directed the prisoner to be admitted to bail, himself in the sum of $4000, and two sureties, each in the sum of $2000.

WILSON, Justice.—The recognisance must be taken for the defendant's appearance at the next stated circuit court. The motion for appointing a special circuit court to try offences of this description, at a place nearer to the scene in which they occurred, has not escaped our attention; and with a wish, if possible, to grant it, we have viewed the subject in every light; but hitherto the difficulties are apparently insurmountable. We will, however, state the principal ones, that the counsel may, if they please, endeavor to remove them.

1. The next circuit court is so near, that it will not be possible to commence and finish the business of the trials for treason, at a special court to be previously held; and it is very questionable, whether we can appoint a special circuit court, at a distant period, to overleap the session of the stated court. The impropriety of such an interference is the more striking, when it is recollected, that the circuit court itself, as well as the supreme court, has a power to appoint a special sessions for the trial of criminal causes. (1 U. S. Stat. 75, § 5).

2. But even if a special court were to be appointed to be held at a distant period, overleaping the stated circuit court, could an indictment found at the latter, be prosecuted and tried at the former? There is a provision, "that all business depending for trial at any special court, shall, at the close thereof, be considered as of course removed to the next stated term of the circuit court" (1 U. S. Stat. 334, § 3); but there is no power given to remit to a special court, the business depending for trial, before the said circuit court.

3. And suppose, a special circuit court were to be appointed previously to the stated court, could both be in session at the same time? Or could two grand juries be impanelled at the same time, for the same district, and both be qualified to present all the offences (including of course, the offences of treason) committed within their jurisdiction? (*a*)

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*BINGHAM, Plaintiff in error, *v.* CABOT *et al.* [*19

Evidence.—Bill of exceptions.—Divided court.

In a suit by the owner of a privateer, against a public agent of the government, to recover the proceeds of property captured, but not condemned, which went into the defendant's hands, documentary evidence, showing in what character he received the property, is admissible.

A bill of exceptions is conclusive, as to the evidence that was before the court below.

If the judgment below be reversed on the merits, but the court is divided on the question of jurisdiction, a *venire de novo* will not be awarded.

THIS was a writ of error to remove the proceedings from the Circuit Court for the district of Massachusetts; and on the return of the record, it appeared, that the defendants in error, being joint-owners of the armed ship called the Pilgrim, formerly commanded by Hugh Hill, had instituted an

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(*a*) *Lewis* and *M. Levy* (as I am informed) attempted to obviate the obstacles above suggested; but it appears, without effect, as a special circuit court was not appointed on this occasion. See the trials for treason, 2 Dall. 335–57.

action on the case against the plaintiff in error, in the circuit court for the district of Massachusetts, of June term 1794, in which a declaration was filed, containing the following counts:

1st Count. That the plaintiff in error, at St. Pierre, on the 8th of May 1779, was indebted to the defendants in error in the sum of $16,969.69, for goods sold and delivered, according to the account annexed; which account was in these words:

"William Bingham, Esq., to the owners of the privateer ship Pilgrim, commanded in the late war by Hugh Hill, on her first cruise, Dr.

1779, 8th May.	To 1000 barrels of flour he received at Martinique, or from on board the privateer Hope, Ole Heilm, master, captured by the ship Pilgrim, and carried into Martinique, previous to 8th May 1779, at 140 livres currency per barrel, livres 140,000, which sum in the currency of the United States, is	16,969	69
	Interest to 9th January 1793,	13,915	84
	Dolls.	30,885	53."

2d Count. *Quantum valebat* for 1000 barrels of flour, with an averment that they are worth $16,969.69. 3d Count. Money had and received by the plaintiff in error, to the use of the defendant in error. 4th Count. That the plaintiff in error was bailiff of the same flour, to sell and account for it to the defendants in error; with an averment that the flour had been long sold, but never accounted for. 5th Count. *Quantum valebat* for 500 barrels of the like flour, with an averment that it was worth $10,000. 6th Count. *Quantum valebat* for one undivided moiety of 1000 barrels of flour, with an averment that it was worth $10,000.

The plea of *non assumpsit* was entered to this declaration; and thereupon, issue was joined.

The material facts attached to the cause were of the following import:

*20] The Pilgrim, being on a cruise off the Rock *of Lisbon, on the 19th of November 1778, captured a brig called the Hope, Ole Heilm, commander, and put on board William Carlton, as a prize-master, who carried the supposed prize, on the 15th January 1779, into Martinique, where the plaintiff in error resided, as a public agent of the United States. On examination, it appeared, that the prize was Danish property, and that her cargo belonged to Portuguese merchants; both those nations being at peace with France and America; but there being no courts of admiralty established at that time in Martinique, competent to decide on the validity of captures as prize, made by American vessels, and the neutral master, after a long detention, on account of repairs, being solicitous to depart, the Marquis de Bouille, governor of the island (to whom authority was delegated by the constitution of the French government, to supply the deficient parts of the civil polity), made the following order, dated the 2d October 1779, which was registered in the admiralty office of the borough of St. Pierre.

"Francis Claude Amour, Marquis de Bouille, Marshal de Camp of the King's armies, commander general of the French troops, militia, fortifications and artillery, of the French windward islands; and governor and lieutenant-general of the islands of Martinique and Dominique: We do certify, that the American privateer, named the Pilgrim, having conducted into the

island of Martinique a Danish brigantine, loaded on account of the subjects of his Most Faithful Majesty, so far as appeared to us, and not on account of the subjects of the King of England, we have ordered, that the said cargo in litigation should be sold, and the freight paid to the captain of the Danish brig, out of the cargo under the care and direction of William Bingham, agent of congress: and the net proceeds of said cargo, deduction made of all other charges, should remain in the hands of said Bingham, to deliver it to whomsoever it may appertain, agreeable to the judgment and orders of congress. (Signed) BOUILLE, &c."

Before, however, the Marquis de Bouille's orders were issued, Mr. Bingham had taken the cargo of the Hope into his custody; and on the 2d of February 1779, addressed a letter to the commercial committee of congress, in which, after mentioning the capture and arrival of the prize, he states, "that upon receipt of the papers (of which he then transmitted copies) found on board, he laid them before the judge of the court of admiralty, at Martinique, who was of opinion, that neither the vessel nor cargo could, with any propriety, be molested on the high seas, by either American or French armed vessels. But (Mr. Bingham adds) that as this vessel is incapable of proceeding *on a European voyage, without great repairs, [*21
which will naturally subject her to a considerable detention; and as her cargo consists of a perishable commodity, he shall dispose of it, at Martinique, pay the master his freight, what damages he may be entitled to, and shall give him permission to take his departure. Indeed, the General insists that the cargo should be disposed of, as the island is in great want of flour; and as the sales will be more advantageous to the owners here, it may make the misfortune less heavy on the concerned. The proceeds, after paying the necessary expenses of the vessel, shall be placed (continues Mr. Bingham) to the credit of the commercial committee of congress, to assist in paying the advances which he had made at Martinique, on the public account: and he is the more inclined to convert it to this use, as he is persuaded, that congress will not have to reimburse it, until the claim of the real owner in Europe is made clear and manifest. It appeared, by an account of sales, signed by Mr. Bingham, on the 8th of May 1779, that the flour had been sold, at different periods, from the 21st of January to the 8th of May 1779, and that the net proceeds, which he placed "to the credit of the owners of prize flour," amounted to livres 107,621. 14. 6.

The owners of the Pilgrim being dissatisfied with the proceedings that had taken place in relation to the cargo of the Hope, instituted in the common pleas of Suffolk county, Massachusetts, an action of trover for the 1000 barrels of flour, in the name of William Carlton, the prize-master, against Mr. Bingham; and attached Mr. Bingham's property, in the hands of Mr. Thomas Russell, of Boston, to answer the judgment of the court. To this action (which was brought to October term 1779) the defendant pleaded not guilty, issue was thereupon joined, and judgment was rendered for the defendant. An appeal was brought to the supreme judicial court of Massachusetts, at February term 1781, by William Carlton; it was tried on the 17th February 1784; a verdict was given for Mr. Bingham, the defendant; and judgment was entered accordingly. When this action at law was commenced, Mr. Bingham, by a letter, dated at Martiniqne, the 6th of October

1779, and addressed to the commercial committee of congress, remonstrated against the proceeding, as he had acted *bonâ fide*, in his official character; and congress passed the following resolutions upon the subject:—

"November 30, 1779.

"Resolved, That Mr. Bingham's letter of the 6th of October last, with the papers inclosed therein, and marked No. 1, 2, 3, 4, together with a certified copy of his appointment to the place of continental agent, be transmitted by the president to the *legislature of the state of Massachusetts Bay, with the following letter:

*22]

"'Gentlemen—I am directed by congress to transmit to you the inclosed papers from Mr. Bingham. They contain an account of his proceedings relative to a vessel, said to be Danish property, captured by the sloop Pilgrim, and carried into Martinique, about which, as he says, a suit is now commenced against him in your superior court. Upon a full examination of the papers, you will judge of the measures which ought to be adopted, to prevent, on the one hand, injustice to individuals, and on the other, the embarrassment of agents, who are obliged to conform to the will of the ruling powers, at the place of their residence. As courts are now instituted at Martinique, for the trial of such causes, congress submit to you whether it would not be advisable to stop the suit already commenced, till judgment is obtained upon the principal question; after which, it will be in Mr. Bingham's power to discharge himself, by delivering to the true owners, the property placed in his hands for their use. If you should be of a contrary opinion, they request you to furnish Mr. Bingham's agent with the inclosed papers. I am, &c.'"

The legislature of Massachusetts taking no order on this application, congress again entered upon the subject, and on the 20th June 1780:

"Resolved, That the General of Martinique, in ordering the cargo of the brig Hope to be sold, and the money to be deposited in the hands of Mr. W. Bingham, till the legality of the capture could be proved (no courts being at that time instituted for the determining of such captures in that island), showed the strictest attention to the rights of the claimants, and the highest respect to the opinion of congress: That Mr. W. Bingham, in receiving the same, only acted in obedience to the commands of the General of Martinique, and in conformity with his duty as agent for the United States.

"Resolved, That congress will defray all the expenses that Mr. William Bingham may be put to, by reason of the suits now depending, or which may hereafter be brought against him in the state of Massachusetts Bay, on account of the brig Hope or her cargo, claimed as prize by the owners, master and mariners of the private ship of war called the Pilgrim.

"And whereas, the goods of the said William Bingham, to a very considerable amount, are attached in the said suits now depending in the hands of the factors of the said W. Bingham, to his great injury. *Resolved, that the general court of the state Massachusetts Bay, be requested to discharge the property of the said W. Bingham from the said attachment: Congress hereby pledging themselves to pay all such sums of momey, with costs of suit, as may be recovered against the said W. Bingham, in either or both the above actions. Resolved, That the navy council at Boston, be directed to give such security, in the

*23]

name of the United States, as the court may require, and to direct the counsel now employed by Mr. Bingham, in the defence of the said actions.

Such were the circumstances of the cause now under consideration, when it came to trial in the circuit court, before Justice CUSHING, an associate judge of the supreme court, alone.(*a*). Mr. Bingham's counsel offered to give the following documents in evidence to the jury: 1. Office copies, certified under the hand and seal of the secretary of state, of the papers found on board the Hope, of depositions relating to the capture, taken officially before Mr. Bingham, as a public agent; of Mr. Bingham's letter of the 2d of February 1779, and other subsequent correspondence and depositions in relation to the capture, addressed to the commercial committee of congress; and of the Marquis de Bouille's order. These documents were stitched together, and were included in one certificate from the secretary of state. 2. The account-sales of the flour at Martinique, dated the 8th of May 1779, and the account-sales of the property which had been attached in the action of trover, brought by *Carlton* v. *Bingham*. 3. The record in the inferior and superior courts of Massachusetts, in the case of *Carlton* v. *Bingham*. 4. The resolutions of congress, passed respectively on the 3d Nov. 1779, and the 20th June 1780. But the court rejected all the evidence (though it would seem from the record, that a part of it must have been admitted in the course of the plaintiff's proofs); and a bill of exceptions was tendered and allowed, in the following words:

"And the said William Bingham, being now here in court, by James Sullivan and Christopher Gore, esquires, his attorneys, the issue joined in the same case, and a jury on the same duly and legally impannelled, prays leave to file a bill of exceptions to the determination of the said court here had on the evidence, which by the said Bingham is offered in this case, and by which determination the said evidence is excluded, and the said Bingham is denied the advantage of giving the same to the jury in the same case, viz.: The several copies, attested by Thomas *Jefferson, and which are hereunto annexed, and numbered from one to [*24
eighteen inclusively; and also three other papers, numbered 23, 24, 25; all which papers had a tendency to prove, that no interest ought to be allowed by the jury, on the sum for which the plaintiffs declare, in their third count, or damages for the detention of the money therein mentioned and declared on; and by the exclusion whereof, the said Bingham does sustain manifest injury and wrong, as he conceives. And the said Bingham further files his exception to the determination of the same court, by which the papers numbered from 27 to 36, inclusively, were excluded; and which papers contain a complete record of the supreme judicial court of the commonwealth of Massachusetts, wherein William Carlton, who had been, as the said Bingham avers, and as appears by the evidence in the case, in possession of the same flour declared on in the said third count in the plaintiff's declaration, had sued in an action of trover for the same; and by which record it appears, that such proceedings were had in the same court, as

(*a*) In the caption, indeed, of the record, Justice LOWELL, the district judge, is named as present; but it is contradicted by a special entry in the margin, in these words:— "N. B. Judge Lowell did not sit in this cause."

would fully show, as the said Bingham conceives, that the said plaintiffs had no legal right to change the same action, after the judgment in the same record specified, into an action of *assumpsit*, or as principals to implead the said Bingham again, after the cause of action had been tried, adjudged and determined, in an action of trover, wherein the special bailiffs of the plaintiffs, as the said Bingham avers, in this suit had so impleaded the said Bingham to verdict and judgment in the same cause, and for the same cause of action in. And that the determination to reject the same papers is wrong—because that if the same papers are admitted to be given to the jury, the evidence therein contained will have a legal tendency to lessen the damages, if not wholly defeat the action of the plaintiffs. And the said Bingham further files in this his bill of exceptions, that the court did reject and refuse to have read to the jury in the trial, as evidence, a resolution of the congress of the United States of America, of the thirteenth of November 1779; also another resolution of the same congress, of the twentieth of June 1780, both which were concerning the subject-matter of the suit. Wherefore, that justice, by due process of law, may be done, in this case, the said Bingham, by the undersigned his counsel, prays the court here, that this his bill of exceptions may be filed and certified as the law directs.

JA. SULLIVAN,
C. GORE.

"June 16, 1794. Allowed to be filed, per
WM. CUSHING,
Judge of said circuit court."

*25] *A verdict was then given for the defendant in error, upon the third count, for money had and received, damages, $29,780.16, and for the plaintiff in error, on all the other counts: and thereupon, judgment was rendered for damages and costs.

A motion was made on behalf of the plaintiff in error, for a new trial, on two grounds: 1. Excessive damages: and 2. A misdirection in the judge's charge to the jury; the judge having directed the jury, "that the law was such, that on the evidence offered in the cause, the plaintiffs ought to recover; whereas, the evidence given was such as clearly proved, that the flour mentioned in the third count, was the joint property of the plaintiffs below, as they were owners of the ship Pilgrim, and of the masters, mariners and company on board the same ship; to wit, of the plaintiffs below, and Hugh Hill and others, jointly: by which evidence, if any contract was proved in the case, it was a contract between the said Bingham with the plaintiffs and divers other persons jointly, who are not plaintiffs, or mentioned in the writ, and who are now alive within the United States." But a new trial was refused.

On the return of the record (to which were annexed several depositions and papers produced in the court below, as well as the papers referred to in the bill of exceptions), the following errors were assigned; the defendant in error pleaded *in nullo est erratum*, and issue was thereupon joined.

1. That judgment had been given for the plaintiff, instead of the defendant below, on the 3d count.

2. That the circuit court, proceeding as a court of common law, in an action on the case, for money had and received, &c., had no jurisdiction of

the cause; the question, as it appears on the record, being a question of prize or no prize, or wholly dependent thereon; and as such, it was exclusively of admiralty jurisdiction.

3. That the evidence referred to in the bill of exceptions, ought not to have been rejected on the trial of the cause."

The argument (which commenced on the 15th of February 1795) was conducted by *Bradford* (Attorney-General of the United States) and *Lewis*, for the plaintiff in error; and by *Ingersoll*, *Dexter* and *E. Tilghman*, for the defendant in error.

THE COURT desiring the counsel, in the first instance, to discuss the question of jurisdiction, the case presents itself under the following general heads. 1. Exceptions to the jurisdiction. 2. Exceptions to the record.

I. The exceptions to the jurisdiction. For the *plaintiff* in error.—The subject-matter of the action is prize or no prize; and it is, with all its consequences, exclusively of admiralty jurisdiction. The action is not trespass, *for a tort in taking the goods; but it is an action of *assumpsit;* and the plaintiffs below cannot make out a right to recover from the defendant, [*26 who is charged as receiver and agent, unless they first prove the vessel to be a prize. They must show to whom the property belonged; and if the court adjudge, that the proceeds of the sales was money had and received to the use of the plaintiff; it is, in effect, pronouncing a sentence, that the vessel (which has not even yet been condemned) was a prize. Carth. 474; Doug. 596 n.; 3 T. R. 344; 4 Ibid. 382, 394; 1 Dall. 221; 2 Ibid.

For the *defendant* in error.—It is true, as a general proposition, that all prize causes and their incidents are of admiralty jurisdiction; but there are some limitations to the operation of the rule. In the present case, there is, in fact, no question of prize; but even in cases where that question is naturally involved, the courts of common law have, incidentally, tried and decided it; as in cases upon policies of insurance and ransom. 3 Burr. 1734; Doug. 579, 580; 2 Lev. 25; 1 Vent. 173; 4 Inst. 138; 1 Raym. 271; 3 Woodes. 450, 3; 2 Saund. 259; 2 Burr. 683, 693; 1 Wils. 229; Doug. 310–14; 4 T. R. 393; 1 H. Bl. 522. In a variety of cases, likewise, the subject may be traced to an original question of prize, and yet the admiralty can take no cognisance of it. Suppose, for instance, a captor sells his prize; he may, surely, bring an action at common law for the purchase-money: or, if a tailor should detain a man's coat, it will be no answer to an action of trover, that the cloth was taken in a prize. Indeed, it may be stated, generally, that whenever the question of prize is at rest, the admiralty jurisdiction ceases. 4 T. R. 432; 2 Dall. 174; 1 Wils. 211; 4 T. R. 393, arg.; 3 T. R. 342, 348; 1 Burr. 8, 526; Doug. 572, 91. The exclusive jurisdiction of the admiralty does not, then, depend on the property having been originally taken as prize; but on the nature of the controversy arising on the high seas, affecting, usually, the rights and interests of different states; and consequently, depending on principles which ought to be decided by the law of nations, and not by the municipal law of either country. It is not contended, however, that in every cause which appears to be between

citizen and citizen, the courts of common law are always to decide; for if the general nature of the controversy may involve foreign subjects, and foreign rights, the admiralty is the regular and appropriate tribunal. The position extends no further, than to those cases, which commonly occur on land, between citizen and citizen (though originating in a capture at sea) and *27] with respect to which the admiralty has not any, much less an *exclusive, jurisdiction. Such is the cause now litigated. It is a transaction on land, between the captors of the vessel, and their agent. The original owners are not, and could not be, parties to the suit; and their rights cannot be set up, to justify the plaintiff in error, who does not claim under them, nor act by their authority. Then, it is to be observed, that there is nothing upon the record, to show that the controversy grew out of a prize cause. Though the declaration states the plaintiffs to be owners of the privateer, it does not state that the property in dispute was captured by her; and the verdict is only upon the third count in the declaration (the count for money had and received), and all the other counts, which refer to the capture, are put, by the finding of the jury, entirely out of the case.(a) The third count does not refer to the account

(a) Wilson, Justice.—The bill of exceptions states the evidence offered and rejected; and it forms a part of the record. Besides, this is a question of jurisdiction: and was not jurisdiction as much exercised in relation to the counts which were disposed of, in favor of the defendant below, as in relation to the count which was disposed of in favor of the plaintiffs?

Paterson, Justice.—Is it contended, that the account annexed to the declaration does not support the third count, on which the verdict is given; and that we cannot take notice of it?

Dexter, for the defendant in error.—The bill of exceptions does not include all the interpolated evidence, and refers to evidence not transmitted: it does not state what was given in evidence, but only what was rejected. With respect to the account annexed, it is only considered as making a part of the record, in relation to those counts of the declaration which refer to it; and all those counts are put out of the case by the finding of the jury. The third count does not refer to it; and, indeed, if there had only been a single count for money had and received, the account would not have been annexed, agreeable to the practice in the courts of Massachusetts.

Paterson, Justice.—What is to be regarded as the record, seems to be a preliminary point, material to be settled; and we must either adopt the peculiar practice of Massachusetts, or pursue the general practice of the common law.

Dexter.—It is the practice in Massachusetts, to accompany an exemplification, with all the written evidence and papers; but the doings of the parties, and of the court, are alone to be taken as constituting the record. The oral testimony cannot be transmitted; and yet that may be more essential to the issue, than what appears in writing.

Bradford, for the plaintiff in error.—The facts must be considered as they appear upon the whole record; and by the exhibit of the plaintiffs themselves, annexed to the declaration, it appears to be a question of prize.

Cushing, Justice.—There was other evidence (some of it parol) given on the trial, besides what now appears on the record. If, then, we suppose that contradictory evidence may be given to the jury, and that they have a right to believe the testimony of one witness, and to reject the testimony of another, I am at a loss to conceive, how the court could, under such circumstances, state what was proved on the trial. But with respect to the record, the practice of Massachusetts is plain and obvious. The declaration and pleadings in every suit, are entered in a book; and all the papers and exhibits

*annexed to the declaration ; and therefore, that account cannot be taken into view, to show that the question depends on a capture as prize. The depositions and papers arbitrarily connected with the record by the clerk below (and which do not comprise all the evidence given on the trial), are not legally a part of the record ; they cannot be resorted to, in order to ascertain the nature of the controversy ; but must be rejected as surplusage : and this court cannot look at the statement in the bill of exceptions, to discover the complexion of the cause ; for the only point to be decided in that respect, is—whether the court below was, or was not, right, in rejecting the evidence that was offered. Bull. N. P. 315 ; 3 Burr. 1745. Besides, this court cannot reverse the judgment for error in fact (1 U. S. Stat. 84, § 22) ; and therefore, they cannot, in the present case, any more than in the case of a special verdict, infer a fact, or take notice of any fact resulting from the depositions and papers annexed to the record, which the jury has not expressly found.(a) 3 Bl. Com. 407. The proof on the third count, may have been of money received to the plaintiff's use, independent of the account annexed, or of any question relating to the prize ; and as the court will presume everything that they reasonably and lawfully can, in support of a verdict and judgment, the sum given in damages will be taken to reach the justice of the case. 1 Wils. 1255 ; 3 Burr. 1786 ; 1 Str. 608 ; 9 Vin. Abr. 598 ; 10 Ibid. 1, pl. 1. But surely, it is now too late, to make the exception to the jurisdiction. 4 Burr. 2037. The defendant below ought to have brought the question forward, by way of plea ; or, at least, if it appeared on the evidence, he should have required the opinion of the court, in the charge to the jury ; but whenever evidence is allowed to go to a jury, without exception, the verdict is conclusive ; and the evidence can never afterwards be examined on a writ of error. 2 Lutw. 1566 ; Holt 301. So, what is pleadable in abatement, is not assignable as error. 4 Burr. 2037. Taking, therefore, a full and candid view of the case, as it appears upon what may legally be denominated the record, it is not a case of prize, but a case of principal and factor. The plaintiff in error obtained possession of the flour, under the authority, and as the agent, of the defendants in error : he cannot dispute that authority ; the flour, in his possession, belonged to his principal ; and when it was sold, the money was the money of his principal. This doctrine does not exclude the idea of an investigation of the lawfulness of the capture, at a proper time, between proper parties, and before *a proper tribunal. If a competent court of admiralty had been established at Martinique, an immediate proceeding there, [*29 would have obviated every difficulty ; and it ought not to be urged by the plaintiff in error, that the captors have never since proceeded to condemn the vessel, as it was by his act they were deprived of the ship's papers and other means for doing so. But even an American court of admiralty may take cognisance of the question of prize ; and in the hands of the captors, the money would always be liable to the claims of the captured. To maintain the present action, however, a special property is sufficient ; and the

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are filed in the clerk's office. The book is alone deemed the record; and the papers and exhibits are only referred to, for the purpose of ascertaining what writ issued, or what depositions have been taken.

(a) Paterson, Justice.—The court cannot infer a fact from a fact; but if the fact is on the record, we may infer the law.

captors have a special property before the condemnation. There are, indeed, many instances of prizes being brought into court and sold, before they were condemned; upon the general principle, that the property is vested in the captor, whenever the original owner has lost the *spes recuperandi.* But when the plaintiff in error sold the prize goods, without and adjudication, at a place where no court of admiralty existed, the defendants in error had no remedy against him, but at common law. It does not even appear on the record, that the plaintiff in error took possession of the goods by order of the Marquis de Bouille; but at all events, it is clear, that the Marquis had no right to examine the validity of the prize; while, on the other hand, the prize-master had a right, under the 17th article of the treaty with France, to bring the prize from Martinique to America.

For the *plaintiff* in error, in reply.—There is no magic in the word "record," to preclude the court from exercising their senses and judgment, upon the inspection and construction of an instrument, which the judge and clerk of the circuit court have officially certified to be an exemplification of all the proceedings in the cause. With what justice, can it be said, that the papers forming a part of this exemplification, have no relation to the controversy? Are the commission of the privateer, the account-sales of the prize goods, and the order of the Marquis de Bouille, entirely unconnected with the demand of the plaintiffs, and the answer of the defendant? The great, the only point in controversy, was—whether, under every circumstance of the case, Mr. Bingham was responsible to the owners of the privateer, for certain goods, which the privateer had captured as prize? The declaration, in every count, claims the same sum that appears in the account-sales, as the proceeds of the prize-goods; and the reasons urged on the motion for a new trial show, that the object of the third count, on which the verdict had been given, was the same as the object of the other counts, to which alone, it has been said, the account-sales apply. But it is also contended, that the court can infer nothing from all these documents; since they "are to be considered, *30] not as facts, but only *as the evidence of facts, proper for a jury, exclusively, to decide upon." The truth, however, is, that it is the peculiar province of the court to construe deeds and papers, and to declare their legal operation. It is, surely, extravagant, to assert, that the court are incompetent to determine the meaning and effect of the privateer's commission, or the Marquis de Bouille's order. If it satisfactorily appears, that all the proceedings and facts which belong to the cause, have been returned, whether the return is according to the technical precision of Westminster Hall, or the informal practice of the courts of Massachusetts, being judicially here, it must be noticed, in all its parts, by the court. The only general question, therefore, upon the point of jurisdiction, is—whether from all the facts, spread throughout the proceedings of the circuit court, the cause of action sufficiently appears?

And a summary of the evidence on the record will demonstrate that it is a prize cause. 1. The plaintiffs sue as owners of the privateer Pilgrim. This raises a legal presumption that their whole demand is in that character; and that it must relate to some transaction of the privateer. 2. The account annexed to the declaration corroborates and confirms that presumption. It states expressly, that the suit is brought to recover the proceeds of flour

captured by the Pilgrim; and whether it is usual, or not, to annex such an account to an action simply for money had and received, in the present instance, it was manifestly intended to exhibit the whole of the plaintiff's claim. 3. The commission of this privateer, and the papers taken on board the prize, are the very exhibits to be produced on a libel for condemnation; and prove, unequivocally, that the cause is of admiralty jurisdiction. 4. The order of the Marquis de Bouille, which was registered in the admiralty of Martinique, shows the tenure by which Mr. Bingham held the property; that is, as a deposit of the proceeds of goods taken as prize, on the high seas. Hence, from the commencement to the close of the transaction, as it appears on the return to the writ of error, nothing is to be traced as the cause of action, but a capture as prize, and its consequences. (*a*)

But in order to escape from the pressure of this proof, the most extraordinary subterfuges are employed; and the principle, that the question of prize belongs exclusively to the admiralty jurisdiction, is so refined upon, as to be rendered *insensible and illusory. Sometimes, it is urged, that the plaintiff in error has tortiously possessed himself of the property of the defendants; sometimes, in direct contradiction to that idea, he is considered as their agent or factor; and finally, pursuing a distinct course from either, it has been said, that there are neutrals concerned, who alone are entitled to dispute the validity of the prize with the defendants in error. The ground taken by the plaintiff in error is, on the other hand, clear, consistent and simple—it is merely this, that the defendant below received the property from the Marquis de Bouille, as his agent, in the first instance, in trust, "to be delivered to whomsoever it may appertain, agreeable to the judgment of congress." The trust, therefore, constituted Mr. Bingham the eventual agent of those persons only to whom the property really belonged —of the defendants in error, it they could show it was lawful prize; but if not, the legal promise resulted to the original owners. As far as the Marquis de Bouille could, he had determined the property to be neutral; and everything that is now said by the defendants in error, might be said with, at least, equal force, by the neutral claimants, to render Mr. Bingham responsible to them. Until, therefore, the validity of the prize is established, the object of his trust cannot be ascertained; and the validity of the prize can only be established in a court of admiralty. [*31

Thus, the fallacy of the opposite argument is exposed, the moment it is considered, that there was no express promise of the plaintiff in error to account to the defendants; for if such a promise had been made, the question of prize would be merged in the *assumpsit;* and it is conceded, that an action at common law might have been maintained (as in *Henderson* v. *Clarkson*, 2 Dall. 174), unless a neutral claimant interposed, and forbade the payment. The case of *Wemys* v. *Linzee*, Doug. 310, has been considerably shaken by the case of *Home* v. *Camden*, 1 H. Bl. 476, where a court of

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(*a*) PATERSON, Justice.—Does it appear from anything, besides the Marquis de Bouille's order, that the cargo was converted into cash?

Bradford.—The deposition of Stephen Webb states, that on behalf of the defendants in error, he made a demand on Mr. Bingham for the money, as the proceeds of the flour captured by the Pilgrim; to which that gentleman answered, "that he had taken the property for the use of the government of the United States."

admiralty was finally considered as the proper jurisdiction for effectuating an admiralty sentence ; but even the former case, properly taken, affords no support to the opposite doctrine ; for it proceeded entirely upon a construction of the prize statute of England. 1 H. Bl. 522. The prize-agent is created under that statute; he is not compellable to make distribution, until the prize has been condemned (when there is a vested right in the captors, 1 Wils. 211), and all the circumstances show, that there has been a condemnation, before the action was brought, though the fact is not mentioned in the report. On a writ of error, in the case of *Home* v. *Camden*, 4 T. R. 382, the judgment was reversed ; because the prize act did not necessarily take away
*32] the jurisdiction of the admiralty, while it was the foundation *of all the common-law jurisdiction upon the subject. In arguing that writ of error, the counsel urged, that "in no instance can any adverse action be maintained at law, for the proceeds of prize, until the demand has been liquidated by the sentence of the proper court of jurisdiction :" 4 T. R. 385. And Judge Shippen, in a late important decision (*Ross et al.* v. *Rittenhouse*, 2 Dall. 160), reasons upon, and affirms the same proposition. Nor is it material, whether neutrals and foreigners are concerned, or not ; for it is the nature of the question, a question of prize, and not the character of the parties to the controversy, that establishes the admiralty jurisdiction. But even on this point, it is unfortunate for the opposite position, that all the cases cited (*Le Caux* v. *Eden*, *Lindo* v. *Rodney*, *Rous* v. *Hassard*) are cases between subjects of the same sovereign. Doug. 587. But it has been likewise urged, that it is now too late to except to the jurisdiction of the circuit court : to which, it is answered, that the question could not be made, on the count for money had and received, until the nature and evidence of the demand were exhibited, nor was it necessary to require the opinion of the judge in his charge to the jury ; since, a defect of jurisdiction must always be noticed, whenever it appears in the proceedings.(*a*)

On the 27th of February, the court delivered their opinion to the following effect :

Paterson, Justice.—Considering, as I do, that all the papers transmitted from the circuit court, upon a return to the writ of error, form a part of the record in this cause, I am clearly of opinion, that the subject-matter of the controversy is fully and exclusively of admiralty jurisdiction.

Iredell, Justice.—I find it difficult, to form an opinion on the question of jurisdiction, at this stage of the cause. I concur in thinking, however, that all the papers, which accompany the record, should be considered as a

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(*a*) Cushing, Justice.—Could not a defect of jurisdiction be taken advantage of, on the general issue?

Bradford.—Yes: but should the party choose to avoid taking advantage of it on the trial, the court is bound to take notice of it, if, at any time, it appears on the record.

Paterson, Justice.—That is, certainly, the law, if the defect of jurisdiction is apparent on the record. We are now inquiring whether it does so appear.[1]

[1] The federal courts being courts of limited, not of general, jurisdiction, if the absence, of jurisdiction in the court below appears, in any way, upon the record, the supreme court is bound to reverse, and direct a dismissal of the cause. Scott *v.* Sandford, 19 How. 393: and see United States *v.* Huckabee, 16 Wall. 414.

part of it; and in relation to the original suit, it appears to me, that on the evidence exhibited by Mr. Bingham, to show that he acted under the orders of the Marquis de Bouille, the judge should have charged, and the jury should have found, that he was not responsible to the plaintiffs.

But still, I am not ready, at this moment, to decide, that *the circuit court had no jurisdiction. Suppose, the plaintiffs below had [*33 expressly stated in their declaration, that their cause of action was a capture as prize; the court would, probably, have directed a nonsuit; and yet, if the plaintiffs had persisted in answering, when called, the jury must have given a verdict. Suppose, again, that the controversy had appeared, from the defendant's evidence, to turn entirely upon the question of prize, the court could not, I conceive (though I speak here with great diffidence), direct the plaintiffs to be nonsuited, merely on the defendant's evidence; and unless a juror had been withdrawn by consent, a verdict must also have been given in this event. It will not be sufficient to remark, that the court might charge the jury to find for the defendant; because, though the jury will generally respect the sentiments of the court on points of law, they are not bound to deliver a verdict conformable to them.[1] From these, and other considerations, I do not find myself at liberty to decide against the jurisdiction of the circuit court; though, I repeat, that the jury ought to have been let in to give a verdict in favor of the defendant.

Wilson, Justice.—From the proceedings laid before the court, it appears clearly to my mind, that the question on which the cause must be decided, is exclusively of admiralty jurisdiction.

Cushing, Justice.—It does not appear to me, from any part of the record, that the circuit court had not jurisdiction on the third count in the declaration. The papers and depositions that have been transmitted, were, no doubt, produced upon the trial; and I agree, that they ought to be regarded as a part of the record. But we are not bound to receive for truth, everything which they allege; nor, indeed, can we give any of their statements the validity and force of a fact; since they only amount to evidence; and it is the peculiar and exclusive province of the jury to infer facts from the evidence. That the court had not jurisdiction on those counts, which seem to refer to a question of prize, is no reason for excluding a jurisdiction upon the count, which has no such reference. The contract might be of a different nature; and the parol testimony (which does not appear, in any shape, on the record) might have supported it.

The Court, being thus equally divided in their opinions, on the exception to the jurisdiction, directed the counsel to proceed to the discussion of—

II. The exceptions to the record. For the *plaintiff* in error.—The exceptions to the record may be classed in the following manner: 1st. That there was *not a court competent to try the cause, and render judgment [*34 therein. It appears by the memorandum in the margin of the record, that only one judge sat on the trial and decision, though the district judge was actually present; whereas, the act of congress requires two judges to constitute a circuit court (1 U. S. Stat. 74, § 4; Ibid. 333, § 1), except in

[1] See note to the case of Georgia *v.* Brailsford, *ante*, p. 4.

certain specific cases, where the latter act empowers one judge of the supreme court to hold the circuit court alone. But as the general constitution of the court requires two judges, and two judges were actually present, the reason for one only sitting on the cause, should appear on the record to be such as the law allows.

2d. That the action is brought for money had and received, &c.; and if any such action would lie, all who are interested must join in bringing it; whereas, there were several other joint owners of the privateer's prizes (the captors) who are not parties to the suit. Journ. of Cong. vol. 2, p. 107. In trespass, this exception must be pleaded in abatement;[1] but in *assumpsit*, it may be taken advantage of at the trial. Bull. N. P. 34, 152; 2 Str. 820; Gilb. L. Ev. 106. In the present case, the plaintiffs waived all tort; and whatever promise the law raised, was a promise to all interested in the property or its proceeds; which included the mariners, as well as the owners of the privateer. But even if the action could be maintained by the owners of the privateer only; yet, the third count does not state the promise to be to all the owners. A person now dead was a joint owner; but the promise is stated to be made to John Cabot, the surviving partner, and not to J. & A. Cabot, in the lifetime of A., &c.

3d. That a variety of papers and depositions offered in evidence by the plaintiff in error (and some of which had actually been given in evidence in behalf of the defendant in error), together with certain resolutions of congress, and the exemplification of the record in the former suit of *Carlton* v. *Bingham*, had been rejected; and if any one of them was improperly rejected, the judgment below must be reversed. The objection to admit those documents must rest either upon the form of authentication or upon the nature of their contents. Those which had been officially deposited in the secretary of state's office were certified in the form prescribed by the act of congress (1 U. S. Stat. 122); the record of the action of *Carlton* v. *Bingham* was an exemplification under the seal of the proper court; the resolutions of congress were formally extracted and certified from the journals; and the whole evidently related to the subject in controversy. Mr. Bingham was a mere stakeholder; and an indemnity, at least, should have been tendered, before the property was taken from him. But whenever the
*35] question of damages arose, it was material to show that he *had acted throughout the business with fidelity, as a public agent, with the approbation of congress, and in conformity to the trust reposed in him by the Marquis de Bouille, which did not allow him to pay over the money until a right to it was established by deciding the question of prize.(*a*) He could only, therefore, defend himself, by showing all the correspondence and

(*a*) The question might, perhaps, have been tried by a monition issuing to Mr. Bingham, from the admiralty of Martinique, on which a decree would be binding upon all the world. See the argument of Sir William Scott, in 3 T. R. 329; and Judge Buller's opinion, p. 346. Besides, it appears, that the *arret* of the French government, authorizing the French courts of admiralty to try and determine captures made by Americans, was promulged immediately after the prize had been consigned to Mr. Bingham's care. Journ. Cong. vol. 5, p. 449–450.

[1] Deal *v.* Bogue, 20 Penn. St. 228; Backenstoss *v.* Stahler, 33 Id. 251. It is otherwise, in replevin. Reinheimer *v.* Hemingway, 35 Id. 432.

proceedings as they occurred. In all mercantile cases, indeed, the correspondence of an agent is admitted to show the real complexion of the transaction; and this is, certainly, the first instance, in which a court has refused to allow the acts or ordinances of congress to be read in evidence. With respect to the record of *Carlton* v. *Bingham*, it might not, perhaps, be regular to give it in evidence, as a bar to the subsequent action, unless it was pleaded: but on the present occasion, it was only offered to show that other persons had sued for the same thing; that Mr. Bingham was, in fact, a mere stakeholder; and that, therefore, he ought not to deliver the property to any one, until the legal ownership was established, nor be compelled to pay damages or interest for the detention, whoever might be the owner. A verdict in another cause may be given in evidence, though the parties are not the same, if the defendant was bailiff or agent of the party now suing. Gilb. 35. So, a common carrier may maintain trover for the principal or owner of the goods; and a verdict in that action may be given in evidence, as conclusive against the principal, in an action brought by him against the carrier. 2 Espinasse, 335; Bull. N. P. 33.

For the *defendants* in error.—It must be premised, that the bill of exceptions is not fairly drawn, since it omits to state the evidence on behalf of the plaintiffs below, and therefore, does not bring the points in the cause fully before the court. On a writ of error, however, facts are not to be considered (3 Bl. Com. 407); and from the statement in a bill of exceptions, the court will infer nothing. Bull. N. P. 316; 2 T. R. 55, 125. But to proceed to the exceptions in their order.

1st Exception. The court was constituted agreeable to the provisions of the acts of congress. It is stated on the record, that the district judge did not sit in the cause; whether he was interested or not is a fact; and from his not sitting, the court will presume that he was interested. 1 Str. 129.

*By the Court.—This exception need not be further answered. We are perfectly clear in the opinion, that although the district judge was on the bench, yet, if he did not sit in the cause, he was absent, in contemplation of law; and that the case otherwise comes within the provisions of the acts of congress. [*36

2d Exception. It cannot be made a question on this record, that all the proper plaintiffs were not joined in the action; since the jury have found the *assumpsit* as it was laid in the declaration. Besides, there is nothing to show, that there were any other parties; the owners and captors might have been the same; or the owners, by a contract with their mariners (which could not be affected by the prize resolutions of congress), might have entitled themselves to the whole of the prizes. The statement of the fact, on the motion for a new trial, is merely the allegation of the interested party, contradicted by the verdict, and the rejection of the motion.

3d Exception. The court below was right in rejecting the evidence offered by the plaintiff in error. That the papers were offered *en masse*, was his fault; and even if some of them should be deemed good evidence, all must be admitted, or none. But Mr. Bingham's own letters to congress, and the correspondence with his counsel, could not be evidence, for he was a party. The Marquis de Bouille's certificate, which has been called an

order, is nothing more than a certificate that he had previously given the order to which it refers, and it had been given in evidence by the plaintiffs. But there is no proof that even this certificate is the act of the Marquis de Bouille; for the secretary of state only certifies, that the original of the office-copy is on his files; and there is no evidence that the original was signed by the Marquis. Being, however, merely the statement of a pre-existing fact, and not the exemplification of a record, certified by a regular officer, it should be proved, like every other fact, in the course of a judicial inquiry, by the oath of a competent witness: the bare certificate of the Marquis de Bouille cannot be allowed as proof of a fact, any more than the certificate of any other respectable individual. Yet, admitting that the Marquis signed the certificate, and that the certificate is competent evidence of the fact, it was enough, to justify the rejection, that it could have no legal effect to prevent the plaintiffs below from recovering; for the Marquis de Bouille's order merely authorized a sale of the prize-goods, which the plaintiffs never impeached; but on the contrary, presuming the sale to be lawful, they brought an action of *assumpsit*, instead of an action of trespass or trover. Though he might order a sale, the Marquis could have no power
*37] *to adjudge who should enjoy the benefit, nor to compel Mr. Bingham to retain the money from its real owners. Besides, it does not appear, that the property came into Mr. Bingham's hands, in consequence of the act of the Marquis de Bouille, nor that the Marquis ever had possession of it. The Marquis directs the proceeds to be retained, liable to the order of congress: but this could give no jurisdiction to congress upon the subject; and congress had, of itself, no right to decide to whom payment should be made. The act of the Marquis is, therefore, merely void; and leaves the question, as to Mr. Bingham, precisely where it stood, before the order was written.

The resolutions of congress were also an improper kind of evidence to be admitted on the issue between the parties; particularly, after congress had become interested, by promising indemnification. They were not in the nature of a law, or rule of conduct, commanding any particular act to be done by Mr. Bingham; they were framed subsequently to his act; and though they appeared, *ex post facto*, as to the sale of the prize-goods, they neither commanded that sale, nor ordered or approved the detention of the proceeds, which alone constitutes the ground of the present demand.(*a*) But even if congress had undertaken to issue such orders, their authority to do so might reasonably be questioned. That body had power to control the operations of war; and as an incident of war, might lawfully decide, conformable to its appellate jurisdiction, the question of prize or no prize. But here was no original suit, no process pending, no parties before congress, in relation to that point; and in relation to the private controversy between

(*a*) PATERSON, Justice.—Does not the subsequent approbation of congress amount to the same thing as if they had issued a precedent order?

Dexter.—In some cases, that principle operates. But congress had not competent authority to protect Mr. Bingham, in the present instance, either by issuing a previous order, or by expressing a subsequent approbation. If an act, originally wrong, gave a party the right to recover damages, no resolution of congress could, retrospectively, affect that right.

the captors and their agent, congress possessed no authority either to legislate or adjudicate. Supposing, however, for a moment, that they had authority to decide, they have not exercised it; they have barely expressed an opinion; and can the opinion of any man, or assemblage of men, be given in evidence? The court had a right to judge, not only whether the evidence comes from a proper source, but also whether it applied to the fact in issue: for even a deed is not evidence, unless it has some relation to the matter in dispute.[1] And if the resolutions of congress were only offered in mitigation of damages, the objection remained. If not proper on the main question, they were not *proper on any question in the cause; and on the merits, it may be remarked, that although no interest should be charged, where money is retained by a party, upon any legal compulsion, or with the consent of the claimants, there was no restraint imposed upon Mr. Bingham by the Marquis de Bouille's order, nor is any consent pretended. [*38

As to the record of the action of trover, *Carlton* v. *Bingham*, it was not pleaded: and therefore, could not be a bar to the present suit. Neither could it be evidence; for a verdict in *trover* is not evidence in *assumpsit*. This appears from the very nature of the actions; the former depending on the proof of a wrongful act, and the latter upon a contract, express or implied. The action of trover failed, because the sale of the goods was not proved to be unlawful or tortious. 4 Bac. Abr. 60–1; 3 Mod. 166; Vin. Abr. tit. Evidence, 68; 4 Ibid. 23, pl. 31.

For the *plaintiff* in error, in reply.—I. It is objected, that the bill of exceptions does not state the evidence given on the trial for the plaintiffs below. But it does not appear, that they gave any evidence more than what the record exhibits. The statute says, that the party aggrieved shall propose his exceptions to the opinion of the court; but there is, surely, no occasion to insert any part of the evidence, which is not material to the point of exception. 2 Inst. 427.

By the Court.—It is exceedingly clear, that the bill of exceptions is conclusive upon this court. We cannot presume or suspect that any material part of the evidence is omitted. On this objection, therefore, nothing now need be added.(*a*)

2. It is objected, that the papers from the office of the secretary of state were not proper evidence; and that though some were good, they could not be received, as the whole were offered *en masse*. The act of congress, however (15th Sept. 1789), makes copies under the official seal of the secretary as valid in proof as the originals; and it is no reason for rejecting the papers, when offered by the defendant, that they, or a part of them, had been previously given in evidence by the plaintiffs. The court, too, might have separated those that were evidence from the rest. As to the contents of the

(*a*) Cushing, Justice, did not seem to coincide in this opinion, but the other three judges were decided.

[1] See Faulkner *v.* Eddy, 1 Binn. 188; Peters *v.* Condron, 2 S. & R. 80; Healy *v.* Moul, 5 Id. 181; Hook *v.* Long, 10 Id. 9; Kennedy *v.* Speer, 3 Watts 95; Murphy *v.* Lloyd, 3 Whart. 538; Meals *v.* Brandon, 16 Penn. St. 220; Schrack *v.* Zubler, 34 Id. 38.

papers: the letters of Mr. Bingham were material to show that he acted as the public agent of congress; that, as such, he had taken depositions and transmitted the ship's papers, and that he had accounted to congress for the property. The correspondence with his counsel merely shows that his
*39] effects had been attached *on account of this demand; and under particular circumstances, the party's own acts are evidence in his favor. 12 Vin. Abr. 24, p. 34, 35; 2 Eq. Abr. 409. The Marquis de Bouille's order, given in evidence by the plaintiffs, was only a translation, while the French original, offered by the defendant, was rejected. The certificate of a chief executive magistrate, is good evidence, without an oath. 3 Bl. Com. 333. The certificate would prove, that the cause was entirely of admiralty jurisdiction; and whether the certificate was *ex post facto*, or not, the jury ought to decide. The 17th article of the French treaty relates to captures from enemies; but this was a capture from a neutral; so the governor had a right to interfere. The resolutions of congress are stated in the bill of exceptions to be concerning the subject-matter of the cause; and it must be presumed, that the resolutions were sufficiently proved. The record of *Carlton* v. *Bingham* (when Carlton sued as bailiff to the owners) ought certainly to have been admitted in mitigation of damages, as it shows that Mr. Bingham could not have paid the money, with safety, to the present claimants, until the question of prize was determined. 4 Co. 94 *b*.

The judges, after some advisement, delivered their opinions, *seriatim*.

Paterson, Justice.—I am clearly of opinion, that the certificate of the Marquis de Bouille, registered in the Admiralty of Martinique, ought to have been admitted as evidence, upon the trial of this cause. He was governor of the island, possessing a high executive and superintending control; and we must presume, that he acted, on this occasion, with legitimate authority.

Those letters which were written to congress by Mr. Bingham, at the time of the transaction, should, likewise, in my opinion, have been submitted to the jury. On the arrival of the captured vessel, the governor might have awarded absolute restitution: but choosing to adopt a middle course, he directed the cargo to be sold, and the proceeds to remain in the hands of Mr. Bingham, as the agent of congress, until congress should instruct him how to act. In the character of a public agent, therefore, Mr. Bingham received the property; and his contemporaneous correspondence on the subject, in that character, with the American government, was, certainly, proper evidence, to show the original nature and complexion of the facts in controversy. I have more doubts on the admissibility of the other letters referred to in the bill of exceptions; but in relation to them, it is unnecessary to give a decided opinion.

With respect to the resolutions of congress, two questions may be proposed, in order to determine, whether they ought to have been admitted as
*40] evidence: I. Had congress authority *to pass such resolutions? and 2. Did the resolutions relate to the subject of the controversy? I have lately had occasion, in the case of *Doane* v. *Penhallow*,(*a*) to express

(*a*) See the case referred to, *post*, p. 54. I have not thought it material to preserve the order of time, in which the cases occurred, any further than by designating the respective terms.

my sentiments at large on the authority of congress (of which, in its application to the present object, I do not entertain the slightest doubt); and no man of common candor can hesitate, for a moment, to pronounce, that the resolutions have an immediate and necessary connection with the merits of the cause. They ought, then, to have been admitted; but what should be their force and operation, is another point, not, at present, before the court.

I am also of opinion, that it was improper to reject the depositions which Mr. Bingham had taken, in his public, official character, to ascertain the circumstances of the capture, and the property of the vessel and cargo, at the time the supposed prize was carried into Martinique.

IREDELL, Justice.—It appears satisfactorily to me, that many of the documents offered in evidence have been improperly rejected. From an inspection of all the papers which are attached to the record the nature of the dispute may be easily ascertained. The plaintiffs allege that Mr. Bingham received, on their account, as their agent, property which had been captured by them as prize; and that, whether the capture was lawful or not, he was bound to account to them, though they might be responsible to the original owners, if any wrong had been committed. To this charge, Mr. Bingham answers, that he never was the agent of the plaintiffs, but a public agent; and that he did not receive the property from them, on their account, but from the Marquis de Bouille on account of their true owners. Admitting either of these positions, a direct and certain consequence will ensue. If the plaintiffs are right, the consequence is, that Mr. Bingham ought to surrender the prize property, or account for its proceeds to them; and though they, as captors, may be sued by the neutral claimants, the existence of a neutral claim will not justify his refusal so to surrender or account. But, if the defendant is right, the consequence is, that he ought not to deliver up the property to the plaintiffs, until it has been ascertained that the capture was lawful, which must be done through the medium of a prize court, not by a judgment in a court of common law. From this view of the controversy, therefore, it must be of great moment, that Mr. Bingham should have an opportunity to show that he had acted throughout the business as the public agent of the United *States, and that his communications to congress were open, fair and faithful. If, indeed, he had given parol [*41 testimony on these points, his opponents might have called for the records of the appointment and correspondence, as affording higher proof. I am, therefore, of opinion, that Mr. Bingham's official letters (some of which were written before any dispute existed, or could reasonably be anticipated), ought not to have been rejected.

The resolutions of congress likewise were proper evidence—not, indeed, to prove that the plaintiffs were not entitled to the money in question, but to prove that the defendant was recognized in the transaction as the agent of congress. The resolutions are not to be considered as the mere expression of a congressional opinion, but as an acknowledgment that Mr. Bingham was a public agent, and that the public, as his principal, was accountable for the money.

The certificate of the Marquis de Bouille, whether regarded as an original order, or as the evidence of a parol order, previously given, ought to have

been laid before the jury. The Marquis acted officially, as governor and commander in chief; and we must presume, that he exercised a lawful authority in a lawful manner.

Under these circumstances, it only remains to consider, what course should be pursued by the court, in order to give the defendant the benefit of a trial, upon a full view of his legal proofs. I think, for that purpose, that a *venire facias de novo* ought to issue. For although a court of common law has no jurisdiction of the question of prize, yet, whether it is necessary in the present case to determine that question, must depend upon the facts, which are established at the trial. On a count for money had and received, &c., the court below has *primâ facie* jurisdiction; and if the jury shall think Mr. Bingham was merely the agent of the plaintiffs, the validity of the capture, as prize, can form no ingredient in deciding the issue. If, on the contrary, the jury shall think Mr. Bingham acted as a public agent, their verdict must be in his favor; as he was bound to keep the property for the real owners; and the captors can never show that they are the real owners, until the vessel and cargo have been condemned as prize by a competent tribunal. The captors may then proceed against Mr. Bingham, in a court of admiralty, whose decree of condemnation, operating against all the world, would entitle the captors to receive the money, and justify Mr. Bingham or congress in paying it.

Wilson, Justice.—In several instances, I concur in the sentiments that have been delivered by the judges who have preceded me; but I think it is
*42] unnecessary to specify the particulars *or to amplify the reasons, since I continue clearly in my opinion, on the point which was separately argued, that this cause is exclusively of admiralty jurisdiction. On that ground, I choose entirely to rest the judgment that I give; but it leads inevitably also to another conclusion, that the court, not having jurisdiction, a *venire facias de novo* (which, in effect, directs the exercise of jurisdiction) ought not to issue. I am, therefore, for pronouncing simply a judgment of reversal.

Paterson, Justice.—I cannot agree to send a *venire facias de novo* to a court which, in my opinion, has no jurisdiction to try or to decide the cause.

Cushing, Justice.—I shall give no opinion upon the question of affirming or reversing the judgment of the court below. My brethren think there is error in the proceedings; and they are right, to rectify it. On the question, however, of awarding a *venire facias de novo*, I agree with Judge Iredell; but as the court are equally divided, the writ cannot issue.

Judgment reversed; but no writ of *venire facias de novo* was awarded.