*FEBRUARY TERM, 1797.

The Perseverance.

Jennings *et al.*, Plaintiffs in error, *v.* The Brig Perseverance *et al.*

Appeal.—Damages.—Costs.

The statement of facts sent up with the record is conclusive; the court cannot look into the evidence.

An objection that counsel fees were allowed as part of the damages, cannot be entertained, unless the fact appear of record.

If a prize be sold by agreement, and the money be stopped in the hands of the marshal, by a third party, increased damages will not be allowed, but interest only.

The expense of printing paper-books for the use of the judges, cannot be taxed in the costs.[1]

This was a writ of error to remove the proceedings in an admiralty cause from the Circuit Court for the district of Rhode Island. Soon after the decree was there pronounced, the district judge died, and Judge Chase had left the district; so that the record was sent up with all the evidence annexed, but no statement of facts by the court.

Du Ponceau and *Robbins*, for the defendant in error, insisted, that the plaintiff could not go into a consideration of errors in fact; and that the rules established in the cases of *Wiscart* v. *D'Auchy* (*ante*, p. 321), *Pintado* v. *Bernard*, and *United States* v. *La Vengeance* (*ante*, p. 297), were conclusive. They, also, cited the following authorities: 1 Vern. 166, 214, 216; 3 Wils. 308; 2 W. Bl. 831; 1 Mod. 207, 56, 61; Cro. Eliz. 667; 6 Co. 7.

E. Tilghman, for the plaintiff in error, admitted, that, although the case of a record transmitted with the evidence, but without a statement of facts, had never been expressly decided, yet, that it appeared to be embraced by the reasoning of the Chief Justice, in support of the second rule in *Wiscart* v. *D'Auchy;* and if the court were also of that opinion, he would decline troubling them with any further argument.(*a*)

*Paterson, Justice.—Though I was silent on the occasion, I concurred in opinion with Judge Wilson upon the second rule laid down in *Wiscart* v. *D'Auchy;* and of course, the court were divided, four to two, upon the decision. I thought, indeed, that excluding a consideration of the evidence (which, virtually, amounts to a statement of facts) was shutting the door against light and truth; and was leaving the property of the country too much to the discretion and judgment of a single judge. But conceiving myself bound by the rule, and that, in some shape, the facts must be made to appear on the record, I have always since thought it my duty to make a statement, where the counsel would not, or could not, agree in forming one. [*337

As to the present point, though there is no express determination, it was the subject of discussion among the judges at their chamber; an opinion

(*a*) Chase, Justice.—Even if the court were to permit it, you would find little encouragement to enter into the merits: the evidence is too plainly against you.

[1] See R. S. § 983.

was formed, but not delivered, by the same majority, that established the second rule in *Wiscart* v. *D'Auchy;* and the reasoning of the chief justice, in support of that rule, went clearly to this case. I do not, therefore, think, that any new argument can be necessary. However disposed I might have been, originally, to give the most liberal construction to the act of congress, the decision of the court precludes me from considering the evidence, at this time, as a statement of facts; and if there is no statement of facts, the consequence seems naturally to follow, that there can be no error.

The Court, concurring in the representation made by Judge Paterson, they proceeded, without further argument on the principal question, to—

Affirm the decree.

E. Tilghman suggested, however, that the damages were very high, and that, in fact, an allowance for counsel-fees was included, though it did not appear on the record.

Du Ponceau urged, that the court could not travel out of the record, to ascertain a fact. In the case where an allowance for counsel fees had been stricken out, that charge and all the items on which damages had been awarded, were stated in an account annexed to the record. (*a*)

Chase, Justice.—An account of items, as a foundation to award damages, was exhibited in the court below: but it is a sufficient answer here, that the allowance does not appear on the record.

The Court concurred in this opinion; and *Du Ponceau* prayed an increase of damages for the delay occasioned by bringing this writ of error,
*338] contending, that under the 23d section of the *judicial act, damages for delay were peremptorily prescribed, and that the discretion of the court only went to the award of single or double costs. But—

By the Court.—The prize was sold by the agreement of the parties, the captor and the French consul; but the money was afterwards stopped in the hands of the marshal, upon a monition issued by a third person (the original owner of the prize), who was not a party to the agreement. The decree must be affirmed, without an increase of damages; and the interest to the present day, must run upon the debt only and not on the damages.

Du Ponceau next prayed an allowance of $12.50, the cost of a printed state of the case for the use of the judges.

But The Court observed, that however convenient it might be, there was no rule authorizing the charge; and therefore, it could not be allowed. (*b*)

(*a*) See Arcambel *v.* Wiseman, *ante*, p. 306.

(*b*) Though I have reported all that occurred in the court upon the hearing of this cause, it may, perhaps, be of use to subjoin a copy of the printed case, which was allowed by E. Tilghman to be correct.

Jennings and Venner, plaintiffs in error, *v.* The Brig Perseverance and her cargo, or the moneys arising therefrom, in the hands of William Peck, Esq., marshal of the district of Rhode Island, and Louis Arcambal, claimant and defendant in error. } Writ of Error from the Circuit Court, for the district of Rhode Island.