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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*502] *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 fron 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 *503] damages, in the circuit court, there had been a *reference to commissioners 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, contrà, 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

damages remain undisposed of, and an appeal may still lie *upon that part of the decree awarding damages. The whole cause is not, therefore, finally determined in the circuit court; and we are of opinion, that the cause cannot be divided, so as to bring up successively distinct parts of it.

The case in 3 Cranch 179, is essentially different. In that case, which was an appeal in an equity cause, there was a decree of foreclosure and sale of the mortgaged property. The sale could only be ordered, after an account taken, or the sum due on the mortgage ascertained in some other way; and the usual decree is, that unless the defendant shall pay that sum in a given time, the estate shall be sold. The decree of sale, therefore, is, in such a case, final upon the rights of the parties in controversy, and leaves ministerial duties only to be performed.

Appeal dismissed.(a)

(a) See Young v. Grundy, 6 Cranch 51; Gibbons v. Ogden, 6 Wheat. 448.