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sonam, and compel appearance by the process of attachment on the goods of the trespasser, according to the forms of the civil law, as engrafted upon the admiralty practice. And we think it indispensable to the purposes of justice, and the due exercise of the admiralty jurisdiction, that the remedy should be applied, even in cases where the same goods may have been attachable under the process of foreign attachment issuing from the common-law courts. For it will necessarily follow, in all such cases, that a question peculiarly of admiralty cognisance, will be brought to be examined before a tribunal not competent to exercise original admiralty jurisdiction ; and that, as a primary, *497] not an incidental question ; since the whole proceeding will have *for its object to determine whether a maritime trespass has been committed, and then to apply the remedy.

Judgment reversed, and the cause remanded for further proceedings.

The GRAN PARA : The Consul-General of PORTUGAL, Libellant.

Admiralty process.

Where the court of admiralty has parted with the possession of the property, upon bail or stipulation, and it is necessary, for the purposes of justice, to retake the property into the custody of the court, the proper process against any person not a party to the stipulation, but who is alleged to have the actual or constructive possession is a monition, and not an execution, in the first instance.

APPEAL from the Circuit Court of Maryland. This is the same case which was reported in 7 Wheat. 471, and was an appeal from proceedings had in the court below, under the mandate of this court in the original cause.

February 24th, 1825. The cause was argued by *D. Hoffman*, for the appellant ; and by the *Attorney-General* and *Taney*, for the respondent. But as the present determination of the court was confined to the single point of practice, without affecting the other questions involved in the *498] cause, it has *not been thought necessary to report the arguments of counsel.

March 1st. STORY, Justice, delivered the opinion of the court.—This is an appeal from the circuit court for the district of Maryland, from proceedings had in that court under the mandate of this court in the original cause, which is reported in 7 Wheat. 471.

The material facts are these : The original libel was against sundry quantities of gold and silver coin, and bullion, deposited by Daniels in the Marine Bank of Baltimore. A claim was interposed by one Nicholas Stansbury, asserting himself to be “agent and attorney in fact,” of Daniels, on behalf of the latter, and claiming restitution of the property, as lawfully captured in war by Daniels. Pending the proceedings in the court below, Stansbury made application for the delivery of the property, upon stipulation, and thereupon, the court ordered, that J. D. Daniels be permitted to draw for, and the president and directors of the Marine Bank be suffered to pay to Daniels, the money in controversy, provided, that Daniels should enter into stipulation in \$23,000, with such surety or sureties as might be

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approved of by the libellant's proctors, to abide such further order or decree, either interlocutory or final, as might be made by the court in the premises. The libellant's proctors approved of Stansbury, and one Thomas Sheppard, and one Henry Didier, jun., as sureties, *and they, accordingly, gave a stipulation for the amount for "J. D. Daniels, claimant." But Daniels [*499 himself was not a party to the stipulation. By a subsequent order of the court, the money was delivered by the Marine Bank to Stansbury, who signed a receipt for the same, as attorney for Daniels, upon a certificate of the deposit originally given by the cashier of the bank to Daniels, and by him delivered over to Stansbury.

A decree of restitution having passed in the supreme court, after the mandate was brought into the circuit court, the libellant prayed that execution might issue against Daniels, to enforce the performance of the decree, and that a monition, or other proper process, might issue against the sureties to the stipulation. To this course the proctor for the claimant objected, and the court finally ordered admiralty process to issue against the stipulators, but refused to make any further order under the motion of the libellant. The case is now before us by appeal from that decision.

Several points have been urged in the argument, upon which, in the present stage of the cause, it is not thought necessary to express any opinion. Assuming Daniels to be a party to the cause, in virtue of the claim made in his behalf by Stansbury, it still remains to show, that the process of execution is, in the first instance, to be issued against him. He is not a party to the stipulation, and so far as any remedy is to be sought upon that, it lies exclusively against the *sureties, since he, as principal, has not, personally, or through the instrumentality of any agent, become bound [*500 by it. The remedy against him for the property, or its proceeds, must be sought solely upon the ground, that he has the actual or constructive possession of them, in virtue of the delivery to his agent, under the order of the court below. If the property had remained in the custody of the court, there is no pretence to say, that he would be liable for the restitution. It is the delivery to them, or to his authorized agent, which can alone give rise to any liability on his part, whether he be a party to the suit, or only a custodian of the property of its proceeds. In such cases, the usual proceeding in the admiralty is, not to award execution against the party, for that would preclude him from showing, in his defence, that he never had any actual or constructive possession, or that he was discharged from all liability. The proper course is, to issue a monition to Daniels, in the usual manner, upon the return of which he may appear and justify himself, and interpose such allegations on the merits as may bring all the matters fully before the court for judgment. This is the constant practice of the admiralty; and the subsequent proceedings are to be according to the common usage, upon which it is unnecessary to comment.

It is, therefore, the opinion of this court, that the circuit court was right in refusing to grant an execution against Daniels, under the circumstances, and that its decretal order ought to be *affirmed; but inasmuch as it appears, that the principal question between the parties has been, [*501 whether any process whatsoever could be awarded against Daniels, it is directed that the affirmation of the order be without prejudice to the award of a monition against Daniels, in the common form of the admiralty.

The Palmyra.

DECREE.—This cause came on, &c.: On consideration whereof, it is ordered, adjudged and decreed, that the decree of the circuit court, refusing to issue an execution against John D. Daniels, as prayed for by the libellant in his petition, be and the same hereby is affirmed, with costs; without prejudice to the libellant, to apply to the said circuit court for a monition against the said John D. Daniels, in the premises, according to the usage of the admiralty, that being a process to which the libellant is entitled by law.

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*The PALMYRA : DEPAU, Claimant.

Appeal.

No appeal lies from a decree of restitution, with costs and damages, in the circuit court; the report of the commissioners appointed to ascertain the damages not having been acted on by the court when the appeal was taken: such a decree is not a final decree.

APPEAL from the Circuit Court of South Carolina. This was the case of an armed vessel, called the Palmyra, taken under Spanish colors, by the United States schooner Grampus (commanded by Lieutenant Gregory, and cruising, with instructions from the president, against pirates), and brought into the port of Charleston, South Carolina, for adjudication. A libel was filed by the captors, and a claim interposed by Mr. Depau, as agent of the alleged owners of the Palmyra, Spanish merchants, domiciled at Porto Rico, and of the captain, officers and crew. In the district court, the libel was dismissed, without costs and damages against the captors. The decree of restitution was affirmed in the circuit court, with costs and damages, and the cause was brought by appeal to this court.

February 19th. It was suggested by the *Attorney-General* (with whom was *Hayne*), for the appellants, that after the decree of restitution, and for damages, in the circuit court, there had been a *reference to com-
*503] missioners to ascertain the amount of damages, and before the report of the commissioners had been acted upon by that court, the appeal was taken. The question was, whether the appeal was not taken too early, the judiciary act of March 3d, 1803, c. 353, having confined the right of appeal to "final decrees." *Ray v. Law*, 3 Cranch 179.

Tazewell, contra, stated, that in the district court there was a decree of restitution and a denial of damages. Both parties appealed from that decree the libellants being dissatisfied with the decree of restitution, and the claimants with the denial of damages. These were, then, cross-appeals, and consequently, there might be an appeal from the decision of the circuit court decreeing restitution, and affirming, in this respect, the decree of the district court, although the decree of the circuit court, reversing that of the district court as to damages, and awarding the latter to the claimants, was as yet undetermined.

February 20th, 1825. MARSHALL, Ch. J., delivered the opinion of the court.—The court has had the question submitted in this cause under consideration, and is of opinion, that the appeal is not well taken. The decree of the circuit court was not *final*, in the sense of the act of congress. The