UNITED STATES *v.* JUDGE LAWRENCE.

Mandamus.

A *mandamus* will not be granted, to compel a judicial officer to decide otherwise than according to the dictates of his own judgment.

A MOTION was made by the Attorney-General of the United States (*Bradford*) for a rule to show cause why a *mandamus* should not be directed to JOHN LAWRENCE, Judge of the District of New York, in order to compel him to issue a warrant, for apprehending Captain Barre, commander of the frigate Le Perdrix, belonging to the French Republic.

The case was this: Captain Barre, soon after the dispersion of a French convoy on the American coast, voluntarily abandoned his ship, and became a resident in New York. The vice-consul of the French republic, thereupon, made a demand, in writing, that Judge LAWRENCE would issue a warrant to apprehend Captain Barre, as a deserter from Le Perdrix, by virtue *of the 9th article of the consular convention between the United [*43 States and France, which is expressed in these words:

"ART. 9. The consuls and vice-consuls may cause to be arrested the captains, officers, mariners, sailors and all other persons, being part of the crews of the vessels of their respective nations, who shall have deserted from the said vessels, in order to send them back and transport them out of the country. For which purpose, the said consuls and vice-consuls shall address themselves to the courts, judges, and officers competent, and shall demand the said deserters in writing, proving by an exhibition of the register of the vessel, or ship's roll, that those men were part of the said crews; and on this demand, so proved (saving, however, where the contrary is proved), the delivery shall not be refused; and there shall be given all aid and assistance to the said consuls and vice-consuls for the search, seizure and arrest of the said deserters, who shall even be detained and kept in the prisons of the country, at their request and expense, until they shall have found an opportunity of sending them back; but if they be not sent back, within three months, to be counted from the day of their arrest, they shall be set at liberty, and shall be no more arrested for the same cause." (8 U. S. Stat. 112.)

To the vice-consul's demand, the judge answered, "that it was, in his opinion, necessary, before a warrant could issue, that the applicant should prove by the register of the ship, or role d'equipage, that Captain Barre was in fact one of the crew of Le Perdrix." The vice-consul replied, "that the ship's register was not in his possession; but at the same time, stated various reasons why he should be admitted to produce collateral proof of the fact in question, instead of being obliged to exhibit the ship's register itself; and declared, that in such case, he would give the judge all the proof that could be desired." The judge persevering in his original opinion on the subject, that "the mode of proof mentioned in the 9th article of the convention was the only legitimate one, and that he could not dispense with it," the vice-consul obtained a copy of the role d'equipage, certified by the French vice-consul at Boston, under the consular seal, and transmitted it to the judge, with another demand for a warrant to arrest Capt. Barre; contending, that this copy was entitled to the same respect as the original

instrument, by virtue of the 5th article of the convention, which is in these words:

"ART. 5. The consuls and vice-consuls, respectively, shall have the exclusive right of receiving in their chancery, or on board of vessels, the declarations and all the other acts which the captains, masters, crews, passengers and merchants, of their nation may choose to make there, even their testaments and other disposals by last will: and the copies of the said acts, *44] duly *authenticated by the said consuls or vice-consuls, under the seal of their consulate, shall receive faith in law, equally as their originals would, in all the tribunals of the dominions of the Most Christian King and the United States. They shall also have, and exclusively, in case of the absence of the testamentary executor, administrator or legal heir, the right to inventory, liquidate and proceed to the sale of the personal estate left by subjects or citizens of their nation, who shall die within the extent of their consulate; they shall proceed therein, with the assistance of two merchants of their said nation, or for want of them, of any other, at their choice, and shall cause to be deposited in their chancery, the effects and papers of the said estates; and no officer, military, judiciary or of the police of the country, shall disturb them or interfere therein, in any manner whatsoever; but the said consuls and vice-consuls shall not deliver up the said effects, nor the proceeds thereof, to the lawful heirs, or to their order, until they shall have caused to be paid all debts which the deceased shall have contracted in the country; for which purpose, the creditors shall have a right to attach the said effects in their hands, as they might in those of any other individual whatever, and proceed to obtain sale of them, until payment of what shall be lawfully due to them. When the debts shall not have been contracted by judgment, deed or note, the signature whereof shall be known, payment shall not be ordered, but on the creditor's giving sufficient surety, resident in the country, to refund the sums he shall have unduly received, principal, interest and costs; which surety, nevertheless, shall stand duly discharged, after the term of one year, in time of peace, and of two, in time of war, if the demand in discharge cannot be formed before the end of this term against the heirs who shall present themselves. And in order that the heirs may not be unjustly kept out of the effects of the deceased, the consuls and vice-consuls shall notify his death, in some one of the gazettes published within their consulate, and they shall retain the said effects in their hands four months, to answer all demands which shall be presented; and they shall be bound, after this delay, to deliver to the persons succeeding thereto, what shall be more than sufficient for the demands which shall have been formed." (8 U. S. Stat. 108.)

The judge, however, declared, that "he did not consider the copy of the register to be the kind of proof designated by the 9th article of the convention; and that until the proof specified by the express words of the article was exhibited, he could not deem himself authorized to issue a warrant for apprehending Captain Barre."

Under these circumstances, the ministers of the French republic applied *45] to the executive of the United States, complaining *of the judge's refusal to issue a warrant against Captain Barre, as a manifest departure from the positive provisions of the consular convention; and the pres-

ent motion was made, in order to obtain the opinion of the supreme court, upon the subject, for the satisfaction of the minister.

The rule was opposed by *Ingersoll* and *W. Tilghman*, who contended: 1st. That the original register of the vessel, or ship's roll, was the only admissible evidence under the 9th article of the convention: and 2d. That in the present case, the judge has, in fact, given a judgment; and although a *mandamus* will lie to compel the judge of an inferior court, to proceed to give judgment, it will not lie to prescribe what judgment he shall give.

I. The treaty has placed the subject in controversy upon a footing different from the law of nations; for, independently of positive compact, no government will surrender deserters or fugitives who make an asylum of its territory. This, then, is a new law, introductory of a new remedy; and whenever a new remedy is so introduced (more especially in a case so highly penal), it must be strictly pursued. 1 Wils. 164; 4 Bac. Abr. 647, 651. The 9th article of the consular convention may, therefore, be considered in a twofold point of view: 1st. As to the true construction of the words: and 2d. As to the competency of a copy of the register, or ship's roll, to be received in evidence, by any analogy to the common-law rules of evidence.

1st. The words of the article are full and express, that the consul shall prove the deserters, whose arrest he demands, to be part of the ship's crew, "by an exhibition of the register of the vessel, or ship's roll." If those who drew the instrument, and appear throughout to have perfectly understood the import of the words they used, had not intended to fix a specific mode of proof, a specific mode would not have been mentioned in this case; but the kind of evidence would have been left at large, as in the 14th article, where, in another case, proof of citizenship is to be made, "by legal evidence." But, in fact, the ship's roll is the best evidence which the nature of the case admits; and if any other is allowed, it must depend upon the mere discretion of the judge. The individuals of the French nation, as well as the republic, are interested in the construction of the article; since it deprives them of that protection, within our territory, to which they would otherwise be entitled; and their interest becomes peculiarly important, when we consider the existing circumstances of the nation. Besides, whatever inconvenience might flow from this strict construction, if it is the genuine, fixed, meaning of the treaty, the court cannot change it on that account. 4 Bac. Abr. 652; 10 Mod. 344. The inconveniences, however, are aggravated *beyond their real force. The cases contemplated were, obviously, [*46
cases of desertion, before the vessel left the port, in which it would always be easy to exhibit the register, before a warrant was issued. The act of congress, vesting this jurisdiction in the district judges, may, indeed, be too restricted, inasmuch as it does not give each district judge a power to issue his warrant to all parts of the United States, by which the necessity of applying to the judge of every district into which a deserter might escape, and the consequent necessity of exhibiting the original roll on every such application, would be avoided. The inconveniences suggested might, therefore, be obviated, by congress; and even the government of France might introduce a remedy, by directing the original roll, in cases of desertion, to be deposited with the consul, and certified copies to be furnished to the captains of the respective ships. But it is contended, that admitting the

exhibition of the original roll to be requisite, still, it is sufficient, to exhibit it before the person is delivered—it need not be exhibited, before the warrant issues to arrest him. This, however, cannot be the true construction of the article, upon a fair analysis of its different parts. In the first part, the arrest of deserters only is mentioned, "in order to send them back and transport them out of the country"—then it is said, "for which purpose (that is, for the purpose of the arrest), the consuls and vice-consuls shall address themselves to the courts, judges, and officers competent, and shall demand the said deserter in writing, proving, by an exhibition of the register or ship's roll, that those men were part of the crew, &c.; and the clause of delivery follows, providing, that "on this demand, so proved, the delivery shall not be refused." On what, then, is the judge to ground his warrant, if not on the exhibition of the roll? There is no other proof mentioned in the article; and certainly, proof of some kind must be made, before the warrant issues. "No warrants shall issue (says the 6th article of the amendment to the federal constitution) but upon probable cause, supported by oath or affirmation:" And in this case, if previous proof has been made, there is nothing to prevent the warrant's containing a clause of immediate delivery; since the deserter is only to be committed and imprisoned at the instance of the consul.

2d. If then, an exhibition of the ship's roll is necessary, the second consideration, arising on the construction of the article, is, whether by analogy to the common-law rules of evidence, a copy ought to be received, instead of the original. It is a general rule, that the copy of a deed, or other extraneous proof of its contents, cannot be given in evidence, unless it is first shown that the original did once exist, and that it had been destroyed or lost, or is in the possession of the adverse party. 1 Ves. 389; Esp. Dig. *47] 780, 782; 10 Co. 92. *In the present case, the only requisite of the rule that is satisfied, establishes the existence of the roll; but proves, at the same time, that it has not been lost or destroyed, and that it is (or, at least, that it was, when the warrant was applied for) in the possession of the consul at Boston. So strictly has the rule been adhered to, that even the acknowledgment of the obligor will not be received as evidence that a bond was executed by him; the subscribing witness must be produced. Doug. 205; 4 Burr. 2275. As to the inference drawn by the consul, from the 5th article of the convention, in support of a copy of the roll as competent evidence, the article clearly relates to matters transacted by consuls, in virtue of their specified consular powers, but not to the authentication of foreign instruments, deeds or commissions.

II. But whatever may be the opinion of this court on the construction of the article in question, they cannot interpose by *mandamus*, to compel the district judge to adopt their judgment, instead of his own, as the rule of decision, in a case judicially before him. The supreme court may, it is true, issue writs of *mandamus*, in cases warranted by the principles and usages of law (1 U. S. Stat. 81); but there is no usage or principle of law to warrant the issuing of a *mandamus*, in a case like the present. By the act of congress (1 U. S. Stat. 254), the district judge is appointed the competent judge, for the purposes expressed in the 9th article of the convention; the consul applied to him as such; and the judge refused to issue his warrant, because, in his opinion, the evidence required by the article was not pro-

duced. The act of issuing the warrant is judicial, and not ministerial; and the refusal to issue it, for want of legal proof, was the exercise of a judicial authority. Where any other court has competent jurisdiction, the court will not interfere by *mandamus* to control it. Esp. Dig. 668; 4 Burr. 2295. In a variety of cases, the stress is laid on the act being ministerial, and not judicial. 1 Wils. 125, 283; Esp. Dig. 662, 663, 666, 669, 512, 552, 530; 1 Str. 113, 392; 1 Vent. 187; T. Raym. 214; 1 W. Bl. 640; 3 Bac. Abr. 531; 1 Burr. 131; 4 Com. Dig. 207, 208; Carth. 450; 2 Str. 835; Sayer 160. It is justly said, however, that a writ of *mandamus* ought in all cases to be granted, where the law has provided no specific remedy, though, on the principles of justice and good government, there ought to be one. Esp. Dig. 661; 4 Com. Dig. 205. And it has been generally said, that writs of *mandamus* are either to restore a person deprived of some corporate, or other franchise, or right; or to admit a person legally entitled; 3 Burr. 1267; 2 Ibid. 1043; or (upon a more extensive basis) to prevent a failure of justice, to enforce the execution of the common law, and to effectuate some statute: *but it has never been allowed as a private remedy for a party, except in cases arising on the 9 *Ann.*, *c.* 20. Nor has it ever [*48 been granted to a person who has exercised a discretionary power; 3 Bac. Abr. 535; 2 Str. 881, 892; Esp. Dig. 668; 2 T. R. 338; Esp. Dig. 667; 3 Bac. Abr. 536; Andr. 183. Thus, the writ was refused, where a visitor has exercised his jurisdiction, and deprived a person of his office in a college: 1 Wils. 206; 4 Com. Dig. 209; Andr. 176; Esp. Dig. 667: where commissioners have issued a certificate of bankrupts: 1 Atk. 82; 2 Ves. 250; 1 Cooke Bank. L. 499. And it should be shown, that the inferior court had made default, for the superior court will not presume it. Esp. Dig. 670; Bull. N. P. 199. Upon the whole of these authorities, it appears, that a *mandamus* is founded on the idea of a default; as, where an inferior court will not proceed to judgment, or a ministerial officer will not do an act which he ought to do; but there is no instance of a *mandamus* being issued to a judge, who has proceeded to give judgment according to the best of his abilities. It ought, likewise, to be observed, that where a fact is doubtful, a *mandamus* never issues, until it is determined by a jury, either on a feigned issue, or on a traverse to the return under the statute: for how can this court determine what the material fact of the present case is? And if a *mandamus* is issued, what will be the command?—to receive certain evidence, or, at all events, to issue a warrant for apprehending Capt. Barre? If, then, the supreme court take the matter up, in the way proposed, they must examine the proof of Capt. Barre's being a deserter; and so make themselves the court competent for this business, contrary to the express meaning and language of the law.

The *Attorney-General*, in reply, premised, that the executive of the United States had no inclination to press upon the court, any particular construction of the article on which his motion was founded: but as it is the wish of our government to preserve the purest faith with all nations, the president could not avoid paying the highest respect, and the promptest attention, to the representation of the minister of France, who conceived that the decision of the district judge involved an infraction of the conventional rights of his republic. In construing treaties, neither party can claim an exclusive jurisdiction: if either party supposes that there is in the conduct

of the other, a departure from the meaning of a treaty, it is the established course, in foreign countries, to apply to the government for immediate redress; and, where that application, for any cause, proves ineffectual, the controversy is referred to a negotiation between the powers at variance. In the present case, however, from the nature of the subject, as well as from
*49] *the spirit of our political constitution, the judiciary department is called upon to decide; for it is essential to the independence of that department, that judicial mistakes should only be corrected by judicial authority. The president, therefore, introduces the question for the consideration of the court, in order to insure a punctual execution of the laws; and at the same time, to manifest to the world, the solicitude of our government to preserve its faith, and to cultivate the friendship and respect of other nations.

I. The question is certainly an interesting and important one; but it ought not to be affected by any circumstances respecting the hardship of Captain Barre's fate, or the crisis of French affairs. If Captain Barre suffers any injury, he might, on a *habeas corpus*, be relieved; and no change or fluctuation in the interior policy of France can release the obligation of our government to perform its public engagements. The case must, therefore, be considered as an abstract case, depending on the fair interpretation of an article in a public treaty. This article contemplates, 1st, The arrest of deserters from French vessels in our ports: and 2d, The delivering of those deserters to the consul, that they may be sent out of the country. The arrest may be made on any kind of proof, the oath of witnesses,(*a*) the confession of the party, or authenticated papers, showing *primâ facie*, that the person against whom the warrant is demanded, belonged to the crew of a French ship. But the delivery is obviously a subsequent act, to be performed after the party has been brought before the judge; when, not only the allegations against him, but his answers and defence are heard, and the judge has decided that he is an object of the article. Natural justice, and the safety of our citizens, require that such a hearing should take place; and it is, indeed, necessarily implied in those words of the article, "saving where the contrary is proved;" which point to a time distinct from that of issuing the warrant, when the party was not present, had not been heard, and could not, therefore, have proved the contrary, even if such proof were in his power; as by showing that he never signed the ship's roll, or that he had been lawfully discharged. Neither principal nor analogy to other cases
*50] will justify a call for the original roll, merely to *bring the party to a hearing, whatever strictness of proof may be exacted to warrant his being delivered. In England, the distinction is uniformly recognised; the grounds for issuing a warrant are not strong; for finding an indictment, they must be stronger; and for conviction and judgment, they are always violent. The construction contended for, in support of the motion, involves no incon-

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(*a*) WILSON, Justice.—Does it appear, that any oath was taken in this case?

Bradford.—No; a warrant, which had been issued by the district judge of Pennsylvania, various official letters, and Captain Barre's own statement, were offered to be produced; but the point was put by the judge on the necessity of producing the original roll, in exclusion of every other species of testimony. This, therefore, is the only question before the court.

venience; because the judge must receive a reasonable satisfaction, before he issues his warrant; and before he delivers the deserter, he may insist on the exhibition of the roll; but the adverse doctrine is attended with the most embarrassing consequences. Suppose, a man deserts, just as the vessel sails on a distant voyage, must she return to port? According to the maritime regulations, her register must remain on board; and in such a case, a deserter could never be surrendered. Again, suppose a French vessel of war takes a prize, puts a part of her crew on board, and sends the prize to America, while she herself remains at sea: the mariners may desert from the prize with impunity, under the very eye of the minister or consul; as the original roll would continue on board the vessel of war. If there are several prizes sent in, the difficulty is proportionally increased. But all those embarrassments are avoided, by a different interpretation of the article—by allowing the deserters to be arrested, even on a reasonable suspicion, and to be detained, until proof of their desertion can be procured. The detention, however, could not, under such circumstances, exceed three months, agreeable to the terms of the treaty; and that part of the article seems strongly to presume the vessel to be absent, at the time of the arrest, as it provides for his imprisonment, until he can be sent out of the country. On the adverse construction, likewise, the article must be deemed to regard as one act, the inspection of the roll, the issuing of the warrant, and the surrender of the deserter; which would operate as a general press-warrant, and might become dangerous in the extreme to the liberty of the citizens; for every man bearing a name enrolled upon the ship's register, would be liable to be arrested and put on board a French vessel, if no hearing took place, subsequently to the arrest. Still, however, it is clear, that when the article speaks of a consul's addressing himself to our courts, it is in order to procure assistance "to send the deserters back, and transport them out of the country;" and not merely to obtain an arrest. But the question then arises, whether, even for the purpose of obtaining a delivery of the deserter, there must be an actual production of the register, or ship's roll? Is that the only proof which can be allowed, or is it merely the specification of one mode of proof, without excluding other modes? The article provides for a case in which there shall, peremptorily, be a delivery; but *neither in its terms, nor in its nature, does it preclude a delivery in other cases, where the facts are satisfactorily ascertained by other [*51 evidence. The inconveniences of that doctrine would be insurmountable. There must be an original roll, to produce in every district, into which a deserter should escape. If the roll were burnt, and all the crew desert, nay, if the deserters themselves were to seize upon and destroy the roll, the judge is not only under no obligation to arrest and deliver them, but he is precluded from doing so.

Such a construction, so destructive of the fair advantages of a public compact, ought not to be tolerated. "All civil laws and all contracts in general (says Rutherford, 2 Inst., lib. 2, c. 7, § 8, p. 327), are to be so construed as to make them produce no other effect, but what is consistent with reason, or with the law of nature." It is inconsistent with reason, that a provision, intended to guard the contracting parties from the inconveniency of the desertion of their mariners, should, in the very mode of expression, defeat

itself; and that interpretation which renders a treaty null and without effect, cannot be admitted. Vatt. lib. 2, c. 17, § 283, 287, 290.

Nor is the common law without an analogy, competent to obviate the difficulty; for wherever an original is either a record, or of a public nature, and would be evidence, if produced, an immediate sworn copy will avail. 5 Wood. p. 320; Espinasse. As, in the instance of the Cottonian Collection, whose papers are not allowed to be sent abroad, a copy is always received in evidence; and since a ship's register must, from the nature of the instrument and the rules of the marine, be on board, the reason is, surely, equally cogent, for receiving a copy of it in proof, on any judicial inquiry, when the ship is necessarily at a distance. The opposite argument goes, indeed, to exclude stronger testimony than the roll; for a deserter's confession of the fact, before the judge, would not be sufficient to dispense with the production of the instrument itself. The constitutions of the United States and of the state of Pennsylvania, seem to have made no provision (except the former, in the case of treason) for a conviction by the confession of the party; yet, the absurdity of proceeding to try a man for a crime, after he has pleaded guilty to the charge, has been too obvious, to receive any sanction from the practice of our courts. But that absurdity is urged as law, in the present case. Captain Barre had confessed the existence of the roll subscribed by him, and his desertion from the ship; still, it is contended, that the judge must wait for the exhibition of the roll, to prove the fact acknowledged—"to take a bond of fate; and make assurance doubly sure." This, however, would be a mocking of justice—a palpable evasion of the treaty. It is said, that the surrender of deserters is an act odious on principles
*52] *of humanity, as well as policy; but the remark is not uniformly just. In the case of one army giving encouragement to deserters from another, the surrender would be faithless and iniquitous; but that bears no analogy to the present case; and in another case, which is analogous to the present, the United States have thought it so reasonable and right, that they have directed any deserter, under contract for a voyage, to be apprehended and delivered to the captain of the ship—Act Congress, ch. 29, § 7, passed 20th July 1790. (1 U. S. Stat. 131.)

But the article of the treaty is affirmative, or directory, and not negative; and the distinction in construing laws so distinguished could never be more properly enforced. Thus, though the statute of Henry, for holding the quarter sessions, prescribes a particular day, the court being held on another day, it was deemed valid. So, where a day was fixed by the act for appointing overseers of the poor, the appointment was good, though made on another day.

Upon the whole, the proof given and tendered in this case, was, 1st, the warrant of the district judge of Pennsylvania, which, on common-law principles, would be sufficient to procure the indorsement or warrant of any other judge: 2d, the official letters and statement of Captain Barre, proving the fact, as conclusively to every purpose of truth and justice, as the exhibition of his signature to the ship's roll; and being, in effect, a written confession, a species of proof which is admitted even in the case of treason: and 3d, a copy of the ship's roll, certified by the vice-consul. This ought not, perhaps, to be regarded as complete evidence, under the 5th article of the convention, which seems only to relate to acts made before, or taken in

the presence of the consul. It is, however, entitled to, at least, as much respect as a notarial certificate, which commands full faith in all commercial countries.

II. If, then, the judge ought not to have refused a warrant for apprehending Captain Barre, this court ought to compel him to grant one, by issuing a *mandamus*. The general principle of issuing that writ, is founded on the necessity of affording a competent remedy for every right; and it constrains all inferior courts to perform their duty, unless they are vested with a discretion. Esp.; 3 Burr. 1267. The treaty is the supreme law of the land; and if an absolute discretion is given to the district judge, it is conceded, that this court cannot interpose to control and decide it. But much will depend on the nature of the discretion given to the judge; since a legal discretion is sometimes as much implied in the exercise of a ministerial, as in the exercise of a judicial function. In the present case, the treaty contemplates an arrest, and a delivery of the deserter: it may, therefore, be considered as one thing *to issue the warrant, and as another, very different in nature and jurisdiction, to decide upon a hearing of the parties. In [*53 Str. 881, a *mandamus* was refused, because the granting of a license was discretionary in the justices: but wherever an a act of parliament peremptorily directs a thing to be done, though it should be of a judicial nature, if no discretion is vested in the inferior officer or court, a *mandamus* will lie. Thus the acts of the judge of probates, &c., are judicial acts; yet, as the act of parliament declares that administration shall be granted to the next of kin, a *mandamus* will issue directing the administration to be granted to the next of kin, and if it appears on the return, that A. B. is next of kin, a *mandamus* will issue to grant it to him. 1 Str. 42, 93, 211. If the district judge had returned, that he was of opinion, that Captain Barre was not a deserter, it might have been sufficient; but he has returned, that he would not examine the evidence, because it was not evidence. Suppose, the ship's roll had been exhibited, and the judge had refused to issue the warrant, because it appeared that Captain Barre had taken the oath of citizenship, would not a *mandamus* issue under such circumstances? 4 Burr. 1991; 2 Str. 992. But issuing the warrant is merely a ministerial act, and where words are so strongly directory as in the article of the treaty, without any express investment of discretion, a *mandamus* has always been awarded. 1 Wils. 283; 1 W. Black. 640; 1 Str. 553, 113; Doug. 182. Though the commissioners returned that they had reason to doubt (pursuing the words of the law of Pennsylvania, 2 Dall. Laws 494) the truth of the bankrupt's conformity, the supreme court at first hesitated, whether a *mandamus* ought not to issue, though it was eventually refused, on the ground of the discretion which the law gave to the commissioners. But one great ingredient in the exercise of this controlling jurisdiction, by *mandamus*, is, that there exists no other specific remedy for the party, and that upon the principles of justice and good government, he ought to have one. 2 Burr. 1045; 3 Ibid. 1266, 1659; 4 Ibid. 2188. In the present case, the district judge is the only competent judge to issue the warrant; and a writ of error cannot be brought merely upon his refusal to institute the process.

By the Court.—We are clearly and unanimously of opinion, that a *mandamus* ought not to issue. It is evident, that the district judge was

acting in a judicial capacity, when he determined, that the evidence was not sufficient to authorize his issuing a warrant for apprehending Captain Barre: and (whatever might be the difference of sentiment entertained by this court) we have no power to compel a judge to decide according to the dictates of any judgment, but his own.[1] It is *unnecessary, however, to declare, or to form, at this time, any conclusive opinion, on the question which has been so much agitated, respecting the evidence required by the 9th article of the consular convention.

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The rule discharged.

PENHALLOW *et al. v.* DOANE'S administrators.

Admiralty jurisdiction.—Practice.—Pleading.—Conclusiveness of decree.—Agents.

The district courts, as courts of admiralty, have power to carry into effect the decrees of the former court of appeals in prize cases, erected by congress, under the confederation.[2]

A court of admiralty in one nation can carry into effect the determination of a court of admiralty of another.[3] IREDELL and CUSHING, JJ.

In a libel to enforce a decree, under a prayer for general relief, damages may be awarded for not executing the original decree.

The proceedings of the admiralty are *in rem;* and therefore, the death of one of the parties to the decree, does not affect the right to have it executed.

It is a rule, at common law, that if a party can plead a fact, material to his defence, and omit to do it, at the proper time, he can never avail himself of it afterwards. IREDELL, J.

All persons, in every part of the world, are concluded by the sentence of a prize court, in a case coming clearly within its jurisdiction.

Congress, under the confederation, had power to erect the court of appeals in prize cases, and its decrees are conclusive.

An agent, who is a party to the suit, and receives money on the footing of an erroneous judgment, and pays it over to his principal, with notice of an application for an appeal, is liable to refund, in case of a reversal.[4]

THIS was a writ of error, directed to the Circuit Court for the district of New Hampshire. The case was argued from the 6th to the 17th of February; the Attorney-General of the United States (*Bradford*) and *Ingersoll*, being counsel for the plaintiffs in error; and *Dexter*, *Tilghman* and *Lewis*, being counsel for the defendants in error.

The case, reduced to an historical narrative, by Judge PATERSON, in delivering his opinion, exhibits these features:

This cause has been much obscured by the irregularity of the pleadings, which present a medley of procedure, partly according to the common, and partly according to the civil, law. We must endeavor to extract a state of the case from the record, documents and acts which have been exhibited.

It appears, that on the 25th of November 1775 (1 Journ. Congress, 259), congress passed a series of resolutions respecting captures. These resolutions are as follows:

"Whereas, it appears from undoubted information, that many vessels, which had cleared at the respective custom-houses in these colonies, agree-

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[1] See Tilton *v.* Beecher, 59 N. Y. 176.

[2] Jennings *v.* Carson, 4 Cranch 2.

[3] And see Ohio *v.* The Rio Grande, 1 Woods 279.

[4] See United States Bank *v.* Bank of Washington, 6 Pet. 8; s. c. 4 Cr. C. C. 86; Hobensack *v.* Hollman, 17 Penn. St. 154.