1 Cr. 1; The Apollo, 3 Rob. 308; Bynk. Q. J. Pub. lib. 1, ch. 5, Du Ponceau's ed. p. 36, 41, 42. And where, upon a re-capture, the parties have entitled themselves to a military salvage, under the prize acts, the court may also award them, in addition, a
*49] civil salvage, if they have subsequently rendered services, by succorring *the vessel in distress from perils of the seas. The Louisa, 1 Dods. 317.

In the construction of the British prize acts (and similar questions may arise under our own act respecting re-captures), it has been held, that a revenue-cutter, having a letter of marque, is to be deemed a private ship of war, and entitled to a salvage of one-sixth. The Helen, 3 Rob. 224; The Sedulous, 1 Dods. 253. But the British revenue-cutters, belonging to private individuals, although fitted out, manned and armed at the expense of the government, it may be thought doubtful, whether this authority applies in the United States, where the revenue-cutters are generally built and owned, as well as equipped, manned and armed, by the government. But a store-ship, armed at the public expense, and commanded by commissioned officers, is clearly to be deemed a public armed ship. The Sedulous, 1 Dods. 253.

In the progress of the cause, an unlivery of the cargo often becomes necessary, either to ascertain its nature and quality (The Liverpool Packet, 1 Gallis. 513; Marriott's Form. 229; The Carl Walter, 4 Rob. 207; The Richmond, 5 Ibid. 325; The Jonge Margaretha, 1 Ibid. 189; The Oster Risoer, 4 Ibid. 199), or more effectually to preserve it from injury and pillage (Marriott's Form. 323), or because the ship stands in a predicament altogether distinct from that of the cargo. The Hoffnung, 6 Rob. 231; The Prosper, Edw. 72; Marriott's Form. 224. In all these, and other proper cases, the prize court will, upon proper application, decree an unlivery. Upon ordering an unliv-

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to Valin on this subject, and cites, in support of his own doctrine, the Consolato del Mare, ch. 287, and Targa, ch. 46, n. 10. Emerigon *Des Assurances*, tom. 1, p. 504, 505.

ery, a warrant or commission of unlivery is directed to some competent person, and usually to the marshal, to unlade the cargo, and to make a true and perfect inventory thereof. Marriott's Form. 224. At the same time, a warrant or commission of appraisement is usually directed to some competent persons, who are to reduce into writing a true and perfect inventory of the cargo, and upon oath, to appraise the same, according to its true value. In England, this commission is sometimes *directed to a person who is authorized to choose and swear the appraisers and himself. Marriott's [*50
Form. 227. But in the United States, the general practice is, for the courts to appoint the appraisers, in the first instance. And where it becomes necessary or proper to unlade the cargo, for inspection of its nature or quality, a commission of inspection is issued, directed to some competent persons, in like manner, to return an inventory thereof, with a certificate of the particulars, names, descriptions and sortments of the goods, together with their several marks and numbers, and the nature, use, quantities and qualities thereof. Marriott's Form. 229.(*a*) The court may also, in its discretion, order the ship or cargo, or both, to be removed to another place or port; for having the custody of the thing, it is bound to use all reasonable precautions to preserve it, and to consult the best interests of all parties; and in such case, a commission of removal is issued, which is usually directed to the marshal; but the court may direct it to any other person. Marr. Form. 234; The Rendsberg, 6 Rob. 142; The Sacra Familia, 5 Ibid. 360.

An unlivery of the cargo is considered as done for the benefit of all parties, and therefore, the expense is generally borne by the party ultimately prevailing. If the captors apply for an unlivery, and the property is condemned, the expense falls on the captors; but if restitution be awarded, the court, in its discretion, usually makes the expense a charge on the cargo. The Industrie, 5 Rob. 88. (*b*.)

*After unlivery and appraisement, the court sometimes decrees a sale, or [*51
delivery on bail, of the property, to the captors or claimants. Where a sale is ordered, which is usually done, where the ship and cargo are in a perishing condition, or liable to deterioration pending the process (The St. Lawrence, 1 Gallis. 467; The Frances, Ibid. 451; Jennings *v.* Carson, 4 Cr. 2; Stoddart *v.* Read, 2 Dall. 40; Marriott's Form. 237, 318; The Copenhagen, 3 Rob. 178), in England, a commission of appraisement and sale usually issues to some competent persons, jointly and severally, to reduce into writing a true inventory of the goods, and to choose appraisers, who are to appraise the same on oath; and after appraisement, the commissioners are to expose the same to public sale, and bring the proceeds into the registry of the court. Marriott's Form. 237, 318. And in England, it is the regular practice of the court, that one of the commissioners should be named by the claimant. The Carl Walter, 4 Rob. 207, 211. And in the United States, a sale is sometimes ordered, without a previous appraisement; or, if an appraisement be ordered, the appraisers are always named by the court itself. In case of an appraisement and sale, the expenses of taking out the commission, &c., are, in the first instance, borne by the party applying for the sale, and ultimately as the court may direct (The Carl Walter, 4 Rob. 207); and such sale is usually, in England, made by the marshal; but it seems, that the court may direct it to be made by any other person. The Rendsberg, 6 Rob. 142. In the United States, the sale is invariably made by the marshal; and it would seem highly proper,

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(*a*) S'il est nécessaire avant le jugement de la prise de tirer les marchandises du vaisseau, pour en empêcher le dépérissement, il en sera fait inventaire en presenee de notre procureur et des parties intéressées, qui le signeront si elles peuvent signer, pour ensuite être mises sous la garde d'une personne solvable, ou dans des magasins fermans à trois clefs différentes, dont l'une sera délivrée aux armateurs, l'autre au receveur de l'amiral, et la troisieme aux reclamateurs, si aucun se présente, sinon à notre procureur. L'Ordonnance de 1687, liv. 3, tit. 9, *des Prises*, art. 27.

(*b*) Qu'à l'avenir, tous les frais faits tants pour la conservation ou la vente des marchandises des prises, dans le cas ou elle sera permise, que pour la subsistance du maître et autres officiers mariners ou matelots qui y seront restés, seront pris sur le bâtiment, et payés par le réclamateur qui en aura obtenu la main-levée, lorsqu'il en sera remise en possession. Arrêt du Conseil du 23 Décembre 1705.

in all cases, to have a previous inventory and appraisement, with a view to check any attempt of fraud, and to establish the proper responsibility of the officers of the court, in cases of negligent custody. This is the regular practice of the prize court, and the most obvious reasons of public policy require a strict adherence to it.

*52] The subject of delivery, either of the property itself, or of its *proceeds, has been already partially discussed in the former note, and to the authorities there referred to may be added the following: The Rendsberg, 6 Rob. 142, 144; The Frances, 1 Gallis. 451; The Diana, 2 Ibid. 93. Sometimes, the property is delivered on bail, to return the same, or the full value, to answer the decree; and in such case, the court have a right to inquire what is the full value, and to decree accordingly. Brymer *v.* Atkins, 1 H. Bl. 264. And if the bail security be taken by way of recognisance (which is irregular), and not by way of stipulation, still the court may enforce it as a stipulation. Brymer *v.* Atkins, *ut supra;* The Alligator, 1 Gallis. 145. Upon such a delivery on bail, the sureties are not responsible beyond the sum in which they become bound. Smart *v.* Wolff, 3 T. R. 323. But the principal may be made to respond to the full value of the property. In ordinary cases, however, the property is delivered on bail, at an appraised value; and in such casses, the principal and sureties are bound to the stipulated value, but not further. If, therefore, there be a delivery on bail, at an admitted value, the court will not listen to an application to diminish the amount to the proceeds of a subsequent sale, but will hold the parties to the appraised or admitted value. The Betsey, 5 Rob. 295, and note *a*, 296. In case of a delivery on bail, the expenses of the delivery are to be borne by the delivering party, unless it is otherwise directed by the court. The Rendsberg, 6 Rob. 142. But generally, the court directs the expenses of the application to be borne by the party who applies for the delivery on bail. And all expenses, after the delivery, are exclusively borne by the party receiving the property. 5 Rob. 295, note *a*. Bail-bonds or securities to answer adjudication are not discharged by lapse of time; but may, at any distance of time, be enforced by the court; but after a great length of time, the court will, in its discretion, refuse a monition or attachment to enforce the bond, unless some reasonable ground for the delay be established. The Vreede, 1 Dods. 1. Nor are these bonds considered as mere personal securities, given to the individual captors, although taken in their names; they are considered as securities given to the court, to abide the adjudication of all events at the time impending before it. The court is not in the habit of

*53] considering bonds precisely in the *same limited way as they are viewed by the courts of common law. In those courts, they are very properly considered as mere personal securities, for the benefit of those parties to whom they are given. In prize courts, they are subject to more enlarged considerations; they are there regarded as pledges or substitutes for the thing itself, in all points fairly in adjudication before the court. If, therefore, a bond be given to the actual captors, to answer the adjudication of the property, which should, from the locality of the capture, or from other circumstances, be condemned to the government, the bail would, in such case, be answerable, in the admiralty, to the government. The Neil Elwin, 1 Dods. 50. But if the property, at the time of capture, was neutral, and delivered on bail, pending the proceedings, and hostilities subsequently intervene with the neutral country, and in consequence thereof, the property is condemned to the government, it seems, that the court is not in the habit of enforcing the bail-bond in such cases, because the event was not originally in the contemplation of the parties, at the time they entered into the security. The Neil Elwin, *ut supra.* Whether this doctrine would be sustained in the United States, is a question upon which there is is no decision to guide the judgment; but certainly, much argument may be used against the asserted exemption; for the bail-bond being a substitute for the property itself, there does not seem any very conclusive reason, why it should not be subject to all the events which would have affected the property, if still in the custody of the court.

It frequently happens, that enemies' goods are found on board of neutral ships; and conversely, that neutral goods are found on board an enemy's ship. In these cases,

questions often occur, as to the right of the parties to freight, expenses, &c. And first, in respect to neutral ships. In general, where enemies' goods are captured in a neutral ship, the captors take *cum onere*, and if the conduct of the neutral has been perfectly fair and impartial, it is the practice of the prize court, to allow him his *full freight, in the same manner as if the original voyage had been performed. The [*54.
Hoop, 1 Rob. 196, 219; The Antonia Johanna, 1 Wheat. 159. And in like manner, to allow him his expenses. The Hoop, 1 Rob. 196; The Bremen Flugge, 4 Ibid. 90; The Der Mohr, Ibid. 314; Smart *v.* Wolff, 3 T. R. 323; Vattel, lib. 3, ch. 7, § 115; The Consolato del Mare, ch. 273; Sir W. Scott and Sir J. Nicholl's letter to Mr. Jay, *ubi supra;* The Copenhagen, 1 Rob. 289; The Anna Catharina, 6 Ibid. 10; The Catharina Elizabeth, Acton 309; The Fortuna, Edw. 56. The freight allowed is not, however, necessarily the rate agreed on by the parties, if it be inflamed by extraordinary circumstances; but a reasonable freight only will, in such cases, be allowed. The Twilling Riget, 5 Rob. 82. And where the goods have been once unlivered, by order of court, the whole freight for the voyage is due, and the owner of the goods, even in case of restitution, cannot demand the ship to reload them, and carry them to the original port of destination; for, by the separation, the ship is exonerated. The Hoffnung, 6 Rob. 231; The Prosper, Edw. 72. But it would be otherwise, if there had been no unlivery. The Copenhagen, 1 Rob. 289. And the neutral will be allowed his freight, where he carries the goods of one belligerent to its enemy, for though such a trade be illegal as to the subjects, it is not so as to neutrals. The Hoop, 1 Rob. 196, 219. So, on a voyage from the port of one enemy to the port of another enemy. The Wilhelmina, 2 Rob. 210, note. But if the neutral has conducted himself fraudulently or unfairly, or in violation of belligerent rights, he will not be allowed freight or expenses, and in flagrant cases, will be visited with confiscation, even of the ship itself. And he is never allowed freight, where he has used false papers (The Atlas, 3 Rob. 299, 304, note; Sir W. Scott and Sir J. Nicholl's letter to Mr. Jay, *ubi supra);* nor upon the carriage of contraband goods (Ibid.; Bynk. Q. J. Pub., Du Ponceau's ed., 81; The Sarah Christina, 1 Rob. 237; The Mercurius, Ibid. 288; The Emanuel, Ibid. 286; The Neptunus, 3 Ibid. 108; The Neutralitet, Ibid. 295; The Oster Risoer, 4 Ibid. 199; The Commercen, 1 Wheat. 382); nor where there has been a spoliation of papers (The Rising Sun, 2 Rob. 104; The Madonna del Burso, *4 Ibid. 169, 183); nor where the cause of capture was the ship and not the cargo. The Fortuna, Edw. 56. But where part [*55
of the goods are condemned as contraband, and part restored, after unlivery of the cargo, freight may be decreed as a charge upon the part restored. The Oster Risoer, 4 Rob. 199. If the goods are unlivered, under a hostile embargo upon neutral ships, they are discharged of the lien of the freight; and if freight be decreed, it can only be against the original consignees or freighters, and not against a prior purchaser, who has received them on bail. The Theresa Bonita, 4 Rob. 236.

When a decree is made that the freight shall be a charge on the cargo, application must be made to the court, for the sale of so much as is necessary for this purpose. The Vrow Margaretha, 4 Rob. 304, note. In general, where a ship and cargo are restored, with a decree that the freight shall be a charge on the cargo, if the proceeds of the cargo are not sufficient to pay the freight, the captors are not responsible for the deficiency. The Haabet, 4 Rob. 302. But although the capture be right, yet, if afterwards, the cargo be lost by the negligence of the captors, and the freight be decreed a charge on the cargo, the captors are responsible to pay it. The Der Mohr, 4 Rob. 314. Where the freight of the neutral, and the expenses of the captors, are both decreed to be a charge on the cargo, and the proceeds are insufficient to discharge both, priority of payment of the freight is, in ordinary cases, allowed by the court, as a lien that takes place of all others. The Bremen Flugge, 4 Rob. 90.

In the next place, as to the allowance of freight to the captors. This may happen, when the ship is hostile, and the cargo, or a part thereof, is neutral. The general rule is, that if neutral goods are found on board of a hostile ship, the captors are not entitled to freight therefor, unless they carry the goods to the port of destination. Bynk. Q. J. Pub. lib. 1, ch. 13, Du Ponceau's ed., p. 105; The Diana, 5 Rob. 67; The Fortuna,

Edw. 56. And the rule is applied, notwithstanding there may have been a sale of the goods, beneficial to the owners. The Vrow Anna Catharina, 6 Rob. 269; The Fortuna, Edw. 56. But there are exceptions to the rule itself; for if the captors bring *56] *the cargo to the country where the claimants ultimately designed to send it, but were compelled to take a circuitous route, under existing circumstances, the captors are entitled to freight, notwithstanding the ship was actually destined to another country, there to land it. The Diana, 5 Rob. 67. So, if brought to the same country, but not to the port of actual destination. The Vrow Henrietta, 5 Rob. 75, note. But see The Wilhelmina Eleonora, 3 Ibid. 234. So, where the goods are brought to the country where the proceeds were ultimately destined, and would have been brought directly, but for a prohibition of municipal law. The Ann Green, 1 Gallis. 274. Where freight is decreed to the captors, it will be paid by the court, out of the cargo or its proceeds, if yet remaining in the admiralty. The Fortuna, 4 Rob. 278. And under particular circumstances, application may be made to the court, to decree the sale of so much of the cargo as may be necessary to be sold for the discharge of freight. 4 Rob. 304, note. And where freight is allowed to the captors, if they have done any damage to the cargo, the amount may be deducted by way of set-off or compensation. The Fortuna, 4 Rob. 278.

As to the allowance of costs and expenses. In cases where further proof is directed, costs and expenses are never allowed to the claimant (The Einigheden, 1 Rob. 323); nor where the neutrality of the property does not appear, by the papers on board, and the preparatory evidence (Sir W. Scott and Sir J. Nicholl's letter to Mr. Jay, *ubi supra;* Opinion of M. Portalis in The Statira, 2 Cr. 102, note); nor where papers are spoliated or thrown overboard, unless the act be produced by the captor's misconduct, as by firing under false colors (The Peacock, 4 Rob. 185); nor where the master or crew, upon the preparatory examinations, grossly prevaricate (Ibid.); nor where any part of the cargo is condemned (The William, 6 Rob. 316); nor where the ship comes from a blockaded port (The Frederick Malke, 1 Rob. 36; The Betsey, Ibid. 93; The Vrow *57] Judith, Ibid. 150); nor if the ship be restored by consent, *without reserving the question of costs and expenses. The Maria Powlona, 6 Rob. 236. But in all these cases, it is in the discretion of the court, to allow the captors their costs and expenses. Sir W. Scott and Sir J. Nicholl's letter to Mr. Jay, *ubi supra.* And in general, wherever the captors are justified in their capture, their costs and expenses are decreed to them by the court, in case of restitution of property. The Imina, 3 Rob. 167; The Principe, Edw. 70. Therefore, they are allowed, where the original destination was to a blockaded port, although changed on hearing of the blockade (The Imina, 3 Rob. 167); where ships, even of our own country, are captured sailing under false papers (The Sarah, 3 Rob. 330); where the nature of the cargo is ambiguous as to contraband (The Twende Brodre, 4 Rob. 33; The Gute Geselschaft Michael, Ibid. 94; The Christina Maria, Ibid. 166); and generally, in all cases of false papers (The Nostra Signora de Piedade Nova Aurora, 6 Rob. 41); and in all cases where further proof is required. (See the Frances, 1 Gallis. 445; The Apollo, 4 Rob. 158; The Mary, 9 Cr. 126.) In cases where the captors' expenses are allowed, the expenses intended are such as are necessarily incurred in consequence of the act of capture. The Catharine and Anna, 4 Rob. 39. Such are the expenses of the captors' agent (The Asia Grande, Edw. 45); but not insurance made by the captors (The Catharine and Anna, 4 Rob. 39); nor expenses of transmitting a cargo from a colony to the mother country. The Narcissus, 4 Rob. 17. And property restored to the claimant is not be charged with any expenses for agency, or for taking care of it, unless made a charge by the court. The Asia Grande, Edw. 45. And the expense of an unlivery or delivery of the property which is restored, is to be borne by the captors or releasing party, and not by the property, unless it is so directed by the court. The Rendsberg, 6 Rob. 142. In general, where the property is condemned, the expenses of unlivery and warehousing, &c., fall on the captors (The Industrie, 5 Rob. 88); and where it is restored, the court will apportion them, in its discretion, on the captors and on the cargo. Ibid.

*In cases of neutral ships, it is usual to allow the master his adventure and personal expenses, if his conduct has been fair and unimpeachable. The Calypso, 2 Rob. 298; The Anna Catharina, 6 Ibid. 10. But where the master and crew prevaricate in their evidence, their adventures are never restored (The Anna Catharina, 4 Ibid. 120); nor where the ship is engaged in a fraudulent trade. The Christiansberg, 6 Ibid. 376.

Claims of joint capture are often interposed in prize causes; and though it is not usual for joint captors to assert their interest, until after a final decree of condemnation (*per* CROKE, J., in The Herkimer, 2 Hall's Law J. 133, 146; s. c. Stew. 128, 144; Home *v.* Camden, 2 H. Bl. 533); yet, as it may be asserted, with legal propriety, at any stage of the cause, it may be as well here to examine the doctrines which have been applied to this subject.

In respect to privateers, it is a general principle, that no right to share as joint captors accrues, merely by being in sight at the time when the prize is captured. There must be actual intimidation, or actual or constructive assistance. Bynk. Q. J. Pub. lib. 1, ch. 18, and a learned note of Mr. Du Ponceau, in his Translation, p. 144; Talbot *v.* Three Brigs, 1 Hall's Law J. 266; s. c. 1 Dall. 95; Martens on Capt. § 32, p. 91; The Santa Brigada, 3 Rob. 52; The Forsighied, Ibid. 311; L'Amitié, 6 Ibid. 261.(*a*) And the same principle is applied to *captures in sight of fortresses, and of land [*59
forces and armies, for they do not share, unless there be actual co-operation. Bynk. Q. J. Pub. lib. 1, ch. 18, Du Ponceau's ed., p. 146; The Dordrecht, 2 Rob. 55. And in such cases, the assistance ought to be material, in order to entitle the parties to share as joint captors. The Dordrecht, *ut supra*. The reason of this rule in relation to privateers, is, that the being in sight is not sufficient, with respect to them, to raise the presumption of co-operation in the capture. They clothe themselves with commissions of war, from views of private advantage only. They are not bound to put their commissions in use, on every discovery of an enemy. And therefore, the court does not presume, in their favor, from the mere circumstance of their being in sight, that they were there, with a design of contributing assistance, and engaging in the contest. There must be, as to them, the *animus capiendi*, demonstrated by some *overt* act; by some variation of conduct, which would not have taken place, but with reference to that particular object, and if the intention of acting against the enemy had not been entertained. L'Amitié, 6 Rob. 261; La Flore, 5 Ibid. 268. Formerly, the principle of constructive assistance was carried a great way; but the later inclination of courts has been rather to restrain than to extend the rule. The Vryheid, 2 Rob. 16; The Odin, 4 Ibid. 318; La Furieuse, Stew. 177. And where no actual assistance is alleged, the presumption of law leans in favor of the actual captors. The Robert, 3 Rob. 194. But even with respect to privateers, it is not necessary that a joint chaser should actually board a prize; it will be enough, if there is the *animus persequendi*, sufficiently indicated by the conduct of the vessel. The act of chasing, therefore, if continued for any length of time, and not abandoned at the time of capture, will be sufficient to found a title of joint capture. L'Amitié, 6 Rob. 261. But if the chase be discontinued, it is otherwise. Ibid.; The Waaksamheid, 3 Rob. 1. And if a ship has actually engaged another, and been beaten off, and yet remains in sight, about the enemy, with an evident intention *of persisting in the contest, and another vessel then comes up [*60
and makes the capture, the first is entitled to share in the capture. La Virginie, 5 Rob. 124.

Public policy has introduced a different rule as to public ships of war; and all such

(*a*) I. Aucun ne pourra être admis au partage d'un vaisseau pris sur les ennemis, s'il n'a contribué à l'arreter, ou contracté société avec celui qui s'en est rendu maitre. II. Celui qui pretend partager un vaisseau, ne sera point sensé avoir contribué à l'arrêter, s'il n'a combattu, ou s'il n'a fait tel effort, qu'en intimidant l'ennemi par sa présence, on en lui coupant chemin, et l'empêchant de s'echapper, il l'ait obligé à se rendre, sans qu'il lui suffise d'avoir été en vues et d'avoir donné chasse, lorsqu'il sera prouvé que cette chasse aura été inutile Réglement du 27 Janvier 1706.

ships being in sight, are deemed to be constructively assisting, and therefore, entitled to share in the capture. The Dordrecht, 2 Rob. 55; The Robert, 3 Ibid. 194; The Forsigheid, Ibid. 311; La Flore, 5 Ibid. 268; The Bellona, Edw. 63; The Furieuse, Stew. 177; The Sparkler, 1 Dods. 359.(*a*) The reason of this distinction is, that public ships are under a constant obligation to attack the enemy, wherever seen; and therefore, from the mere circumstance of being in sight, a presumption is sufficiently raised, that they are there *animo capiendi*. In the case of privateers, the same obligation does not exist; the law, therefore, does not give them the benefit of the same presumption. La Flore, 5 Rob. 268. Where the actual captor is a public armed ship, the rule is additionally supported, by the obvious policy of promoting harmony in the service. But the rule equally applies where the actual captor is a privateer (La Flore, 5 Rob. 268); though the privateer, in the converse case, is not entitled to share, from merely being in sight. The Santa Brigada, 3 Rob. 52. There are exceptions, however, to the rule, where the circumstances of the case repel the presumption of the *animus capiendi;* such is the case, where a public ship is in sight, but steering an opposite or
*61] different course, inconsistent with the notion of an intent *to capture. The Robert, 3 Rob. 194; The Drie Gebroeders, 5 Ibid. 339. But the mere sailing on a different course is not sufficient to defeat a title of joint capture; for it is not necessary that the two ships should pursue the enemy in the same line. If one vessel sail in one direction, and the other in a different direction, with the purpose of capturing, that difference of course would not defeat a unity of purpose, nor destroy the claim of joint capture. Le Niemen, 1 Dods. 9. But if the ship, claiming as joint captor, has changed her course, and discontinued the chase, before the capture, the claim is defeated, unless this conduct be occasioned by the fraud or misconduct of the capturing ship; for then the court will let in the claim, with a view to punish the fraud or misconduct. The Waaksamheid, 3 Rob. 1; The Robert, Ibid. 194; La Virginie, 5 Ibid. 124; The Drie Gebroeders, Ibid. 339. So, if the persons claiming as joint captors, have reconnoitred the prize, and abandoned all design of capture, they are not entitled to share. The Lord Middleton, 4 Rob. 153; The Drie Gebroeders, 5 Ibid. 339; L'Amitié, 6 Ibid. 261.

But even with regard to public ships, cases of constructive assistance in joint capture are not to be extended, and therefore, the court requires that the ship should be actually in sight. The Vryheid, 2 Rob. 16; The Odin, 4 Ibid. 318; The Furieuse, Stew. 177. Therefore, being in sight, a day or two before the capture, is not sufficient. It must be at the commencement of the engagement, or chase, or during its continuance. The Vryheid, 2 Rob. 16. And being in sight, when the enemy was first descried, and being detached before the chase, or preparations therefor, is not sufficient. Ibid. But it would be otherwise, if detached in sight of the enemy, at the moment of chase, and under preparation for chase; for there must be some actual contribution of endeavor as well as of general intention. Ibid. And it would seem to be very doubtful, whether the prize being seen from the mast-head, would bring the case within the rule of being in sight. The Robert, 3 Rob. 194. And a like rule is applied to the capitulation of an island; for, to entitle a public ship to share in the capture, she must
*62] not be detached upon another service, *but must be actually in sight at the time. The Island of Trinidad, 5 Rob. 92. And no antecedent or subsequent services in the expedition, will help the case, where the party would not otherwise be entitled to share. Buenos Ayres, 1 Dods. 28.

(*a*) Si plusieurs vaisseaux ont part à une même prise, et par vaisseaux preneurs sont entendus ceux qui se seront trouvés ensemble et à vue de la prise lorqu'elle aura été faite, ou faisant partie d'une même escadre, le montant de ce qui reviendra à chaque ivaisseau, frégat et autre bâtiment de Sa Majesté, sera constaté sur la proportion du nombre de leur canons en batterie et de leur calibre, à commencer par celui de quatre livres et au dessus, et du nombre d'equipage étant à bord de chaque vaisseau; et cette proportion ainsi établie, la répartition de ce qui reviendra à chaque vaisseau, sera faite sur le pied qui est prescrit dans l'article précédent. Ordonnance du Roi, concernant les prises faites par les vaisseaux, frégates et autres bâtimens de S. M., du 15 Juin 1757.

In respect also to a joint chase, if both ships are in chase, without any common co-operation, except such as the two parties, acting separately, with a common object in view, might produce, and during the chase, night comes on, and the enemy is lost sight of, and the ships still are in pursuit, but one of them cruising merely in search, and from conjecture adopts an erroneous course, and in consequence thereof, the prize is captured, either by the other, or by a third ship, on the next day, out of sight, the ship so erroneously cruising is not entitled to share as a joint captor, for it is a discontinuance of the chase, to change a course upon conjecture. Le Niemen, 1 Dods. 9; The Financier, Ibid. 61. Nor will it vary the case, that the position or course run by such ship had the effect of throwing the prize into the hands of the other ship, by inducing the prize to alter her own course. Ibid. It would, indeed, be an extravagant position, to admit, that every fleet or ship which, either by accident or design, diverts the course of an enemy, and by so doing occasions her capture by a totally distinct force, should be considered as a joint captor. Le Niemen, 1 Dods. 9. It is certainly true, that darkness, preventing sight, will not universally exclude from a right to share; nor can the rule be laid down universally the other way; for there may not, in every case, be evidence to show the proximity to the scene of action. Where it can be shown, that the asserted joint captor was in sight, when the darkness came on, and that it continued steering the same course, by which it was before nearing the prize, and that the prize itself also continued the same course, it amounts almost to demonstration, that the ships would have seen, and been seen by, each other, at the time of capture, if darkness had not intervened; and in such case, it ought to be let in to the benefit of joint capture. The Union, 1 Dods. 346. But if the chase be lost sight of, in the night, and the capture is afterwards made, at such a distance, that the asserted joint captor would not, at the time of capture, have been in sight, even if it *had been day, the claim [*63
of joint capture cannot be sustained. Indeed, Sir W. Scott has declared, that where a ship is lost sight of, in the night, the pursuit of that ship cannot properly be denominated a chase; it is a conjectural pursuit only; it is a feeling about in the dark, a search and inquiry, but no chase. The Financier, 1 Dods. 61. And where a ship is herself only a constructive captor, it is not a sufficient ground to let in another ship, that she had joined in a previous chase with the constructive captor, and lost sight of the prize in the night. Ibid. Therefore, in a case where one or two joint chasers were ordered to pick up the boats of the other, and in consequence of the delay occasioned by her obedience to those orders, she lost sight of the prize, which was, in the mean time, captured by a third ship coming up in the presence of the other, it was held, that the ship, so out of sight, was not entitled to share. Ibid. A revenue-cutter, though having a letter of marque, is not considered, in England, as a public ship of war, entitled to the benefit of the rule of constructive assistance from being in sight. The Bellona, Edw. 63. A convoying ship, notwithstanding her special employment, may be entitled as a joint captor, if, by chase or intimidation, she aid in the capture, when it does not interfere with convoy duty. The Waaksamheid, 3 Rob. 1; La Furie, 3 Ibid. 9. In captures made by boats, it is a general rule, that the ships to which they belong are entitled to share. The Anna Maria, 3 Rob. 211; The Odin, 4 Ibid. 318. But if a boat be detached from the ship to which she belongs, and attached to another, the ship only shares, to which she is attached at that time; for she must be taken, at that time, and in those operations, to be acting under the authority and for the benefit of such ship only. The Melomane, 5 Rob. 41. But constructive assistance by boats will not entitle the ships to which they belong to share in the prize, though actual capture by the boats would be sufficient for this purpose; for they are a part of the force of the ship. And in cases of mere constructive assistance, the right of participation must be in proportion to the intimidation caused, and cannot go beyond the force actually seen by the enemy. La Belle Coquette, 1 Dods. 18; The Odin, *4 Rob. 318; The [*64
Nancy, Ibid. 327, note *a*. And it is extremely questionable, whether a boat of a ship of war could support a title to share, on the mere principle of being in sight. In the case of mere constructive capture, the construction which is laid upon the supposed intimidation of the enemy, and the encouragement of the friend, from a ship of

war being seen or in sight, applies very weakly to the case of a boat, an object that attracts very little notice upon the water, and whose character, even if discerned by either of the parties, may be totally unknown to both. The Odin, 4 Rob. 318. Nor will the fact, that the ship to which the boat belongs is in sight, lying at anchor in a harbor, entitle the ship to share. Ibid.; The Nancy, 4 Rob. 327, note *a;* La Belle Coquette, 1 Dods. 18.

In respect to captures made by ships which are associated in the same service, or are engaged in a joint enterprise, under the orders of the same superior officer, it is a general rule, that they are entitled to share in each other's prizes, made while in such service or joint enterprise. The Forsigheid, 3 Rob. 311; The Guillaume Tell, Edw. 6; The Empress, 1 Dods. 368. Therefore, if one ship of a squadron take a prize, in the night, unknown to the rest, it will entitle the whole fleet to share, although, possibly, the capture may have been made at a distance out of sight of most of the ships of war, even if it had been noonday, for the fleet so associated is considered as one body, unless detached by orders, or entirely separated by accident; and what is done by one, continuing to compose in fact a part of the fleet, inures to the benefit of all. The Forsigheid, 3 Rob. 311; s. c. Edw. 124. Where a fleet is employed in a blockade, the service is considered as joint, and all the ships are entitled to share in all captures, although all the ships have not joined in the chase, and the capture has been made, after the chase, at a great distance from the blockaded port. The Guillaume Tell, Edw. 6; The Forsigheid, Ibid. 124. But if a part of the fleet be detached on a separate service, or if the capture be not within the purposes for which they were associated, then the rest of the fleet, not actually or constructively assisting in the capture,
*65] are not entitled to share. The Forsigheid, 3 Rob. 311; The *Nordstern, cited in The Forsigheid, Edw. 124, 127; s. c. 1 Acton 128; The Island of Trinidad, 5 Rob. 92; The Stella del Norte, 5 Ibid. 349. And this rule applies to all detachments for some distant and separate purpose, which, though possibly connected with the main service, carries the detached ships out of the scene of the common operations for the time. The Forsigheid, 3 Rob. 311. But if they are only sent to look out, and they preserve their connection with the fleet, and maintain their dependence upon it, and keep within signal distance, this is not a detached service. It is more like stretching one of the arms of the fleet, without dissolving, in any manner, the connection between them and the main body. Ibid. In respect to transports, mere association in service is not sufficient to entitle them to share, as constructive joint captors; but for this purpose, they must actually acquire a military character, and must be employed in military operations, and there must be an *animus capiendi*, while so employed. The Cape of Good Hope, 2 Rob. 274. It is not sufficient, that the enemy may have been intimidated by their presence. Mere intimidation may be produced, without any co-operation having been given or intended. If a frigate were going to attack an enemy's vessel, and four or five large merchant ships, unconscious of the transaction, should appear in sight, they might be objects of terror to the enemy, but no one would say, that such terror would entitle them to share. Though the fact of terror were ever so strongly proved, there would not be that co-operation which the law requires to entitle non-commissioned vessels to be considered as joint captors. Ibid. But if non-commissioned ships chase, *animo capiendi*, they are entitled to share, if the capture be made by their contribution in this service. The Twee Gesuster, and Le Franc, cited 2 Rob. 284, 285, notes *a*, *b*.

As to conjunct operations by land and naval forces, how far the former are permitted to share in prizes made by the latter, where no express provision is made by statute, depends upon the circumstances of the case. A mere general co-operation in the same general objects would not be sufficient. The Stella del Norte, 5 Rob. 349. But an
*66] actual co-operation in the particular *capture, is clearly sufficient. Ibid.; The Dordrecht, 2 Rob. 55.

If the fleet of an ally, and our own fleet, serve together under our commander, who detaches the squadron of the ally, the latter is not entitled to share in captures subsequently made. But if an ally actually co-operate in effecting a capture, he is entitled

to share as a joint captor; but the question whether he is a joint captor or not, is a question of which courts of common law have no jurisdiction, and which belongs exclusively to the admiralty. Duckworth *v.* Tucker, 2 Taunt. 7.

As to the manner in which claims of joint capture are to be asserted. It has been already stated, that it is usual not to file such claims, before a decree of condemnation; but if they are not filed before a decree ascertaining who are the captors, and who are entitled to share, and especially after a distribution decreed, it is too late to assert the right. (See The Stella del Norte, 5 Rob. 34; Duckworh *v.* Tucker, 2 Taunt. 7; Home *v.* Camden, 2 H. Bl. 533.) But if the sentence below be suspended by an appeal, it seems, that a joint claim may be interposed, upon the appeal. Home *v.* Camden, 2 H. Bl. 533; The Nostra Signora de los Dolores, 1 Acton 262; The Société, 9 Cr. 209. It is, however, best to interpose such claims, at an earlier stage of the proceedings, and before any decree of condemnation has passed in any court.

A question of joint capture is never permitted to be settled by affidavits. It must be brought forward by a regular allegation, containing a statement of the facts; and if the allegation contain such facts as, if proved, may entitle the parties to share, the court direct it to be admitted and filed; and thereupon, the actual captors are entitled to file a counter-allegation; and the cause is then regularly to be sustained by proofs, to be taken and established as in other causes, that is to say, by documentary proofs, and the depositions of competent witnesses. The Urania, 5 Rob. 148; La Virginie, Ibid. 124. If, indeed, upon the statement made in the original allegation, the claim cannot, in point of law, be sustained, the court will not inquire into the facts, but reject the application *in limine.* The Waaksamheid, 3 Rob. 1. The case, however, must be very clear, *where this course is adopted. When the claim of joint capture is admittted to proof, the *onus probandi* lies on the asserted joint captor. The Union, 1 Dods. 346; The John, Ibid. 363. The single testimony of witnesses on board of the claiming ship, though they release their right, is never deemed sufficient to establish the fact of joint capture; it must be corroborated by evidence *aliunde,* or it will be rejected. The Fadrelandet, 5 Rob. 120; La Flore, Ibid. 268; The John, 1 Dods. 63. If, at the moment of capture, the capturing ship admits the fact of joint capture, it is conclusive, unless there be some circumstance invalidating the admission. The San Jose, 6 Rob. 244. And if the asserted joint captors expressly renounce all claim to the prize, at the time of capture, their claim is entirely waived, though from subsequent circumstances, they may be disposed to assert it. The William and Mary, 4 Rob. 381. [*67

In case of joint captures by public ships, the rule as to the proportion in which they are to share, is established, generally, by statute. This is fixed in the United States, by the act of the 22d April 1800, ch. 33, which provides, that the capturing ships shall share "according to the number of men and guns on board each ship in sight." In respect to privateers, no statute regulation exists; and by the general rule of the prize law, they are to share in proportion to their relative strength. Bynk. Q. J. Pub. lib. 1, ch. 18, Du Ponceau's ed., p. 164. This relative strength, is, by the law of Great Britain and the United States, ascertained by the number of men on board of such ship assisting in the capture. Roberts v. Hartley, 1 Doug. 311; The Despatch, 2 Gallis. 1. Such, too, is the rule, where an ally co-operates in the capture. Duckworth *v.* Tucker, 2 Taunt. 7. And the same rule seems applicable to the case of a joint capture by a public ship and a private ship of war; and this, whether the latter be commissioned or not. The Twee Gesuster, 2 Rob. 284; Le Franc, Ibid. 285.

*Upon the hearing of the proofs, if the case does not require or admit further proof, the court proceeds to pronounce a sentence of acquittal or condemnation, as the justice of the case requires. And it may proceed to make its decree, as well after as before the death of the parties; for in proceedings *in rem,* the suit does not abate by the death or absence of all or any of the parties named in the proceedings. Penhallow *v.* Doane, 3 Dall. 54, 86, 117; The Falcon, 6 Rob. 194, 199. It may be proper, in many cases, where all the parties on either side are dead, not to proceed to [*68

make a decree *in rem*, without serving a monition upon the representatives of the deceased party to appear and pursue or defend his rights. And where the decree is *in personam*, the court will generally require that the representative should be cited duly to appear, to protect his interests, so far as they may be affected by the decree. (*Vide* The Nostra Signora de los Dolores, 1 Dods. 290.) It is, indeed, the duty of the court, to take notice of all interests that result from evidence before it, and not to suffer any persons to be precluded from their just demands, from want of notice of any facts that appear in the course of the proceedings. The Maria Frangaise, 6 Rob. 282. And where parties are not formally before the court, it acts as a general guardian of all interests which are brought to its notice. Ibid. Indeed, in the common cases of condemnation, the enemy proprietor is necessarily absent, by operation of law; and yet the sentence is completely valid, as well against him as against all the world. The Falcon, 6 Rob. 194, 199. To give validity, therefore, to decrees *in rem*, it is not necessary that the adverse parties should be before the court. Ibid.

When a sentence is pronounced, either of acquittal or condemnation, it is, in general, by an interlocutory decree. An interlocutory decree is proper in all cases, where anything further remains to be done by the court, as, in ascertaining damages in cases of illegal capture, or in deciding who are captors, after deciding that the property is to be condemned. The right to decide who are captors entitled to distribution, belongs exclusively to the prize court, and its adjudication cannot be examined by a court of common law (Home *v.* Camden, 2 H. Bl. 533; *4 T. R. 332; Duckworth *v.* Tucker, 2 Taunt. 7); and no title vests in the captors, until the final adjudication of the prize court. Ibid. In England, the usual practice is, to acquit or condemn by interlocutory decree, in all cases (Marriott's Form. 194, 196); and a definitive sentence is reserved, until all other questions and interests are finally disposed of. Ibid. 198, 203. In the United States, it is more common to reserve a decree, until a final decision of all the questions before the court; but there can be no doubt of the propriety of an adherence to the English practice, where the circumstances of the case require a suspension of a final sentence, although the propriety of an acquittal or condemnation is perfectly clear. And in case of an acquittal or condemnation, by interlocutory decree, there can be no question, that an appeal immediately lies to the proper appellate court, by the parties affected by that decree; for, as to them, it is an interlocutory having the effect of a final decree.

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In respect to cases of acquittal. This may be either with or without damages and costs, or upon the terms of paying costs and expenses. In either case, where the damages or expenses are uncertain, and to be ascertained, the court itself may proceed directly to assess them. The Lively, 1 Gallis. 315. But the usual practice is, to refer it to commissioners to hear the parties, examine their statements and accounts, and to report to the court in detail, such allowance as they think equitably or legally due to the parties. Accompanying the report, the reasons of the commissioners for the allowance or disallowance of any particular item, are usually given; and the report, when returned to the court, is heard upon exceptions by the parties, substantially, though not formally, as in a suit in chancery; for the prize court almost always proceeds as in summary suits, and not as in plenary suits, in the civil law.

When restitution is decreed, if the property remains specifically in the custody of the court, a warrant issues for the delivery to the claimant; and in such case, unless it is otherwise ordered by the court, the expenses of the delivery are to be borne by the captors. The Rendsberg, 6 Rob. 142. If the proceeds of the property are in court, an order for delivery is usually made by the court; and after a decree of restitution, the *captors have no right to arrest the proceeds in the registry of the court by a *caveat;* that can only be done by an application to the court itself. The Fortuna, 4 Rob. 278. If the proceeds are in the hands of the captors, or their agents, a monition, and, if necessary, an attachment, issues to them, to bring in the proceeds. But where the captors have not conducted unfairly, on restitution decreed, they will not be held answerable for more than the proceeds, although the sale made was less than the original value of the property. The Two Susannahs, 2 Rob. 152. The prop-

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erty, upon a decree of restitution, may be delivered to the master as agent of the shipper, for in such case, the master is the agent of the shipper, and is answerable to him. Sir W. Scott and Sir J. Nicholl's letter to Mr. Jay, *ubi supra.* But in such a case, neither the master, nor any other prize-agent, can claim the property, against his principal, unless so far as to cover his expenses; and the court will thus far protect his rights; but when his expenses and his liens on the property are discharged, the court will deliver it directly to the principal, upon his own application. The Franklin, 4 Rob. 404; The St. Lawrence, 2 Gallis. 19. After a decree for restitution of partnership property, to a foreign house *in solidum*, the court will not sever the property, merely because one partner is a bankrupt here; but if the assignees put in a claim for this purpose, before a decree, it would be otherwise. The Jefferson, 1 Rob. 325.

Where damages are decreed, the decree is either against the parties, by name, or by a description of their relation to the ship. Where a decree is against the owners of a privateer, generally, a monition issues against them, personally, to pay the damages assessed; and it may also issue against the sureties in the bond given on taking out the commission. In a court of the law of nations, a person may be considered as a part-owner, though his name has not been inserted in the bill of sale, or ship's register; and the representatives of a person, so deemed a part-owner, is responsible for costs and damages decreed against the owners generally, though the party of whom he is the representative was not the actual wrongdoer. The Nostra Signora de los Dolores, 1 Dods. 290. And as has been *already stated, a part-owner is not exempted from being [*71
a party to a suit for the proceeds, by having a release from the claimant for his share. The Karasan, 5 Rob. 291.

In respect to cases of condemnation. Where an interlocutory decree of condemnation passes in favor of a privateer, it seems to be usual, in England, to deliver that decree, with a proper commission, to the master of the privateer, to make sale of the prize, and to return an account into court. (*Semble*, The Venus, 6 Rob. 235.) But in the United States, all sales of prizes, before, as well as after condemnation, are made by the marshal; and in respect to sales after condemnation, this practice is further enforced by the statute of January 27th, 1813, ch. 155 (2 U. S. Stat. 792).

It has already been stated, that no right vests in the captors, until after a final sentence of condemnation, and that the right to decide who are the captors entitled to distribution, belongs exclusively to the prize court, and cannot be entertained in a court of common law. Duckworth *v.* Tucker, 2 Taunt. 7; Home *v.* Camden, 2 H. Bl. 533. When the case is pronounced to be one of condemnation, the next question, therefore, is, to whom it is to be condemned. This generally depends upon the question, whether the capturing ship be a commissioned or non-commissioned ship; and if the former, whether a public or private armed vessel; and in each of these cases, questions as the rights of asserted joint captors may also arise before the court. Captures or seizures may also take place in port; or be made on land, by conjunct land and naval forces; and in these cases, questions may arise as to the right of the army and navy to share in the prizes or booty.

It is an elementary principle of prize law, that all rights of prize belong originally to the government (The Melomasne, 4 Rob. 41); and the beneficial interests derived to others can proceed only from the grant of the government; and therefore, all captures wherever made, inure to the use of the government, unless they have been granted away. The Elsebe, 5 Rob. 173; Sterling *v.* Vaughan, 11 East 619; The Maria Francaise, 6 Rob. 282; The Joseph, 1 Gallis. 545. In cases of public armed ships, duly commissioned for the capture, the condemnation *is always to the government, [*72
but the proceeds are to be distributed according to the act of the 23d April 1800, ch. 33, § 5, 6. In cases of privateers, duly commissioned for the capture, condemnation is, by the prize act of the 26th of June 1812, ch. 107, to the owners, officers and crew of the privateer, and the proceeds are to be distributed according to the regulations of the same statute. But captors, even though duly commissioned, may forfeit their rights of prize, by misconduct; and this, independent of any statutory provision, by the old established law of the admiralty. La Reine des Anges, Stew. 9;

The Cossack, Ibid. 513, 517; The Herkimer, Ibid. 128; s. c. 2 Hall's Law J. 133; The Clarissa, cited in Stew. 144, and 2 Hall's Law J. 145. And an obstinate neglect or refusal to comply with the instructions of the government, or the regulations of the prize act, have been held sufficient to authorize an infliction of the forfeiture; and in such case, the prize is condemned to the government. Ibid.; The Bothnea and Janstoff, 2 Gallis. 78, 92. So, the unlawful rescue of the prize by the captors from the custody of the court. The Cossack, Stew. 513. And where the claimant has not affected his property with a hostile character, as by a trade with the enemy, &c., but has been engaged in some other traffic, contravening the municipal law of his own country, so that he cannot entitle himself to a restitution of the property, it will be condemned to the government, and not to the captors. The Walsingham Packet, 2 Rob. 77; The Etrusco, 4 Ibid. 262, note; The Venus, 8 Cr. 277, 287.

In cases of non-commissioned ships, and ships commissioned against one enemy, having no commission against another, whose property is captured, the captors are not entitled to any share in the prize, and the property is to be condemned to the government, or to its special grantee, if any such exist. Bynkershoek, indeed, contends, that if a non-commissioned ship is attacked, and captures the assailant, in her own defence, the officers and crew are solely entitled to the prize; and this doctrine seems also to be supported by Grotius. Bynk. Q. J. Pub. lib. 1, ch. 20, Du Ponceau's ed., 155–61; Grotius, *de Jure Belli ac Pacis*, lib. 3, ch. 6, § 10. However, the general prize
*73] law of *France, Great Britain and the United States, is as has been above stated. Du Ponceau's Bynk. p. 162, note *d;* 1 Valin, Sur l'Ord. tom. 1, p. 79; The Hasse, 1 Rob. 286; The Rebeccah, Ibid. 227; The Amor Parentum, Ibid. 303; The Twee Gessuster, 2 Ibid. 284, note *a;* The Melomane, 5 Ibid. 41; The Joseph, 1 Gallis. 545. If, at the time of a capture by a letter of marque, the master of the capturing vessel be not on board, the capture is considered as made without a commission, and it inures to the government, or its special grantee. The Charlotte, 5 Rob. 280. And if a capture be made by a cutter fitted out by a captain of a man of war as a tender, and manned from his ship, but without any authority or commission, it is deemed to be made by a non-commissioned vessel, and the capture will not inure to the benefit of of the man of war. It would be otherwise, if the tender were attached to the ship by public authority; for then the ship would share. The Melomane, 5 Rob. 41; The Charlotte, Ibid. 280; Capture of Curacoa, 4 Ibid. 282, note *a;* The Dos Hermanos, *ante*, p. 76. And if persons in the navy land from their ships and man a fort, and thereby compel a ship to strike as prize, it is considered as a capture made at sea, by a force upon land, which is a non-commissioned capture. The Rebeccah, 1 Rob. 227. But it would be otherwise, if the place on shore were a resort for naval purposes, by persons in the navy only, for then it may be deemed a stationary tender, rather attached to, and dependent upon, the vessels, than having the vessels attached to, and dependent upon, it. Ibid. If a foreign cartel-ship be engaged in trade, it is contrary to the duties of the ship, and the goods will be condemned to the government. La Rosine, 2 Rob. 372. And the cartel-ship also, if belonging to our own citizens, will, if the trading has been very gross, be condemned also. The Venus, 4 Rob. 355.

In England, by very ancient grants from the crown, the lord high admiral has the benefit of all captures made at sea, by non-commissioned vessels, and also of all captures by whomsoever made, of all ships and goods coming or already come into ports, creeks or roads of England and Ireland, by stress of weather or other accident, or by
*74] mistake of port, or by ignorance, not knowing *of the war; and also of all derelicts. But the crown has still reserved to itself all such ships and goods as shall be seized in port, before any declaration of war or reprisals; and also all such as shall voluntarily come in, upon revolt from the enemy, and as shall be driven or forced into port by the king's men of war. The Rebeccah, 1 Rob. 227, and 230, note *a;* The Gertruyda, 2 Ibid. 211; The Melomane, 5 Ibid. 22. The Maria Françoise, 6 Ibid. 282; The Joseph, 1 Gallis. 545. The office of lord high admiral has for more than a century past been put in commission. But as the office is still considered to have a legal existence, though now residing in the person of the king, the rights and per-

quisites of that office are still distinguished, as they were anciently, and are ascertained by an observance of the ancient rules, with the same exactness as if the proceeds were carried in the ancient and distinct course. The Gertruyda, 2 Rob. 211 ; The Maria Française, 6 Ibid. 282. Hence arises the well-known distinction of condemnation to the king *jure coronæ*, and to the king in his office of admiralty, as *droits* of admiralty; the former applying in all cases where the crown is still entitled to the prize property, in virtue of its sovereignty and inherent prerogatives ; the latter applying to all cases where the same belongs to the office of lord high admiral.

In the United States, strictly speaking, there are no *droits* of admiralty; for all prizes, to which no persons can entitle themselves by a public or private commission of war, are condemnable to the government itself, in its sovereign capacity. The Joseph, 1 Gallis. 545. But the phrase, *droits* of admiralty, is often used in legal adjudications in the United States, as equivalent to condemnations to the United States, in virtue of their general sovereignty and prerogative, as enforced in the courts of admiralty.

But although non-commissioned persons cannot, by making a capture, entitle themselves to the benefits of prize, yet where their conduct has been fair, in all cases of condemnation as *droits* of admiralty, the prize court will, in its discretion, award them a recompense; and even in some cases, will award them the whole value of the prize, where there has been great personal gallantry and merit. The Haase, 1 Rob. 286; *The Amor Parentum, Ibid. 303. It is not necessary to enumerate at large the various cases in which property is deemed a *droit* of admiralty, or a prize to the government *jure coronæ*. The preceding authorities will be found to contain almost all the learning on the subject. [*75

It being ascertained who are the captors, and that they are duly commissioned, the next subject is, the distribution of the prize proceeds ; and this is regularly to be done by the prize court having possession of the cause. The St. Lawrence, 2 Gallis. 19. Regularly, there should be a decree of distribution ; and neither any officer of the court, nor any prize-agent, having prize proceeds in his hands, can be safe in distributing them, without a decree to this effect. Kean *v.* The Brig Gloucester, 2 Dall. 36; Penhallow *v.* Doane, 3 Ibid. 54; The Herkimer, Stew. 128; s. c. 2 Hall's Law J. 133. And the prize court have a most unquestionable and exclusive jurisdiction to decree a distribution, either upon its own motion, or upon the application of the parties interested. Kean *v.* The Brig Gloucester, 2 Dall. 36; Bingham *v.* Cabot, Ibid. 19; Home *v.* Camden, 1 H. Bl. 476, 524; s. c. 2 Ibid. 633; 4 T. R. 382; Duckworth *v.* Tucker, 2 Taunt. 7. Nor can any person claim a share in a prize, whose claim has not been admitted and supported in the prize court. Duckworth *v.* Tucker, 2 Taunt. 9.

In respect to public ships, the distribution is to be made according to the act of congress of April 23d, 1800, ch. 33, § 5, 6. Besides the officers and crew of the capturing ship, the commander of the fleet or squadron is entitled to one-twentieth, which is called the flag-twentieth. In England, the commander of the fleet or squadron is entitled to a flag-eighth. Many cases have arisen in England as to the circumstances under which the commander is or is not entitled to share. These cases are collected in a recent decision in our own courts, to which the reader is referred. Decatur *v.* Chew, 1 Gallis. 506. And to the authorities there collected, may be added the *following: The Diomede, 1 Acton 69, 239; Gardner *v.* Lyne, 13 East 574; Drury *v.* Gardner, 2 Maule & Selw. 150; Duncan *v.* Mitchell, 4 Ibid. 105. [*76
Upon the construction of our own act, it has been held, that the commander of a squadron, to whose command a ship of war is attached, and under whose orders she sails, is entitled to the flag-twentieth of all prizes made by such ship, although the other part of such squadron may never have sailed on the cruise, in consequence of a blockade by a superior force; and that to deprive such a commander of his flag-twentieth, on account of his having left his station, under the act, it is indispensable, that some local limits should have been assigned to him. Decatur *v.* Chew, 1 Gallis. 506. And it seems, that a person acting by regular authority as commander of a ship *pro*

tempore, though not commissioned as such, is entitled to the commander's share of all prizes taken. Pill *v.* Taylor, 11 East 414. And the captain of a ship, actually on board, at the time of the capture, is entitled to prize-money, though under arrest at the time, and though another officer had been sent on board to command the ship. Lumby *v.* Sutton, 8 T. R. 224. But to entitle a person to share as an officer of the ship, under the prize act, he should not only be on board, but also an officer of, and attached to, the ship, and not a mere passenger. The Nostra Signora del Carmen, 6 Rob. 302. (See Weyms *v.* Linzee, 1 Doug. 324; Lumley *v.* Sutton, 8 T. R. 224.) But soldiers who are on board a public ship are, under the English prize act, entitled to share, although they are invalided, and returning home in the capturing ship. The Alert, 1 Dods. 236. And even passengers, under the expression in our prize act, as well as the English prize act, are entitled to share in the lowest class of distribution, as "persons doing duty on board." Ibid.; Wemys *v.* Linzee, 1 Doug. 324.

Beside the prize proceeds, by the act of April 23d, 1800, ch. 33, § 7, a bounty of $20 is given for each person on board any ship of an enemy, at the commencement of an action, which shall be sunk or destroyed by any ship of the United States of equal or inferior force, to be divided among the officers and crew as prize-money. No legal adjudications have as yet taken place on this clause of the act. But under *the *77] British act giving this bounty, or head-money, as it is called, it has been decided, that head-money is not due, when the captured ship was not a duly-commissioned ship of war (Several Dutch Schuyts, 6 Rob. 48); that constructive joint captors are not entitled to head-money (L'Alerte, Ibid. 238); that it is not due for British prisoners on board of the captured ships (The San Joseph, Ibid. 331); but is due for all the crew on board at the time of the attack, although some afterwards escape. The Babillion, Edw. 39. Head-money is also due, whether the surrender has been produced by actual combat or not; but it is never granted, unless the act of capture or of destruction is cousummated. La Clorinde, 1 Dods. 436; L'Elise, Ibid. 442. The military character of a hostile vessel is not so lost by capture and re-capture, as to extinguish the right to head-money. The Matilda, Ibid. 367.

In respect to privateers, the prize act of June 26th, 1812, ch. 107, § 4, gives the whole proceeds, after condemnation, and deducting duties and other public charges, to the captors, according to any written agreement among them; and if there be no written agreement, then, one moiety to the owners, and the other moiety to the crew, to be distributed as nearly as may be among the officers and crew, as in cases of public ships. A mariner who has engaged for the cruise, but is disabled, by sickness and other inevitable casualty, from doing duty on the cruise, is entitled to share; but it would be otherwise, if the disability occurred during the cruise. Ex parte Giddings, 2 Gallis. 56. And if one of the crew be illegally turned on shore, during the cruise, he is entitled to share in all the prizes made during the cruise. Kean *v.* The Brig Gloucester, 2 Dall. 36. And the persons of the crew who are put on board of prizes are entitled to share in all subsequent prizes made by the privateer; and so, in the converse case, the privateer will share in the prizes made by any prize-vessel, after capture. The Frederick and Mary Ann, 6 Rob. 213; The Brutus, 2 Gallis. 526. Agreements between the owners and officers of two privateers, to share in all prizes, are valid; but the master and officers have no authority to make such an agreement, without the consent of the owners. Bynk. Q. J. Pub. lib. 1, ch. 18, Du Ponceau's ed. p. 139, 141.

*78] *When a distribution has been decreed, it often becomes necessary, in order to perfect the decree of the court, where the proceeds are in the hands of prize-agents, or of officers of the court, to institute a suit to compel the proper parties to come in and account for the proceeds, and make due distribution. And for this purpose, a suit may be maintained in the prize court, by any party interested, or by any representative of the party, or by any assignee duly entitled. The St. Lawrence, 2 Gallis. 19; The Brutus, Ibid. 526. Where the cause is in possession of an appellate court, the application may be made there, by a supplementary intervention or petition; or it may be made by a direct original suit *in personam*, brought in the district court. Ibid.;

Home *v.* Camden, 1 H. Bl. 474, 524; s. c. 2 Ibid. 533; Willis *v.* Commissioners, &c., 5 East 22; The Noysomhed, 7 Ves. 593; Smart *v.* Wolff, 3 T. R. 323; Bingham *v.* Cabot, 3 Dall. 19; Kean *v.* Brig Gloucester, 2 Ibid. 36; The Pomona, 1 Dods. 25; The Herkimer, Stew. 128; s. c. 2 Hall's Law J. 133. And it is a general principle, that the power of the prize court subsists, after a general adjudication, to compel captors and other persons having proceeds of prize in their hands, to bring the same into court, until all claims respecting the prize are definitively settled. Ibid. And the remedy is not confined to the stipulation taken in the cause; but the prize proceeds will be followed, in whose hands soever they may be, unless they have been purchased *bonâ fide*, and without notice of the claim. *Per* Buller, J., 3 T. R. 323; *per* Grose, J., 5 East 22; The Pomona, 1 Dods. 25. This subject, indeed, has been already treated of in an early part of the present note, when we were considering the subject of prize jurisdiction; and to that part the reader is respectfully referred for further information. A few additional particulars, respecting prize-agents, &c., may, however, not be without use.

It is no discharge of a prize-agent, that he has paid over to his principal the prize proceeds, after full notice of a libel pending for restitution of the property (Hills *v.* Ross, 3 Dall. 331); *nor to a marshal, that he has distributed prize proceeds, [*79
pending an appeal, or where an appeal is wrongfully denied. Penhallow *v.* Doane, 3 Dall. 54. But an agent is only liable for the prize proceeds which have come to his own hands, and not for the proceeds which have come to the hands of his co-agents. Ibid.

Where the prize court has decreed distribution, and allotted the shares, and required the prize-agent to make payment of the proceeds accordingly, if he refuses to obey the order, the court may proceed *in personam* (*per* Lord Loughborough, Home *v.* Camden, 1 H. Bl. 474, 524); and in such case, it will decree interest, to be paid by the agent. And in general, the prize court may compel prize-agents, or others having prize proceeds in their hands, to pay interest on the proceeds, where a proper case is laid before it; for such proceeding is a mere incident to the prize jurisdiction. The Louis, 5 Rob. 46; Willis *v.* Commissioners, &c., 5 East 22; The Pomona, 1 Dods. 25. And it is no objection, that there has been a previous decree for interest against the captors personally. The Polly, 5 Rob. 147, note; Willis *v.* Commissioners, &c., 5 East 22. Interest is not usually allowed against a prize-agent, unless it has been actually made by him, or there has been an unjustifiable delay in payment. But it seems, that a prize-agent has no right to detain property condemned, and in his hands for distribution, to answer demands arising, or which may arise, against the ship, for other unjustifiable captures. The Printz Henrick Von Preussen, 6 Rob. 95. And interest is not usually allowed against a commissioner for appraisement and sale, or a marshal, after sale, unless in cases of a fraudulent detainer or gross delay. The Exeter, 1 Rob. 173; The Princessa, 3 Ibid. 31; Willis *v.* Commissioners, &c., 5 East 22.

This note must now be brought to a conclusion, although some of the topics discussed are far from being exhausted. To some, perhaps, an apology may be necessary for the length to which it has already extended. When, however, it is considered, that *no treatise exists in print, containing even a summary view of prize practice, [*80
any attempt, however humble, to collect and arrange what is so little methodized, and so little known, may be entitled to indulgence, or, at least, escape the severity of criticism.

NOTE II.

President's Instructions to Private Armed Vessels.

1. The tenor of your commission, under the act of congress, entitled, "an act concerning letters of marque, prizes and prize goods," a copy of which is hereto annexed, will be kept constantly in your view. The high seas, referred to in your commission, you will understand, generally, to refer to low-water mark; but with the exception of the space within one league, or three miles, from the shore of countries at peace both with Great Britain and the United States. You may, nevertheless, execute your commission within that distance of the shore of a nation at war with Great Britain, and even on the waters within the jurisdiction of such nation, if permitted so to do.

2. You are to pay the strictest regard to the rights of neutral powers, and the usages of civilized nations; and in all your proceedings towards neutral vessels, you are to give them as little molestation or interruption as will consist with the right of ascertaining their neutral character, and of detaining and bringing them in for regular adjudication, in the proper cases. You are particularly to avoid even the appearance of using force or seduction, with a view to deprive such vessels of their crews or of their passengers, other than persons in the military service of the enemy.

*81] 3. Towards enemy vessels and their crews, you are to proceed, in exercising the rights of war, with all the justice and humanity which characterize the nation of which you are members.

4. The master, and one or more of the principal persons belonging to the captured vessels, are to be sent, as soon after the capture as may be, to the judge or judges of the proper court in the United States, to be examined upon oath, touching the interest or property of the captured vessel and her lading; and at the same time, are to be delivered to the judge or judges, all passes, charter-parties, bills of lading, invoices, letters and other documents, and writings found on board; the said papers to be proved by the affidavit of the commander of the capturing vessel, or some other person present at the capture, to be produced, as they were received, without fraud, addition, subduction or embezzlement.

By the command of the President of the United States.

JAMES MONROE, Secretary of State.

NOTE III.

The Standing Interrogatories.

1st Interrogate.—What is your name, where were you born, and where have you lived for the last seven years? Where do you now live, and how long have you lived in that place? To what prince or state, or to whom are you, or have you ever been, a subject? Are you a married man, and if married, where do your wife and family reside?

2d Interrogate.—Were you present at the time of taking and seizing the ship, or her lading, or any of the goods or merchandises concerning which you are now examined? Had the ship concerning which you are now examined any commission; what, and from whom?

*82] 3d Interrogate.—In what place, latitude or port, and when, was the *said ship and goods concerning which you are now examined, taken and seized? Upon what pretence, and for what reasons were they seized? Into what port were

they carried, and under what colors did the said ship sail? What other colors had you on board, and for what reason had you such other colors? Was any resistance made, at the time when the said ship was taken? and if yea, how many guns were fired? and by whom? and by what ship or ships were you taken? Was the ship or vessel by which you were captured, a ship of war, or a vessel acting without any commission, as you believe? Were any other and what ships in sight, at the time of the capture?

4th Interrogate.—What is the name of the master or commander of the ship or vessel taken? How long have you known the said master, and who appointed him to the command of said vessel? Where did said commander take possession of her, at what time, and what was the name of the person who delivered the possession to the said master? Where doth he live? Where is the said master's fixed place of abode, and where doth he generally reside? How long has he lived there, where was he born, and of whom is he now a subject? Is he married? If yea, where does his wife and family reside?

5th Interrogate.—Of what burden is the vessel which has been taken? What was the number of her mariners, and of what country were the said seamen and mariners? Did they all come on board at the same port, or at different ports, and who shipped or hired them, and when and where?

6th Interrogate.—Had you, or any of the officers or mariners belonging to the ship or vessel, concerning which you are now examined, any, and what, part, share or interest in the said vessel or her lading? If yea, set forth who and what goods or interest you or they have? Did you belong to the said vessel, at the time she was seized and taken? In what capacity did you belong to her? How long have you known her? When and where did you first see her, and where was she built?

7th Interrogate.—What is the name of the vessel? How long has she been so called? Do you know of any other name or names, and what are they, by which she has heretofore been called? Had she any passport or sea-chart on board, and from whom? To what ports and places did she sail, during her said voyage, before she was taken? Where did her last voyage begin, and where was the said voyage to have ended? From what port, and at what time, particularly from the last clearing port, did the said ship sail, previously to the capture? Set forth all the ports to which she has sailed, and at which she has touched and traded, during her whole voyage, out and home.

*8th Interrogate.—What lading did the said vessel carry, at the time of her first setting sail on her last voyage, and what sort of lading and goods had she on board, at the time she was taken? When was the same put on board? Set forth the different species of lading, and the quantity of each sort. Has any part of the cargo of said vessel been unladen, since the commencement of her original voyage? If so, at what ports or places was it unladen? State the articles which were unladen. [*83

9th Interrogate.—Who were the owners of the vessel, at the time when she was seized? How do you know that they were owners at that time? Of what nation or country are such owners by birth? Where do they reside, and where do their wives and families reside? How long have they resided there? Where did they reside before, to the best of your knowledge? To whom are they subject? How long have the present owners been in possession? and of whom did they purchase?

10th Interrogate.—Was any bill of sale made, and by whom, to the aforesaid owners of said vessel? and if any such were made, in what month and year, and where, and in the presence of what witnesses? Was any, and what, engagement entered into concerning the purchase, further than appears on the bill of sale? If yea, was it verbal or in writing? Where did you last see it, and what has become of it?

11th Interrogate.—Was the said lading put on board in one port and at one time, or at several ports and at several times, and at what ports, by name? Set forth what quantities of each sort of goods were shipped at each port.

12th Interrogate.—What are the names of the respective laders or owners, or con-

signees of said goods? What countrymen are they? Where do they now live and carry on their business? How long have they resided there? Where did they reside before, to the best of your knowledge? And where were the said goods to be delivered, and for whose real account, risk or benefit? Have any one of the said consignees or shippers, any and what interest in the said goods? If yea, whereon do you found your belief, that they have such interest? Do you verily believe, that at the time of the lading the cargo, and at the present time, and also if said goods shall be restored and unladen at the destined port, the goods did, do, and will belong to the same persons, and to none others?

13th Interrogate.—How many bills of lading were signed for the goods seized on board the said ship? Were any of those bills of lading false or colorable, or were any bills of lading signed, which were *different in any respect from those which were on board the ship, at the time she was taken? What were the contents of such other bills of lading, and what became of them? *84]

14th Interrogate.—Are there in the United States of America any bills of lading, invoices, letters or instruments relative to the ship and goods, concerning which you are now examined? If yea, set forth where they are are, and in whose possession, and what is the purport thereof, and when they were brought or sent to the United States.

15th Interrogate.—Was there any charter-party signed for the voyage, in which the ship, concerning which you are now examined, was seized and taken? What became thereof? When, where, and between whom, was such charter-party made? What were the contents of it?

16th Interrogate.—What papers, bills of lading, letters or other writings, were on board the ship, at the time she took her departure from the last clearing port, before her being taken as prize? Were any of them burnt, torn, thrown overboard, destroyed or cancelled, or attempted to be concealed, and when, and by whom, and who was then present?

17th Interrogate.—Has the ship, concerning which you are now examined, been, at any time, and when, seized as prize, and condemned as such? If yea, set forth into what port she was carried, and by whom, and by what authority, or on what account she was condemned?

18th Interrogate.—Have you sustained any loss by the seizing and taking the ship, concerning which you are now examined? If yea, in what manner do you compute such your loss? Have you already received any indemnity, satisfaction or promise of satisfaction, for any part of the damage which you have sustained, or may sustain, by this capture and detention, and when, and from whom?

19th Interrogate.—Is the said ship, or goods, or any, and what part, insured? If yea, for what voyage is such insurance made, and at what premium, and when and by what persons, and in what country was such insurance made?

20th Interrogate.—In case you had arrived at your destined port, would your cargo, or any part thereof, on being unladen, have immediately become the property of the consignees, or any other person, and whom? Or was the lader to take the chance of the market for the sale of his goods?

21st Interrogate.—Let each witness be interrogated of the growth, produce, and manufacture of what country and place was the lading of the ship or vessel, concerning which you are now examined, or any part thereof?

*22d Interrogate.—Whether all the said cargo, or any, and what part thereof, was taken from the shore or quay, or removed or transshipped from one boat, barque, vessel or ship, to another? From what, and to what shore, quay, boat, barque, vessel or ship, and when and where, was the same so done. *85]

23d Interrogate.—Are there, in any other country, and where, or on board any and what ship or ships, vessel or vessels, other than the ship and vessel concerning which you are now examined, any bills of lading, invoices, letters, instruments, papers or documents, relative to the said ship, or vessel and cargo, and of what nature are such bills of lading, invoices, letters, instruments, papers or documents, and what are the

contents? In whose possession are they, and do they differ from any of the papers on board, and in what particular do they differ?

24th Interrogate.—Were any papers delivered out of the said ship or vessel, and carried away in any manner whatsoever? And when, and by whom, and to whom, and in whose custody, possession or power, do you believe the same now are?

25th Interrogate.—Was bulk broken during the voyage in which you were taken, or since the capture, of the said ship? And when, and where, by whom, and by whose orders, and for what purpose, and in what manner?

26th Interrogate.—Were any passengers on board the aforesaid ship? Were any of them secreted, at the time of the capture? Who were the passengers, by name? Of what nation, rank, profession or occupation? Had they any commission? for what purpose, and from whom? From what place were they taken on board, and when? To what place were they finally destined, and upon what business? Had any, and which of the passengers, any, and what property or concern, or authority, directly or indirectly, regarding the ship and cargo? Were there any officers, soldiers or mariners secreted on board, and for what reason were they secreted? Were any of the citizens of the United States on board, or secreted or confined, at the time of the capture? How long, and why?

27th Interrogate.—Were, and are, all the passports, sea-briefs, charter-parties, bills of sale, invoices and papers, which were found on board, entirely true and fair? Or are any of them false or colorable? Do you know of any matter or circumstances to affect their credit? By whom were the passports or sea-briefs obtained, and from whom? Were they obtained for this ship only? And upon the oath, or affirmation, of the persons therein described, or were they delivered to, or on behalf of the person or persons who appear to have been sworn, or to have affirmed thereto, without their having ever, in fact, made any such oath or affirmation? How long time were they to last? Was any duty or fee payable, and paid, for the same? And is there any duty or fee to be paid on the renewal thereof? Have such passports been renewed, and how often? And has the duty or fee been paid for such renewal? Was the ship in a port in the country where the passports and sea-briefs were granted? and if not, where was the ship at the time? Had any person on board any let-pass, or letters of safe-conduct? If yea, from whom and for what business? Had the said ship any license or passport from any foreign power or authority during the voyage? if so, state from whom been obtained, and for what purpose and use. [*86

28th Interrogate.—Have you written or signed any letters or papers concerning the ship and her cargo, other than those found on board and delivered to the captors? If yea, what was their purport, to whom were they written and sent, and what is become of them?

29th Interrogate.—Towards what port or place was the ship steering her course, at the time of her being first pursued and taken? Was her course altered, upon the appearance of the vessel by which she was taken? Was her course, at all times, when the weather would permit, directed to the place or port for which she appears to have been destined by the ship's papers? Was the ship, before or at the time of her capture, sailing beyond, or wide of the said place or port to which she was so destined by the said ship's papers? At what distance was she therefrom? Was her course altered, at any, and what time, and to what other port or place, and for what reason?

30th Interrogate.—By whom, and to whom, hath the said ship been sold or transferred, and how often? At what time, and at what place, and for what sum or consideration, hath such sum or consideration been paid or satisfied? Was the sum paid, or to be paid, a fair and true equivalent? Or what security or securities have been given for the payment of the same, and by whom, and where do they live now? Do you know, or believe, in your conscience, such sale or transfer has been truly made, and not for the purposes of covering or concealing the real property? Do you verily believe, that if the ship should be restored, she will belong to the persons now asserted to be the owners, and to none others?

31st Interrogate.—What guns were mounted on board the ship, and what arms and

ammunition were belonging to her? Why was she so armed? Were there on board any other, and what, arms and ammunition, and when and where they put on board?

*87] and by *whom, or by what authority, or for what purpose or destination, and on whose account were they put on board?

32d Interrogate.—What is the whole which you know or believe, according to the best of your knowledge and belief, regarding the real and true property and destination of the ship and cargo, concerning which you are now examined at the time of the capture?

Form of the Oath to be administered to each Witness.

You shall true answer make to all such questions as shall be asked of you on these interrogatories; and therein you shall speak the truth, the whole truth, and nothing but the truth. So help you God!

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TO THE

MATTERS CONTAINED IN THIS VOLUME.

The References in this Index are to the STAR *pages.

ADMIRALTY.

1. The courts of the United States have exclusive jurisdiction of all seizures for a breach of the laws of the United States; and if the seizure be adjudged wrongful, and without probable cause, the party may proceed, at his election, by a suit at common law, or in the court of admiralty, for damages for the illegal act. *Slocum* v. *Mayberry*.....*1, 10
2. Under the judiciary act of the 20th September 1789, and the act of the 3d March 1803, causes of admiralty and maritime jurisdiction cannot be removed, by writ of error, from the circuit court, for re-examination in the supreme court; the appropriate mode of removing such causes is by appeal. *The San Pedro*.....*132, 137

See JURISDICTION, 1: PRIZE.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A letter, written within a reasonable time, before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise. *Coolidge* v. *Payson*.....*66
2. Review of the English cases on this subject.....*Id.*
3. Law of France as to previous acceptance.....*Id.* *75
4. American decisions on the same subject.....*Id.* *76
5. A demand of payment of a promissory note must be made of the maker, on the last day of grace; and where the indorser resides in a different place, notice of the default of the maker should be put into the post-office, early enough to be sent by the mail of the succeeding day. *Lenox* v. *Roberts*.....*377
6. An action of debt will lie, by the payee or indorsee of a bill of exchange, against the acceptor, where it is expressed to be for value received. *Raborg* v. *Peyton*.....*385

CHANCERY.

1. H., in contemplation of marriage with B., gave a bond for $5000 and interest, to trustees, to secure to B. a support during the marriage, and after the death of H., in case she should survive him, and to their child or children, in case he should survive her; with condition, that if H. should, within the time of his life, or within one year after his marriage (whichsoever of the said terms should first expire), convey to the trustees, some good estate, real or personal, sufficient to secure the annual payment of $300, for the separate use of his wife, during the marriage, and also sufficient to secure the payment of the said $5000 to her use, in case she should survive her husband, to be paid within six months after his death; and in case of her death before her husband, to be paid to their child or children; or if H. should die before B., and by his will should, within a year from its date, make such devises and bequests as should be adequate to these provisions, then the bond to be void H. died, leaving his widow B., and a son, having, by his last will, devised a tract of 1000 acres of land, in the Mississippi Territory, to his son in fee; a tract of 10,000, acres in Kentucky, equally between his wife and son, with a devise over to her, in fee, of the son's moiety, if he died before he attained "the lawful age to will it away;" and

the residue of his estate, real and personal, to be divided equally between his wife and son, with the same contingent devise over to her as with regard to the tract of 10,000 acres: the value of the property thus devised to her, beside the contingent interest, might have been estimated, at the time of H.'s death, at $10,000. B. subsequently died, having made a nuncupative will, by which she devised all her estate, "whether vested in her by the will of her deceased husband or otherwise," to be divided between her son and the plaintiff in the cause, with a contingent devise of the whole to the survivor: the son after wards died, and the plaintiff brought his bill to charge the lands of H. with the payment of the bond for $5000 and interest, to which the plaintiff derived his right under the nuncupative will of B.: by the laws of Kentucky, this will did not pass the real estate of the testator, but was sufficient to pass her personal estate, including the bond: *held*, that the provision in the will of H., for his wife, must be taken in satisfaction of the bond, but subject to her liberty to elect under the will and the bond, and that this privilege was extended to her devisee, the plaintiff. *Hunter* v. *Bryant*..*32

2. Actual maintenance is equivalent to the payment of a sum secured for separate maintenance, and therefore, interest upon the bond during the husband's lifetime, was not allowed.....*Id.*
3. Under all the circumstances of the case, it was determined, that the bond was chargeable on the residue of the estate, and of this, the personalty first in order.....*Id.*
4. It is a universal rule of equity, that he who asks for a specific performance, must be in a condition to perform himself; therefore, in a suit for the specific performance of a contract, by conveying lands in Ohio, stipulated to be conveyed as the consideration for other lands sold in Kentucky, it was held, that the vendor, being unable to make a title free from incumbrances to the lands sold in Kentucky, was not entitled to a decree for a specific performance. *Morgan's Heirs* v. *Morgan*..*290
5. Origin of the doctrine of the English court of chancery as to the specific performance of agreement.....*Id.* *302
6. Does not in general extend to the enforcing of agreements, respecting personal property.....*Id.* *303
7. Vendee not obliged to take a defective title; but may elect to have compensation, by deduction from the purchase-money, in case of a mistake or misrepresentation as to quantity or quality, or the estate of the vendor in the property sold, and a specific performance as the residue.....*Id.* *303
8. Moral certainty sufficient as to title. *Id.* *304
9. How far time is material in the enforcing of specific performance.....*Id.*
10. In what cases, the court will direct an issue of *quantum damnificatus*, or a reference to the master, to ascertain the damages, where a specific performance is refused, but the party is entitled to damages.....*Id.*
11. In order to obtain a specific performance of a contract, its terms should be so precise as that neither party can reasonably misunderstand them; if the contract be vague and uncertain, or the evidence to establish it be insufficient, a court of equity will not enforce it, but will leave the party to his legal remedy. *Colson* v. *Thompson*.....*336, 341
12. The plaintiff, who seeks for a specfic performance of an agreement, must show that he has performed, or offered to perform, on his part, the acts which formed the consideration of the alleged undertaking, on the part of the defendant.....*Id.* *342
13. Cases where a court of equity will not decree the performance of agreements for want of certainty.....*Id.* *341
14. The court will, if practicable, execute an uncertain agreement, by rendering it certain.....*Id.*
15. Where all the property of the late Bank of the United States had been assigned by a general assignment, in trust, to assignees, for the purpose of liquidating its affairs, *Quære?* Whether any action at law could be maintained by the assignees, on certain promissory notes, indorsed to, and the property of the bank, which had not been specially assigned nor indorsed to the assignees? *Lenox* v. *Roberts*.....*373
16. However this may be, it is clear, that a suit in equity might be maintained by the assignees against the party to the notes...*Id.* *376

See PRACTICE.

COLLUSIVE CAPTURE.

See EMBARGO, 8: PRIZE, 9, 14.

COVENANT.

1. A trustee is, in general, only suable in equity, but if he chooses to bind himself by a personal covenant, he is liable at law, for a breach of that covenant, although he describe himself as covenanting as trustee. *Duvall* v. *Craig*.....*45, 56
2. Where the parties to a deed covenanted severally against their own acts and incumbrances, and also to warrant and defend against their own acts, and those of all other persons, with an indemnity in lands of an equivalent value, in case of eviction; it was

held, that these covenants were independent, and that it was unnecessary to allege in the declaration, any eviction, or any demand or refusal to idemnify with other lands, but that it was sufficient to allege a prior incumbrance by the acts of the grantors, &c.; and that the action might be maintained on the first covenant in order to recover pecuniary damages.....*Id.*

3. Where the grantors covenant generally against incumbrances made by them, it may be construed as extending to several, as well as joint incumbrances.....*Id.*
4. An averment of an eviction under an elder title is not always necessary to sustain an action on a covenant against incumbrances; if the grantee be unable to obtain possession, in consequence of an existing possession or seisin by a person claiming and holding under elder title, it is equivalent to an eviction, and a breach of the covenant .....*Id.*
5. Manner in which a person who acts as agent for another must execute a deed, in order to avoid a personal responsibility.....*Id.* *56
6. Cases illustrative of the doctrine that a trustee, agent, &c., who binds himself by a personal covenant, is liable at law for a breach of that covenant, although he describe himself as covenanting as trustee.....*Id.*
7. Distinction as to public agents.....*Id.*
8. Damages recoverable upon a breach of covenant of good right and title to convey against incumbrances, and for quiet enjoyment, and of general warranty..... *Id.* *62
9. Rules of the civil law, as to damages in case of eviction.....*Id.* *65

See PLEADING, 1, 2, 3.

CONSTITUTIONAL LAW.

1. The courts of the United States have exclusive jurisdiction of all seizures made on land or water, for a breach of the laws of the United States, and any intervention of a state authority, which, by taking the thing seized out of the hands of the United States officer, might obstruct the exercise of this jurisdiction, is illegal. *Slocum* v. *Mayberry*...*1, 9
2. In such a case, the court of United States, having cognisance of the seizure, may enforce a redelivery of the thing, by attachment or other summary process.....*Id.*
3. The question under such a seizure, whether a forfeiture has been actually incurred, belongs exclusively to the courts of the United States, and it depends upon the final decree of such courts, whether the seizure is to be deemed rightful or tortious.....*Id.*
4. If the seizing officer refuse to institute proceedings to ascertain the forfeiture, the district court may, upon application of the aggrieved party, compel the officer to proceed to adjudication, or to abandon the seizure. *Id.*
5. Under the constitution of the United States, the power of naturalization is exclusively in congress. *Chirac* v. *Chirac*.....*259, 269
6. The jurisdiction of the circuit court of the United States extends to a case between citizens of Kentucky, claiming lands exceeding the value of $500, under different grants, the one issued by the state of Kentucky, and the other by the state of Virginia, upon warrants issued by Virginia, and locations founded thereon, prior to the separation of Kentucky from Virginia: it is the grant which passes the legal title to the land; and if the controversy be founded upon the conflicting grants of different states, the judicial power of the courts of the United States extends to the case, whatever may have been the equitable title of the parties prior to the grant. *Colson* v. *Lewis*.....*377

DOMICIL.

1. It seems, that where a native citizen of the United States emigrated, before a declaration of war, to a neutral country, there acquired a domicil, and afterwards returned to the United States, during the war, and re-acquired his native domicil, he became a redintegrated American citizen; and could not, afterwards, *flagrante bello*, acquire a neutral domicil, by again emigrating to his adopted country. *The Dos Hermanos*.....*77, 98
2. Effect of domicil on national character. Appendix, note I.....*27, 28, 29

See PRACTICE, 10: TREATY, 2.

DUTIES.

1. The act of the 23d July 1813, imposing a duty according to the capacity of the still, on all stills employed in distilling spirits from domestic or foreign materials, and inflicting a penalty of $100, and double duties, for using any still or stills, or other implements, in distilling spirituous liquors, without first obtaining a license, as required by the act, does not extend to the rectification or purification of spirits already distilled. *United States* v. *Tenbroek*.....*248
2. The word insolvency, mentioned in the duty act of 1790, § 45; and repeated in the act of 1797, § 5, and of 1799, § 65, means a legal insolvency, which, whenever it occurs, the right of preference arises to the United States, as well as in the other specified cases to which the acts of 1797 and 1799 have extended the cases of insolvency. *Thelusson* v. *Smith*.....*396, 424

3. But if, before the right of preference has accrued to the United States, the debtor has made a *bonâ fide* conveyance of his estate to a third person, or has mortgaged it to secure a debt, or if his property has been seized under an execution, the property is divested out of the debtor, and cannot be made liable to the United States.....*Id.*
4. A judgment gives to the judgment-creditor a lien on the debtor's lands, and a preference over all subsequent judgment-creditors; but the law defeats the preference in favor of the United States, in the cases specified in the act of 1799, § 65.....*Id.*

ELECTION AND SATISFACTION.

See CHANCERY, 1–3.

EMBARGO.

1. Where a seizure was made under the 11th section of the embargo act of April 1808, it was determined, that no power is given by law to detain the cargo, if separated from the vessel, and that the owner had a right to take the cargo out of the vessel, and to dispose of it in any way not prohibited by law; and in case of its detention, to bring an action of replevin therefor in the state court. *Slocum* v. *Mayberry*.....*1, 10
2. In seizures under the embargo laws, the law itself is a sufficient justification to the officer, where the discharge of duty is the real motive, and not the pretext for detention; and it is not necessary to show probable cause. *Otis* v. *Walter*.....*18, 21
3. But the embargo act of the 25th of April 1808, related only to vessels ostensibly bound to some port in the United States, and a seizure, after the termination of the voyage, is unjustifiable; and no further detention of the cargo is lawful, than what is necessarily dependent on the detention of the vessel..*Id.*
4. It is not indispensable to the termination of a voyage, that a vessel should arrive at the *terminus* of her original destination; but it may be produced by stranding, stress of weather, or any other cause inducing her to enter another port, with a view to terminate her voyage *bonâ fide*.....*Id.*
5. But if a vessel, not actually arriving at her port of original destination, excites an honest suspicion in the mind of the collector, that her demand of a permit to land the cargo was merely colorable, this is not a termination of the voyage, so as to preclude the right of detention.....*Id.*
6. Under the embargo act of the 22d December 1807, the words " an embargo shall be laid," not only imposed upon the public officers, the duty of preventing the departure of registered or sea-letter vessels on a foreign voyage, but consequently, rendered them liable to forfeiture, under the supplementary act of the 9th January 1808. *The William King*.....*148, 153
7. In such case, if the vessel be actually and *bonâ fide* carried by force to a foreign port, she is not liable to forfeiture.....*Id.*
8. But if the capture under which it is alleged the vessel is compelled to go to a foreign port, be fictitious and collusive, condemnation will ensue.....*Id.*

EVIDENCE.

1. Where a witness, a clerk to the plaintiff, swore that the several articles of merchandise contained in the account annexed to his deposition, were sold to the defendant by the plaintiff and were charged in the plaintiff's day-book, by the deponent and another person (since dead), and that the deponent delivered the goods, and further swore, that he had referred to the original entries in the day-book: *held*, that this was sufficient evidence to prove the sale and delivery of the goods. *McCoul* v. *Lekamp's Adm'r*.....*111, 116
2. Law of France as to evidence of tradesmen's books.....*Id.* *117
3. English cases on the same subject..*Id.* *118
4. Rules of practice in the United States...*Id.*
5. Interest in the subject-matter of the suit, a fatal objection to a witness, by the civil law. *Laidlaw* v. *Organ*..... *192
6. The answer of one defendant to a bill in chancery cannot be used as evidence against his co-defendant; and the answer of an agent, is not evidence against his principal, nor are his admissions *in pais*, unless they are a part of the *res gestæ*. *Leeds* v. *Marine Ins. Co*.....*380, 383

See PRIZE.

INDICTMENT.

1. Under the act of the 6th July 1812, " to prohibit American vessels from proceeding to or trading with the enemies of the United States, and for other purposes," living fat oxen, &c., are articles of provision and munitions of war, within the true intent and meaning of the act. *United States* v. *Sheldon*.....* 119
2. Driving living fat oxen, &c., on foot, is not a transportation thereof, within the true intent and meaning of the same act.....*Id.*

JURISDICTION.

1. Where a seizure for a breach of the laws of the United States is finally adjudged wrong-

ful, and without probable cause, by their courts, the party may proceed, at his election, by a suit at common-law, or in the instance court of admiralty, for damages for the illegal act; but the common-law remedy in such case must be sought for in the state courts; the courts of the United States having no jurisdiction to decide on the conduct of their officiers, in the execution of their laws, in suits at common law, until the case shall have passed through the state courts. *Slocum* v. *Mayberry*.....*10

2. The jurisdiction of the circuit court having once vested, between citizens of different states, cannot be divested by a change of domicil of one of the parties, and his removal into the same state with the adverse party, *pendente lite*. *Morgan's Heirs* v. *Morgan*.....*290, 297
3. This court has not jurisdiction to issue a writ of *mandamus* to the register of a land-office of the United States, commanding him to enter the application of a party for certain tracts of land, according to the 7th section of the act of the 10th of May 1800, "providing for the sale of the lands of the United States north-west of the Ohio, and above the mouth of Kentucky river," which *mandamus* had been refused by the supreme court of the state of Ohio, upon a submission by the register to the jurisdiction of that court, being the highest court of law or equity in that state. *McCluny* v. *Silliman*.....*369
4. Cases where the courts of the United States have, or have not, authority to issue writs of *mandamus*.....*Id.* *370

See Constitutional Law.

LICENSE.

1. The sailing under the enemy's license constitutes, of itself, an act of illegality, which subjects the property to confiscation, without regard to the object of the voyage, or the port of destination. *The Ariadne*....*143

LOCAL LAW.

1. It is essential to the validity of an entry, that the land intended to be appropriated should be so described as to give notice of the appropriation to subsequent locators. *Johnson* v. *Pannel's Heirs*.....*206, 208
2. In taking the distance from one point to another on a large river, the measurement is to be with its meanders, and not in a direct line.....*Id.*
3. In ascertaining a place to be found by its distance from another, the vague words "about" or "nearly," and the like, are to be rejected, if there are no other words rendering it necessary to retain them; and the distance is to be taken positively.....*Id.*
4. Reasonable certainty is required, both in the descriptive call and the locative call of an entry: if the descriptive call will not inform a subsequent locator in what neighborhood he is to search for the land, the entry is defective, unless the particular object is one of sufficient notoriety: if, after having reached the neighborhood, the locative object cannot be found within the limits of the descriptive calls, the entry is also defective. A single call may, at the same time, be of such a nature (as, for example, a spring of general notoriety), as to constitute within itself a call of description and of location; but if this call be accompanied with another, such as a marked tree at the spring, it seems to be required, that both should be satisfied.....*Id.*
5. The call for an unmarked tree, of a kind which is common in the neighborhood of a place sufficiently described by the other parts of the entry, to be fixed with certainty, may be considered as an immaterial call.....*Id.*
6. Therefore, where the entry was in the following words, "D. P. enters 2000 acres, on a treasury-warrant, on the Ohio, about twelve miles below the mouth of Licking, beginning at a hickory and sugar tree on the river bank, running up the river from thence 1060 poles, thence at right angles to the same, and back for quantity," it was held, that the call for a sugar tree might be declared immaterial, and the location be sustained on the other calls.....*Id.*
7. The entry in this case was decreed to be surveyed, beginning twelve miles below the mouth of Licking, on the bank of the Ohio, and running up that river 1060 poles; which line was to form the base of a rectangular parallelogram, to include 2000 acres of land.....*Id.*
8. An error in description is not fatal in an entry, if it does not mislead a subsequent locator. The following entry, "H. M. enters 1687 acres of land on a treasury-warrant, No. 6168, adjoining Chapman Aston, on the west side, and Israel Christian, on the north, beginning at Christian's north-west corner, running thence west 200 poles; thence, north, parallel with Aston's line, until an east course to Aston's line will include the quantity," was held valid, although no such entry as that referred to could be found in the name of Aston, but the particular description clearly pointed out an entry in the name of Chapman Austin, as the one intended, and this, together with Christian's entry, satisfied

the calls of H. M.'s entry. *Shipp* v. *Miller's Heirs*.....*316
9. It is a general rule, that when all the calls of an entry cannot be complied with, because some are vague or repugnant, the latter may be rejected or controlled by other material calls, which are consistent and certain: course and distance yield to known, visible, and definite objects; but they do not yield, unless to calls more material and equally certain.....*Id.*
10. It is a settled rule, that where no other figure is called for in an entry, it is to be surveyed in a square, coincident with the cardinal points, and large enough to contain the given quantity, and that the point of beginning is deemed to be the centre of the base line of such square.....*Id.*
11. The act of Kentucky of 1797, taken in connection with preceding acts, declaring that entries for lands shall become void, if not surveyed before the first day of October 1798, with a proviso, allowing to infants and *femes covert* three years after their several disabilities are removed, to complete surveys on their entries: *held*, that if any one or more of the joint-owners be under the disability of infancy or coverture, it brings the entry within the saving of the proviso as to all the other owners. Distinction between this statute and a statute of limitations of personal actions.....*Id.*
12. A call for a spring branch, generally, or for a spring branch, to include a marked tree at the head of such spring, is not a sufficiently specific locative call; and where further certainty is attempted to be given, by a call for course and distance, and the course is not exact, and the distance called for is a mile and a half from the place where the object is to be found, the entry is void for uncertainty...*Id.*
13. By the act of incorporation of the Union Bank of Georgetown, § 11, the shares of any individual stockholders are transferrible only on the books of the bank, according to the rules (conformable to law) established by the president and directors; and all debts due and payable to the bank, by a stockholder, must be satisfied, before a transfer shall be made, unless the president and directors should direct to the contrary: *Held*, that no person could acquire a legal title to any shares, except under a regular transfer, according to the rules of the bank; and if any person takes an equitable assignment, it must be subject to the rights of the bank, under the act of incorporation, of which he is bound to take notice. *Union Bank* v. *Laird*...* 390
14. A creditor may lawfully take and hold several securities for the same debt, and cannot be compelled to yield up either, until the debt is paid; therefore, the bank has a right to take security from one of the parties to a bill or note discounted by it, and also to hold the shares of another party as security for the same.....*Id.*

See STATUTES OF MARYLAND: STATUTES OF NORTH CAROLINA.

MASTER.

1. Where the owner of certain slaves, and also part-owner of a vessel, hired the slaves to the master of the vessel, to proceed as mariners on board, on a voyage, at the usual wages, and without any special contract of hiring: *held*, that the master, having acted with good faith, was not responsible for the escape of the slaves, in a foreign port, which was one of the contingent *termini* of the voyage; and, consequently, within the hazards to which the owner knew his property might be exposed; although it was doubtful, whether the master had strictly pursued his orders in going to such port. *Beverly* v. *Brooke*.....*109
2. Duties of the master to the ship-owner, and extend of his responsibility.....*Id.* *169
3. Effect of the illegal acts of the master upon the owner's property, and as the agent of the cargo. Appendix, note I.....*37

PLEADING.

1. Variances between the writ and declaration, are matters pleadable in abatement only, and cannot be taken advantage of, upon general demurrer to the declaration. *Duvall* v. *Craige*.....*45, 55
2. No *profert* of a deed is necessary, where it is stated only as inducement, and where the plaintiff is neither a party nor privy to it..*Id.*
3. Manner of assigning breaches upon the covenants of title, &c.....*Id.* *62
4. In a writ of right, brought under the statute of Kentucky, where the demandant described his land by metes and bounds, and counted against the tenants jointly; *held*, that this was matter pleadable in abatement only, and and that, by pleading in bar, the tenants admitted their joint seisin, and lost the opportunity of pleading a several tenancy. *Liter* v. *Green*.....*306, 307
5. The tenants could not, in this case, severally plead, in addition to the *mise* or general issue, that neither the plaintiff, nor his ancestor, nor any other under or from whom he derived his title to the demanded premises, were ever actually seised or possessed thereof, or of any part thereof; because it amounted to the general issue, and was an application

to the mere discretion of the court, which is not examinable upon a writ of error.....*Id.*

6. *Quære?* Whether the tenants could plead the *mise* severally, as to the several tenements held by them, parcel of the demandant's premises, without answering or pleading anything as to the residue?.....*Id.*

7. Under such pleas, and the replication prescribed by the statute, the *mise* was joined; the parties proceeded to trial; and the following general verdict was found, viz: "The jury find that the demandant hath more mere right to hold the tenement, as he hath demanded, than the tenants, or either of them, have to hold the respective tenements set forth in their respective pleas, they being parcels of the tenement in the count mentioned:" it was *held*, that this verdict, being certain to a common intent, was sufficient to sustain a judgment.....*Id.*

8. Also held, that a joint judgment against the tenants for costs, as well as the land, was correct.....*Id.*

PRACTICE.

1. A. L. brought an action of *assumpsit*, in the circuit court, and after issue joined, the plaintiff died, and the suit was revived by *scire facias*, in the name of his administratrix; while the suit was still depending, the administratrix intermarried with F. A., which marriage was pleaded *puis darrein continance: held*, that the *scire facias* was thereupon abated, and a new *scire facias* might be issued to revive the original suit, in the name of F. A. and wife, as the personal representative of A. L., in order to enable her to prosecute the suit until a final judgment, under the judiciary act of 1789, § 31. *McCoul* v. *Lekamp's Adm'r*.....*111, 115

2. Under the judiciary act of 1789, and the act of the 3d of March 1803, causes of admiralty and maritime jurisdiction, or in equity, cannot be removed, by writ of error, from the circuit court, for re-examination in the supreme court. *The San Pedro*.....*132

3. The appropriate mode of removing such causes is by appeal; and the regulations contained in the 22d and 23d sections of the judiciary act, respecting the time within which a writ of error shall be brought, when it shall operate as a *supersedeas;* the citation to the adverse party, the security to be given by the plaintiff in error, and the restrictions upon the appellate court as to reversals, &c., are applicable to appeals, and to be substantially observed; except that where the appeal is prayed at the same term when the decree is pronounced, a citation is not necessary...*Id.*

4. Nature of the process of sequestration in the practice of the civil law. *Laidlaw* v. *Organ*.....*179

5. Intervention, in the practice of the civil law, nature of.....*Id.* *192

6. A verdict is bad, if it varies from the issue in a substantial matter, or if it find only a part of that which is in issue; and though the court may give form to a general finding, so as to make it harmonize with the issue, yet, if it appears, that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict. *Patterson* v. *United States*.....*221

7. A circuit court has no authority to issue a *certiorari*, or other compulsory process, to the district court, for the removal of a cause from that jurisdiction, before a final judgment or decree is pronounced.....*Id.*

8. In such a case, the district court may, and ought, to refuse obedience to the process of the circuit court; and either party may move the circuit court for a *procedendo*, after the transcript of the record is removed into that court, or may pursue the cause in the district court, as if it had not been removed.....*Id.*

9. But if the party, instead of properly taking advantage of the irregularity in the proceedings, enters his appearance in the circuit court, takes defence, and pleads to issue, it is too late, after verdict, to object to the irregularity, and the supreme court, will, on error, consider the cause as an original suit in the circuit court.....*Id.*

10. The jurisdiction of the circuit court having vested, between citizens of different states, cannot be divested by a change of domicil of one of the parties, and his removal into the same state with the adverse party, *pendente lite*. *Morgan's Heirs* v. *Morgan*..*290, 297

11. Rule requiring all persons interested to be parties to a bill in chancery.....*Id.* *298

12. Exceptions to this rule.....*Id.*

13. Form of proceeding in writs of right. *Liter* v. *Green*.....*306

14. Distinction between a writ of right patent, and a writ of right close.....*Id.* *311

15. No writ of error lies to the highest court of law or equity of a state, under the 25th section of the judiciary act of 1789, unless there be something apparent on the record bringing the case within the appellate jurisdiction of this court. *Inglee* v. *Coolidge*....*363, 368

16. The report of the judge who tries the cause at *nisi prius*, containing a statement of the facts, is not to be considered as a part of the record; the judgment being rendered upon a general verdict, and the report being mere matter *in pais*, to regulate the discretion of the court, as to the propriety of granting a

new trial, the writ of error, in such a case, will be dismissed.....*Id.*

17. Consequence of moving for a new trial, instead of tendering a bill of exceptions or having a special verdict found .....*Id.* *367

18. No costs are given, where the writ of error is dismissed for want of jurisdiction. *Id.* *368

19. But costs will be allowed, if the original defendant be also defendant in error. *Id.* *363

20. Where a chancery cause is set down for hearing, on the bill, answer and exhibits, without other pleadings, the whole of the answer must be considered as true. *Leeds* v. *Marine Ins. Co. of Alexandria*....*380, 383

21. A writ of error does not lie, to carry to this court, a civil cause which has been carried from the district to the circuit court by writ of error. *United States* v. *Barker*....*395

22. The United States never pay costs.....*Id.*

23. The provision in the judiciary act of 1789, § 30, as to taking depositions *de bene esse*, does not apply to cases pending in this court, but only to cases in the district and circuit courts: testimony by depositions can be regularly taken for this court only under a commission issuing according to its rules. *The Argo*.....*287

24. Further proof, in revenue or instance causes.....*Id.* *289

See ADMIRALTY, 1: BILL OF EXCHANGE, 5: CHANCERY, 15, 16: CONSTITUTIONAL LAW, 1–4, 6: JURISDICTION, 1–4: PRIZE.

PRIORITY.

See DUTIES, 2–4.

PRIZE.

1. The evidence to acquit or condemn, must come, in the first instance, from the papers and crew of the captured vessel. *The Dos Hermanos*.....*76, 79

2. It is the duty of the captors, to bring the ship's papers into the registry of the district court, and to have the examinations of the principal officers and seamen taken on the standing interrogatories.....*Id.*

3. It is exclusively upon these papers, that the cause is to be heard in the first instance. If, from the evidence, the property appears clearly to be hostile or neutral, condemnation or restitution immediately follows: if the property appears to be doubtful, or the case suspicious, further proof may be granted, according to the rules which govern the legal discretion of the court.....*Id.*

4. If the parties have been guilty of gross fraud, or misconduct, or illegality, further proof is not allowed, and condemnation follows.....*Id.*

5. Although some apology may be found, in the state of peace, which had so long existed previous to the late war, for the irregularities which had crept into the prize practice, that apology no longer exists; and if they should hereafter occur, it may be proper to withhold condemnation, even in the clearest cases, unless the irregularities are avoided or explained.....*Id.*

6. If a party attempts to impose upon the court, by knowingly or fraudulently claiming as his own, property belonging in part to others, he will not be entitled to restitution of that portion which he may ultimately establish as his own.....*Id.*

7. The claimants have no right to litigate the question, whether the captors were duly commissioned; the claimants have no *persona standi in judicio*, to assert the rights of the United States: but if the capture be made by a non-commissioned captor, the prize will be condemned to the United States.....*Id.*

8. A question of proprietary interest, and concealment of papers: further proof ordered, open to both parties. *The Fortuna*...*161

9. Where an enemy's vessel was captured by a privateer, and subsequently dispossessed by the force or terror of another, the prize was adjudged to the first captor, with costs and damages. *The Mary*..... *123

10. A question of collusive capture: condemnation to the captors. *The Bothnea*...*169

11. If the court below deny an order for further proof, when it ought to be granted, or allow it, when it ought to be denied, and the objection is taken by the party and appears on the record, the appellate court can administer the proper relief. *The Pizarro*.*227, 240

12. But, if evidence in the nature of further proof be introduced, and no formal order or objection appear on the record, it must be presumed to have been done by consent, and the irregularity is waived.....*Id.*

13. Concealment on spoliation of papers, is not, *per se*, a sufficient ground for condemnation in a prize court: it is calculated to excite the vigilance and justify the suspicions of the court; but is open to explanation; and if the party, in the first instance, fairly, frankly and satisfactorily explains it, he is deprieved of no right to which he is otherwise entitled. If, on the contrary, the spoliation is unexplained, or the explanation is unsatisfactory; if the cause labor under heavy suspicions, or gross prevarications, further proof is denied, and condemnation ensues from defects in the evidence which the party is not permitted to supply.....*Id.*

14. French and Spanish law of spoliation of

papers : application of the same : opinions of M. Portalis : principle of reciprocity. *Id.* *242

15. A question of collusive capture : Condemnation to the United States. *The George*.....*278

16. A suit by the owners of captured property, lost through the fault and negligence of the captors, for compensation in damages. *The Anna Maria*.....*327

17. The right of visitation and search is an unquestionable, belligerent right; but must be exercised with as much regard to the safety of the vessel detained, as is consistent with a thorough examination of her character and voyage.....*Id.*

18. Detention after search, pronounced to be unjustifiable, under the particular circumstances of the case.....*Id.*

19. The value of the captured vessel, and the prime cost of the cargo, with all charges, and the premium of insurance, where paid, allowed in ascertaining the damages.....*Id.*

20. A libel against a commander of a squadron, calling on him to proceed to adjudication, or to make restitution in value, of a vessel and cargo, detained for search by the captain of a frigate belonging to the squadron, and lost while in his possession : Libel dismissed. *The Eleanor*.....*345

21. The commander of a squadron is liable to individuals for the trespasses of those under his command, in case of positive or permissive orders, or of actual presence and co-operation. But *quære*, how far he is responsible in other cases ?.....*Id.*

22. Where a capture has actually taken place, with the assent, express or implied, of the commander of a squadron, the prize-master may be considered as a bailee, to the use of the squadron, who are to share in the prize-money, and thus the commander may be made responsible; but not so as to mere trespasses, unattended with a conversion to the use of the squadron.....*Id.*

23. The commander of a single ship is responsible for the acts of those under his command ; as are, likewise, the owners of privateers, for the conduct of the commanders appointed by them.....*Id.*

24. Detention for search is a right which a belligerent may exercise over every vessel, except a national vessel, which he meets with on the ocean.....*Id.*

25. The principal right necessarily carries with it all the means essential to its exercise ; among these may, sometimes, be included the assumption of the disguise of a friend, or an enemy, which is a lawful stratagem of war. If, in consequence of its use, the crew of the vessel detained abandon their duty, before they are actually made prisoners of war, and the vessel is thereby lost, the captors are not responsible.....*Id.*

26. Whenever an officer seizes a vessel as prize, he is bound to commit her to the care of a competent prize-master and crew ; not because the original crew, when left on board (in the case of a seizure of the vessel of a citizen or neutral), are released from their duty, without the assent of the master, but from the want of a right to subject the captured crew to the authority of the captor's officer. But this rule does not extend to the case of a mere detention for examination, which the commander of a cruising vessel may enforce by orders from his own quarter-deck, and may, therefore, send an officer on board the vessel detained, in order more conveniently to enforce it, without taking the vessel out of the possession of her own officers and crew.....*Id.*

27. The modern usages of war authorize the bringing one of the principal officers of the vessel detained on board the belligerent vessel, with the papers, for examination ....*Id.*

28. Further illustration of these principles. *Appendix*, note I.....*13, 14, 15

29. It is the practice of the court, in prize causes, to hear the cause, in the first instance, upon the evidence transmitted from the circuit court, and to decide from that evidence, whether it is proper to allow further proof. *The London Packet*.....*371

30. Affidavits to be used as further proof in causes of admiralty and maritime jurisdiction, in this court, must be taken by commission.....*Id.*

31. Principles and practice in prize causes. *Appendix*, note I.....*1

32. Extent of the prize jurisdiction of the admiralty.....*Id.* *1–6

33. Seizures by non-commissioned captors.....*Id.* *7

34. Probable cause for captures.....*Id.* *8

35. Responsibility of captors having a *bonâ fide* possession.....*Id.* *9

36. Proceedings on sending in for adjudication.....*Id.* *10

37. Capture without probable cause....*Id.* *11

38. Proceedings to compel the captors to proceed to adjudication.....*Id.* *12, 16

39. Liability of commanders of squadrons, and owners of privateers, for the loss of captured property.....*Id.* *13

40. Custody of the captured property..*Id.* *17

41. Prize libel and monition.....*Id.* *19

42. Claims, and persons who are to conduct the proceedings.....*Id.* *21

43. Rules of evidence.....*Id.* *23

44. National character of persons and ships, how determined.....*Id.* *27

45. Questions of proprietary interest...*Id.* *31

46. Act of the master, how far binding on the ship-owner.....*Id.* *37
47. Re-captures and salvage.....*Id.* *40
48. Unlivery, appraisement, sale and delivery on bail of the cargo.....*Id.* *49
49. Questions of freight.....*Id.* *53
50. Allowance of costs and expenses...*Id.* *56
51. Restitution of the master's adventure.....*Id.* *58
52. Claims of joint capture.....*Id.*
53. Decree of condemnation or restitution.....*Id.* *68
54. Condemnation to the captors, or as *droits*.....*Id.* *71
55. Distribution of the prize proceeds..*Id.* *75
56. Responsibility of prize-agents.....*Id.* *78
57. President's instructions. *Appendix*, note II.....* 80
58. Standing interrogatories. *Id.* Note III. *81

See Domicil : License.

SALE.

1. Where a promissory note is given for the purchase of real property, the failure of consideration, through defect of title, must be total, in order to constitute a defence to an action on the note. *Greenleaf* v. *Cook*.....*13, 14
2. *Quære?* Whether, after receiving a deed, a party can avail himself, at law, even of a total failure of consideration?.....*Id.*
3. But where the note is given with full knowledge of the extent of the incumbrances, and the party thus consents to receive the title, its defect is no legal bar to an action on the note.....*Id.*
4. Any partial defect in the title or the deed, is not inquirable into by a court of law, in an action on the note; but the party must seek relief in chancery.....*Id.*
5. Rule of the French law as to the recovery of purchase money on a failure of title...*Id.*
6. It is not the duty of the vendee to communicate to the vendor intelligence of extrinsic circumstances which may influence the price of the commodity, where the particular information is exclusively within the knowledge of the vendee, but the means of intelligence are equally open to both parties; but, at the same time, each party must take care not to say or do anything tending to impose upon the other. *Laidlaw* v. *Organ*....*178, 195
7. Doctrine of Pothier as to the respective obligations of the vendor and vendee in this respect.....*Id.* *185

SPECIFIC PERFORMANCE.

See Chancery, 4–14.

STATUTES OF KENTUCKY.

See Local Law, 11.

STATUTES OF MARYLAND.

See Treaty, 6–8.

STATUTES OF NORTH CAROLINA.

1. The plaintiffs in ejectment claimed under a grant from the state of North Carolina, comprehending the lands for which the suit was brought, and the defendants claimed under a junior patent, and a possession of seven years, which, by the statutes of that state and Tennessee, constitutes a bar to the action, if the possession be under color of title: to repel this defence, the plaintiffs proved, that no corner or course of the grant, under which they claimed, was marked, except the beginning corner; that the beginning, and nearly the whole land, and all the corners, except one, were within the Cherokee Indian boundary, not having been ceded to the United States, until the year 1806, within seven years from which time the suit was brought, but the land in the defendant's possession, and for which the suit was brought, did not lie within the Indian boundary: *Held*, that, notwithstanding the laws of the United States prohibited all persons from surveying or marking any lands within the Indian territory, and the plaintiffs could not, therefore, survey the lands granted to them, the defendants were entitled to hold the part possessed by them for the period of seven years, under color of title. *McIver* v. *Rogan*.....*25
2. A question relative to the title of the late Major-General Nathaniel Greene, to 25,000 acres of land, given to him, within the bounds of the land reserved for the use of the army, by the 10th section of the act of the legislature of North Carolina, passed in 1782, as a mark of the sense entertained by that state of his eminent services. *Rutherford* v. *Greene's Heirs*.....*196

TREATY.

1. Under the Spanish treaty of 1795, stipulating that free ships shall make free goods, the want of such a sea-letter or passport, or such certificates as are described in the 17th article, is not a substantial ground of condemnation: it only authorizes capture and sending in for adjudiction, and the proprietary interest in the ship may be proved by other equivalent testimony. But if, upon the original evidence, the cause appears extremely doubtful and suspicious, and further proof is

necessary, the grant or denial of it rests on the same general rules which govern the discretion of the prize courts in other cases. *The Pizarro*.....*244, 245

2. The term "subjects," in the 15th article of the treaty, when applied to persons owing allegiance to Spain, must be construed in the same sense as the term "citizens" or "inhabitants," when applied to persons owing allegiance to the United States, and extends to all persons domiciled in the Spanish dominions.....*Id.*
3. The Spanish character of the ship being ascertained, the proprietary interest of the cargo cannot be inquired into, unless so far as to ascertain, that it does not belonged to citizens of the United States, whose property, engaged in trade with the enemy, is not protected by the treaty.....*Id.*
4. The privilege of the neutral flag, of protecting enemy's property, conferred by treaty or otherwise, does not extend to a fraudulent use of the flag.....*Id.* *247
5. The stipulation of the Spanish treaty, taken in connection with the law of Spain, does not necessarily imply the converse proposition, that enemy's ships shall make enemy's goods, which is not expressed in the treaty. *Id.* *248
6. The treaty of amity and commerce of 1778, with France, art. 11, enabling French subjects to purchase and hold lands in the United States, being abrogated in 1798; the act of Maryland of 1780, permitting the lands of a French subject, who had become a citizen of that state, dying intestate, to descend on the next of kin, being non-naturalized Frenchmen, with a proviso, vesting the land in the state, if the French heirs should not, within ten years, become resident citizens of the state, or convey the lands to a citizen; and the convention of 1800, between the United States and France, enabling the people of the one country, holding lands in the other, to dispose of the same by testament, and to inherit lands in the other, without being naturalized: *held*, that the latter treaty dispensed with the performance of the condition in the act of Maryland, and that the conventional rule applied equally to the case of those who took by descent, under the act, as to those who acquired by purchase, without its aid. *Chirac* v. *Chirac*.....*259
7. The further stipulation in the convention, "that in case the laws of either of the two states should restrain strangers from the exercise of the rights of property with respect to real estate, such real estate may be sold, or otherwise disposed of, to citizens or inhabitants of the country where it may be," does not affect the rights of a French subject, who takes, or holds, by the convention, so as to deprive him of the power of selling to citizens of this country; and gives to a French subject, who has acquired lands by descent, or devise (and, perhaps, in any other manner), the right, during life, to sell or otherwise dispose of the same, if lying in a state where lands purchased by an alien, generally, would be immediately escheatable.....*Id.*
8. Although the convention of 1800 has expired, the instant a descent is cast on a French subject, during its continuance, his rights become complete under it, and cannot be affected by its subsequent expiration...*Id.*
9. Modification of the *droit d'aubaine* in France, by treaties with other powers.....*Id.* *271

VERDICT.

See PLEADING, 7: PRACTICE, 6.

WRIT OF RIGHT.

See PLEADING, 4–8.