Huger *et al. v.* South Carolina.

Process against a State.

In a suit against a state, leaving a copy of the process at the house of the governor, is a sufficient service on him.

Bill in Equity. A *subpœna* had been issued in this cause, agreeable to the rule; and an affidavit of the service was now read, in which it was set

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Proceedings in the District Court, 20th September 1794.

The now plaintiffs in error, subjects of the king of Great Britain, file their libel, complaining of the capture made on the 27th of July preceding, of their Brig Perseverance and her cargo, on the high seas, on a voyage from Turks Island, to St. John's, New Brunswick. They state that she was captured by two armed vessels, each of about thirty-five tons burden, one called the Sanspareil, the other the Senora, brought into the district of Rhode Island, under the care of John Baptiste Bernard, prize-master, sold by his order, at Providence, for $5028, and the proceeds lodged in the hands of the marshal of the district, where they now are. They complain that the Senora was originally fitted out, and the force of the Sanspareil was increased and augmented, by adding to the number of guns and gun-carriages, at Charleston, South Carolina, with intent to cruise, &c. That at the time of capture, there were on board both the captured vessels, divers citizens of the United States, to wit, on board the Sanspareil, twelve, and on board the Senora, twenty-one, all of whom were aiding and assisting at the capture. That there was no person on board of either of the capturing vessels duly commissioned to make captures, &c. They pray restitution of the vessel and cargo, or the proceeds thereof.

Process served in due form.

First Monday in November 1794. John Baptiste Bernard, prize-master, appears and pleads to the jurisdiction of the court—he grounds his plea upon the following reasons:

1st. That the legality of the capture had already been determined under the authority of the United States,[1] and agreeable to the practice of nations, and in the mode required at the special instance of the libellants, by their public consul, resident in the said district of Rhode Island.

2d. That the custody of the proceeds of the prize had come to the marshal in due course of law, and not under the authority of the court—therefore, the disposal thereof was not under its jurisdiction.

3d. That the sale of the prize having been made on land, admiralty had no jurisdiction.

4th. That there was an adequate remedy at common law, by an action against the marshal for money had and received.

5th. That the prize was made from British subjects, in open war, on the high seas, by the crew of the schooner Sanspareil, belonging to citizens of the French republic, commanded by a French citizen, manned with more than two-thirds of her crew by French seamen and marines, and bearing a commission of war, under the French republic.

Concludes to the jurisdiction only, prays that the court will take no further cognisance, but that the libel be dismissed.

[1] By documents annexed to, and making a part of the record, it appeared, that previous to this suit being instituted, the libellants, represented by the British consul, preferred the same complaints that were contained in their libel, to the Governor of Rhode Island, who, in consequence of the said complaint, and in pursuance of instructions from the executive of the United States, which were also annexed to the record, did hear the merits of the said complaint, in a solemn judicial form, upon evidence produced and examined on both sides, and finally dismissed the said complaint, on the ground of its being unsupported by evidence.

forth, that a copy had been delivered to the Attorney-General; and that a copy had been left at the governor's house, where the original had likewise been shown to the secretary of the state.

No replications or further pleadings appear on the record, the decree of the district court appears to have been given on the libel and plea only, and is in the following words:

Nov. 6th, 1794. "Upon mature consideration of the allegations in the libel contained, and of the plea of the claimants against the jurisdiction of the court thereon, and of the arguments of the counsel, &c., it appears to me, that the reasons assigned, or most of them, are to the merits of the cause, and not to the jurisdiction of the court, that they are altogether insufficient to take the cognisance and jurisdiction of the court from the present cause, as set forth in the said libel, and therefore, I do sustain the jurisdiction of the court thereon."

*340] *After this decree, no rule to answer over appears to have been prayed by the libellants, no further pleadings appear upon the record, but immediately after the said decree, an entry is made in these words: "This cause was continued to the next February term, to be heard on the merits."

The cause is then continued successively, by consent of the parties, to August term 1795, when the judge pronounced his final decree; the record of which is as follows: "This cause having been continued, by consent of the parties, from term to term, ever since November term, in the year 1794, for trial upon the merits—it was now further moved by the counsel for the libellants, that the same be further continued to next November term, to procure further evidence; this motion was opposed by the counsel for the claimants, for that the cause had been continued three terms, beyond which a further indulgence would be unreasonable. Upon a full hearing thereof, it seemed to the court, that the cause ought not to be further continued, and the judgment of the court was, that the said motion for a continuance be overruled—Whereupon, the cause being called for hearing upon the merits, the libellants declined and refused to offer any proofs or arguments in support of their said libel, and thereupon, I do adjudge, that the said libel be dismissed, and do further adjudge, order and decree, that the proceeds arising from the sales of the said Brig Perseverance and her cargo, in the hands of the said William Peck, amounting to $5028, be by him, the said William Peck, restored, given up and paid to the said John Baptiste Bernard, claimant in the said cause, and respondent to the said libel, first deducting therefrom the duties paid into the custom-house on the said cargo, and the commission arising on the sales of said brig and cargo, together with such other expenses as this court may allow or decree—and I do further order, adjudge and decree, that the said libellants pay to the said John Baptiste Bernard, claimant in this cause, as damages occasioned by the detention of said moneys arising from the sales of the said Brig Perseverance, after said deduction so to be made as aforesaid, the interest of the same from the 24th day of September, in the year 1794, to the day of the date of this decree, at the rate of six per cent. per annum, as the same shall be cast and reported by the clerk of this court, upon the sum to be restored and paid by the said Wllliam Peck, together with $300 in full of all other damages and costs sustained or expended in and about this cause."

First Monday in August, 1795.

Upon which an appeal was interposed by the libellants.

Proceedings in the circuit court.

The first proceedings in this court are on the 20th of June 1796, when Louis Arcambal, vice-consul of the French republic, appears in the cause and files his claim, praying that the libel be dismissed, and the proceeds of the prize be delivered up to him, with damages and costs. He is admitted as claimant, without any opposition No further pleadings appear to have taken place in this court.

On the 25th of June, 1796, the court proceed to decree on the appeal in these words: "Decreed, that so much of the decree of the district court as decreed that the

IREDELL and CHASE, Justices, expressed some doubt, whether showing the original to the secretary of state, would have been a service of the process, conformable to the rule, without leaving a copy at the governor's

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libel be dismissed, be and hereby is affirmed, and that the residue of the said decree be and hereby is reversed—and it is further ordered and decreed, that the proceeds arising from the sales of the said Brig Perseverance in the hands of William Peck, amounting to $5028, be by him restored and paid to Louis Arcambal, vice-consul of the French republic, admitted by this court as claimant in this *cause for the use of the [*341
owners, officers and crew of the armed Schooner Sanspareil, first deducting therefrom the duties paid into the custom-house on the said cargo, and the commission on the sales: it is further ordered and decreed, that the said libellants pay to the said Louis Arcambal for the use of the owners, officers and crew aforesaid, for damages occasioned by the detention of the said moneys arising from the sales of the said Brig Perseverance and her cargo (after the deduction aforesaid), $800, and also the interest, at the rate of six per cent. per annum on the money in the hands of the said William Peck (after the deduction aforesaid), from the 24th of September 1794, to the date of this decree, together with the costs in the district court, and this court." Whereupon, a writ of error is prayed by Thomas Jennings and John L. Venner, and allowed.

No assignment of errors appears to have been filed in the court below, according to law;[1] the facts on which the circuit court founded their decree, do not appear either from the pleadings and decree itself, or from a statement made by the parties or by the court.

It is intended by the defendants in error, to object to any error in fact being assigned or argued by the plaintiffs, agreeable to the 22d section of the judiciary act, and for the following reasons:

1. That it was the duty of the plaintiffs in error, to see that the facts were made to appear on the record, otherwise, the court will presume that the facts found by the circuit court were such as warranted the inference of law, which they thought proper to draw from them. That on the authority of the cases of United States *v.* La Vengeance, Pintado *v.* Bernard, and Wiscart *v.* D'Auchy, determined at the last supreme court, this court cannot, without the consent of the parties, go into the examination of the evidence annexed to the record.

2. That the defendants cannot give their consent to going to a hearing upon the evidence, because this matter has been kept depending in various shapes for a period of almost three years, at the instance of the plaintiffs, who have had three hearings upon the merits. 1st. Before the governor of Rhode Island. 2d. Before the district court. 3d. Before the circuit court.

3. Because the executive of the United States had competent authority, by the usage of nations and the law of the land, to decide, whether or not there was ground for restitution in the present case; and whether its jurisdiction be exclusive of, or concurrent with, the judicial courts, its decision, obtained on the application of the libellants, is a bar to the present suit, and even if the governor of Rhode Island had no legal jurisdiction or cognisance of the case, his decision ought to be final, as the award of an arbitrator, or amicable judge, agreed upon by the parties.

If, nevertheless, the court should be of a contrary opinion, the cause will remain to be examined on the evidence, which is annexed to the record, and is too lengthy to admit of an analysis in this statement, and from that evidence the following points will arise.

1st. A point of fact: Whether the charges exhibited in the libel are supported, and if so—

2d. The point of law: Whether the facts so stated in the libel are a sufficient ground in law for a judicial restitution.

[1] The general error has been assigned since the record came up: admitted, *nunc pro tunc.*

house: but they agreed with the rest of THE COURT, in deeming the service, under the present circumstances, to be sufficient, in strictness of construction, as well as upon principle.

The service of the *subpœna* being thus proved, the complainant was entitled to proceed *ex parte;* and accordingly, moved for and obtained commissions, to take the examination of witnesses in several of the states.

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*342] *CLERKE, Plaintiff in error, *v.* HARWOOD.

Practice.—Mandate.—Costs.

If the judgment of the highest state court be reversed, and that of the subordinate state court affirmed, the mandate goes to the subordinate court;[1] and the costs of both courts will be allowed.

THIS was a Writ of Error to the High Court of Appeals of the state of Maryland, to remove the proceedings in a cause, involving a construction of the treaty of peace between the United States and Great Britain, which that court had decided against the title claimed under the treaty, by reversing and annulling a previous judgment given in the general court of the state, in favor of the claim. The only objection arising on the record, was—whether a paper money payment of a British debt into the treasury of Maryland, during the war, by virtue of a law of the state, was a bar to the creditor's recovery at this time? And the solemn adjudication in *Ware* v. *Hylton* (*ante*, p. 199), having settled that point, *Dallas*, for the defendant in error, submitted the case, without argument, to the court, who, in general terms, reversed the judgment of the high court of appeals, and affirmed the judgment of the general court.

*343] *It then became a question, to which of the state courts the mandate should be sent, and what costs should be allowed.

E. & W. Tilghman, for the plaintiff in error, contended, that the judgment of the court of appeals being reversed, it was to be regarded as if it had never existed; and that, therefore, the mandate must issue to the general court, whose judgment was to be carried into effect. They insisted also, that the costs in both the courts of Maryland, and in this court, should be allowed.

Dallas, on the other side, stated that by the 25th section of the judicial act, the writ of error was to have the same effect in this case, as if the judgment or decree complained of, had been rendered or passed in a circuit court,

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Upon the whole, the defendants in error pray that the decree of the circuit court may be affirmed, with costs and damages for the delay, to wit, the lawful interest of the state of Rhode Island, being six *per centum per annum*, on the balance in the hands of the marshal of the said district, and also on the sum of $800, awarded as damages by the said circuit court, to be computed from the 25th of June 1796, the date of the said decree.

ASHER ROBBINS, } Of counsel with
PETER S. DU PONCEAU. } the defendants.

Philadelphia. 6th February 1796.

[1] Gelston *v.* Hoyt, 3 Wheat. 335.