question, it is more proper, that the error should be judicially corrected. The
*301] circuit court ought to have remanded the *cause to the district court, taken in either of the views it exhibits: if it was a criminal cause, strictly speaking, it ought to have been remanded, because it had not been tried by a jury, and because the judgment of the district court is, in such case, definitive—if it was a civil suit, but not of admiralty or maritime jurisdiction, it ought to have been remanded, because, in such case, the issue had not been tried by jury: And in either case, whether criminal or civil this court has a superintending and efficient control over the judgments and decrees of the circuit court.

The Chief Justice informed the opposite counsel, that as the court did not feel any reason to change the opinion, which they had formed upon opening the cause, they would dispense with any further argument; and on the 11th of August, he pronounced the following judgment.

By the Court.—We are perfectly satisfied upon the two points that have been agitated in this cause. In the first place, we think, that it is a cause of admiralty and maritime jurisdiction. The exportation of arms and ammunition is, simply, the offence; and exportation is entirely a water transaction. It appears, indeed, on the face of the libel, to have commenced at Sandy Hook; which, certainly, must have been upon the water. In the next place, we are unanimously of opinion, that it is a civil cause: it is a process of the nature of a libel *in rem;* and does not, in any degree, touch the person of the offender. In this view of the subject, it follows, of course, that no jury was necessary, as it was a civil cause; and that the appeal to the circuit court was regular, as it was a cause of admiralty and maritime jurisdiction. Therefore—

Let the decree of the circuit court be affirmed, with costs.

But on opening the court the next day, the Chief Justice directed the words "with costs" to be stricken out of the entry, as there appeared to have been some cause for the prosecution. He observed, however, that in doing this, the court did not mean to be understood, as at all deciding the question, whether, in any case, they could award costs against the United States; but left it entirely open for future discussion.

---

*302] *Cotton, Plaintiff in error, *v.* Wallace.

Damages in error.

Where a judgment or decree is affirmed, on error, there can be no award of damages, except for delay.[1]

Writ of Error to the Circuit Court for the district of Georgia, to remove the proceedings and decree in an admiralty cause. At the last term, the decree of the circuit court had been affirmed, with costs; subject to the opinion of the court, whether any and what damages shall be allowed on

[1] See R. S. § 1010, whereby it is provided, that where, upon a writ of error, judgment is affirmed in the supreme court, or a circuit court, the court shall adjudge to the respondent in error, just damages for his delay, and single or double costs at its discretion. And see Kilbourne *v.* Savings Institution, 22 How. 503; Sutton *v.* Bancroft, 23 Id. 320; Jenkins *v* Banning, Id. 455.

the affirmance? On arguing this question at the present term, it appeared, that the libel prayed for restitution, "and all the damages and costs that have arisen by occasion of the premises," that the decree of the circuit court awarded restitution, "and that the defendants do pay all the expenses of this suit;" and that the circuit court affirmed the decree of the district court, generally. When the decree of the circuit court was affirmed here, the counsel for the plaintiff suggested, that he was entitled to damages, and urged the court to sanction some mode of assessing them. This proposition, however, was rejected; and therefore, the plaintiff in error applied to the circuit court, where the presiding judge was in favor of appointing auditors; but the district judge dissented from the opinion. Under these circumstances, the plaintiff in error, with notice to the defendant, engaged some respectable citizens to value and certify the damages; and his counsel, *Reed* (of South Carolina), now offered their certificate, as the measure proper to be adopted by the court; urging, that if the proceeding was deemed irregular, further time might be allowed to ascertain the proper remedy for an evident right. (*a*)

**Du Ponceau*, for the defendant in error, insisted, that the question of damages was exhibited on the libel; and that the decree of the district court amounted to a negation of the claim. Damages cannot be included in the word "expenses," which is synonymously and indiscriminately used, in the civil law, with the words costs and charges. Clark 15, 17, 87; Floyer 87. But the cause now comes before this court on an assignment for error, that no restitution ought to have been awarded; a plea *in nullo est erratum*, on which issue was joined; and upon that issue, there is a general affirmance of the decree below. The proceedings, therefore, are complete, and the jurisdiction of the court expended, as to everything brought into controversy upon the record. But on principle, independently of the peculiar state of this cause, the court has not a power to award general damages. The damages spoken of in the 23d and 24th sections of the judicial act (1 U. S. Stat. 851) can only apply to damages for delay, from the time of the writ of error brought: it does not authorize an assessment and decree for general damages; nor does it embrace a proceeding *in rem*, but only cases in which a liquidated sum is given by the inferior court. Besides, if the defendant in error has suffered any extraordinary damages, for which there is not, at this time, any redress, it must be imputed to his own fault. The decree of the district court being in his favor, he might have applied for immediate restitution of the property, on giving security; or he might have claimed damages. In the latter case, if the court had ordered its register to examine and report upon the amount, the defendant in error would have been entitled to interest upon it, if the ultimate decree of this court was in his favor, or, if the court below had refused the claim of damages, there might have been a cross-appeal, when the point [*303

(*a*) PATERSON, Justice.—Do you mean to go out of the record, to prove your damages; or is your estimate of damages founded upon what appears on the record itself?

Reed.—The record does not show the extent of our damages, although the decree will entitle us to recover the full amount. We wish, therefore, by matter *dehors* the record, to ascertain that amount.

would have been brought directly before the supreme court, upon a writ of error to reverse that part of the decree; and if a reversal had been pronounced, the cause would have been regularly remanded to the circuit court to assess the damages, under the 24th section of the judicial act. Even, indeed, if the circuit court had awarded damages, without assessing the amount, this court must have remanded the cause. But how can the defendant be allowed to claim general damages, on a writ of error brought by his antagonist; and in opposition to which, he is so far from alleging there was any error in the decree below, that he merely prays for an affirmance? And yet, to grant the claim, is, in effect, to reverse so much of that very decree, which he thus prays may be entirely affirmed, as does not allow and assess general damages in his favor. The assessment of damages is a matter peculiarly delicate. In the court below, the sources of information are easily accessible; *but here, there are no *data;* so that the inquiry, if at all tolerated, can only be made by affidavits, the worst mode of judicial investigation. The evil, however, does not occur, when nothing is left for this court to do, but to calculate the interest on the sum previously assessed and ascertained by the competent tribunal. (*a*)

*304]

After advisement, the Chief Justice delivered the opinion of the Court, that where a judgment or decree was affirmed on a writ of error, there could be no allowance of damages, but for the delay; and thereupon, the following order was made in this cause:

By the Court.—It is ordered, that the defendant in error recover as damages against the plaintiff in error the sum of $3515.11, being the interest on $34,841.55, the amount of the sales of the brig Everton and her cargo, from the 5th of May 1795, the date of the decree of the circuit court in the said cause, being one year, three months and four days, at the rate of eight per cent. per annum: And also, that the said plaintiff in error do pay the costs accrued in this cause since the last term. And a special mandate is awarded to carry this order into execution.

(*a*) Iredell, Justice.—This case is distinguishable from the case of Penhallow *v.* Doane (*ante*, p. 54), for there the damages were decreased, to the benefit of the plaintiff in error. In the case of Talbot *v.* Jansen, however, it appears from the decree, that increased damages were allowed to the defendant in error. (*Ante*, p. 133.)

Chase, Justice.—In the case of Talbot *v.* Jansen, did the court go back beyond the decree of the circuit court, to increase the damages; or was the increase allowed merely for the delay in executing that decree?

Paterson, Justice.—In every case, in which there has been adjudged, either a decrease or an increase of damages, the facts that regulated the decision of the court arose and appeared upon the record. I have always, however, entertained, and still entertain, great doubts, whether a writ of error is the proper remedy, to remove an admiralty cause.

On this remark, the other counsel employed (*Lewis* and *E. Tilghman* for the plaintiff in error, and *Ingersoll* for the defendant in error) left the general question of damages to the court, on the argument already stated, and entered into a discussion upon the regularity of the process by which the cause had been removed. See Wiscart *v.* D'Auchy (*post*, p. 321); and Jennings *v.* The Brig Perseverance (*post*, p. 336).