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.

*54]

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.

able to the regulations established by acts of the British parliament, have, in a lawless manner, without even the semblance of just authority, been seized by his majesty's ships of war, and carried into the harbor of Boston and other ports, where they have been rifled of their cargoes, by order of his majesty's naval and military officers, there commanding, without the said vessels having been proceeded against by any form of trial, and without the charge of having offended against any law.

"And whereas, orders have been issued in his majesty's name, to the commanders of his ships of war, to proceed as in the case of actual rebellion against such of the sea-port towns and places, being accessible to the king's ships, in which any troops shall be raised or military works erected; *under color of which said orders, the commanders of his majesty's said ships of war have already burned and destroyed the flourishing [*55 and populous town of Falmouth, and have fired upon and much injured several other towns within the united colonies, and dispersed, at a late season of the year, hundreds of helpless women and children, with a savage hope, that those may perish under the approaching rigors of the season, who may chance to escape destruction from fire and sword, a mode of warfare long exploded among civilized nations.

"And whereas, the good people of these colonies, sensibly affected by the destruction of their property, and other unprovoked injuries, have at last determined to prevent as much as possible a repetition thereof, and to procure some reparation for the same, by fitting out armed vessels and ships of force. In the execution of which commendable designs, it is possible, that those who have not been instrumental in the unwarrantable violences above mentioned may suffer, unless some laws be made to regulate, and tribunals erected competent to determine the propriety of captures. Therefore, resolved,

"1. That all such ships of war, frigates, sloops, cutters and armed vessels as are or shall be employed in the present cruel and unjust war against the united colonies, and shall fall into the hands of, or be taken by, the inhabitants thereof, be seized and forfeited to and for the purposes hereinafter mentioned.

"2. Resolved, that all transport vessels in the same service, having on board any troops, arms, ammunition, clothing, provisions, military or naval stores of what kind soever, and all vessels to whomsoever belonging, that shall be employed in carrying provisions or other necessaries to the British army or armies, or navy, that now are, or shall hereafter be within any of the united colonies, or any goods, wares or merchandise for the use of such fleet or army, shall be liable to seizure, and with their cargoes shall be confiscated.

"3. That no master or commander of any vessel shall be entitled to cruise for, or make prize of any vessel or cargo, before he shall have obtained a commission from the congress, or from such person or persons as shall be for that purpose appointed, in some one of the united colonies.

"4. That it be and is hereby recommended to the several legislatures in the united colonies, as soon as possible, to erect courts of justice, or give jurisdiction to the courts now in being, for the purpose of determining concerning the captures to be made as aforesaid, and to provide that all trials in *such case be had by a jury, under such qualifications, as to the [*56 respective legislatures shall seem expedient.

"5. That all prosecutions shall be commenced in the court of that colony, in which the captures shall be made, but if no such court be at that time erected in the said colony, or if the capture be made on open sea, then the prosecution shall be in the court of such colony as the captor may find most convenient; provided, that nothing contained in this resolution shall be construed so as to enable the captor to remove his prize from any colony competent to determine concerning the seizure, after he shall have carried the vessel so seized within any harbor of the same.

"6. That in all cases, an appeal shall be allowed to the congress, or such person or persons as they shall appoint for the trial of appeals, provided the appeal be demanded within five days after definitive sentence, and such appeal be lodged with the secretary of congress, within forty days afterwards, and provided the party appealing shall give security to prosecute the said appeal to effect, and in case of the death of the secretary during the recess of congress, then the said appeal to be lodged in congress, within twenty days after the meeting thereof.

"7. That when any vessel or vessels shall be fitted out, at the expense of any private person or persons, then the captures made shall be to the use of the owner or owners of the said vessel or vessels; that where the vessels employed in the capture shall be fitted out at the expense of any of the united colonies, then one-third of the prize taken shall be to the use of the captors, and the remaining two-thirds to the use of the said colony, and where the vessels so employed shall be fitted out at the continental charge, then one-third shall go to the captors, and the remaining two-thirds, to the use of the united colonies; provided, nevertheless, that if the capture be a vessel of war, then the captors shall be entitled to one-half of the value, and the remainder shall go to the colony or continent as the case may be, the necessary charges of condemnation of all prizes being deducted before distribution made."

That on the 23d March 1776, congress resolved that the inhabitants of these colonies be permitted to fit out armed vessels, to cruise on the enemies of the united colonies. That on the 2d April 1776, congress agreed on the form of a commission to commanders of private ships of war; that the commission run in the name of the Delegates of the United Colonies of New Hampshire, &c., and was signed by the President of Congress. That on the 3d July 1776, the legislature of New Hampshire *passed an act for the trial of captures; of which the part material in the present controversy, is as follows: *57]

"And be it further enacted, that there shall be erected and constantly held in the town of Portsmouth, or some town or place adjacent, in the county of Rockingham, a court of justice, by the name of the court maritime, by such able and discreet person as shall be appointed and commissioned by the council and assembly, for that purpose, whose business it shall be to take cognisance, and try the justice of any capture or captures of any vessel or vessels, that have been, may or shall be taken, by any person or persons whomsoever, and brought into this colony, or any recaptures, that have or shall be taken and brought thereinto.

"That any person or persons who have been, or shall be concerned in the taking and bringing into this colony, any vessel or vessels employed or offending, or being the property as aforesaid, shall jointly, or either of them,

by themselves, or by their attorneys or agents, within twenty days after being possessed of the same in this colony, file before the said judge, a libel in writing, therein giving a full and ample account of the time, manner and cause of the taking such vessel or vessels. But in case of any such vessel or vessels already brought in as aforesaid, then such libel shall be filed within twenty days next after the passing of this act, and at the time of filing such libel, shall also be filed all papers on board such vessel or vessels, to the intent that the jury may have the benefit of the evidence therefrom arising. And the judge shall, as soon as may be, appoint a day to try by a jury, the justice of the capture of such vessel or vessels, with their appurtenances and cargoes; and he is hereby authorized and empowered to try the same. And the same judge shall cause a notification thereof, and the name, if known, and description of the vessel so brought in, with the day set for the trial thereon, to be advertised in some newspapers printed in the said colony (if any such paper there be), twenty days before the time of the trial, and for want of such paper, then to cause the same notification to be affixed on the doors of the town-house, in said Portsmouth, to the intent that the owner of such vessel, or any persons concerned, may appear and show cause (if any they have) why such vessel, with her cargo and appurtenances, should not be condemned as aforesaid. And the said judge shall, seven days before the day set and appointed for the trial of such vessel or vessels, issue his warrant to any constable or constables within the county aforesaid, commanding them, or either of them, to assemble the inhabitants of their towns respectively, and to draw out of the box, in manner provided for drawing jurors to serve at the superior *court of judicature, so many good and lawful men as [*58
the said judge shall order, not less than twelve, nor exceeding twenty-four; and the constable or constables shall, as soon as may be, give any person or persons, so drawn to serve on the jury in said court, due notice thereof, and shall make due return of his doings therein to the said judge, at or before the day set and appointed for the trial. And the said jurors shall be held to serve on the trial of all such vessels as shall have been libelled before the said judge, and the time of their trial published, at the time said jurors are drawn, unless the judge shall see cause to discharge them, or either of them, before; and if seven of the jurors shall appear and there shall not be enough to complete the number of twelve (which shall be a panel), or if there shall be a legal challenge to any of them, so that there shall be seven, and not a panel, it shall and may be lawful for the judge, to order his clerk, the sheriff or other proper officer attending said court, to fill up the jury with good and lawful men present; and the said jury, when so filled up and impannelled, shall be sworn to return a true verdict, on any bill, claim or memorial which shall be committed to them, according to law and evidence; and if the jury shall find, that any vessel or vessels, against which a bill or libel is committed to them, have been offending, used, employed or improved as aforesaid, or are the property of any inhabitants of Great Britain as aforesaid, they shall return their verdict thereof to the said judge, and he shall thereupon condemn such vessel or vessels, with their cargoes and appurtenances, and shall order them to be disposed of, as by law is provided: and if the jury shall return a special verdict, therein setting forth certain facts, relative to such vessel or vessels (a bill against which is committed to them), and it shall appear to the said judge, by said verdict,

that such vessel or vessels have been infesting the sea-coast of America, or navigation thereof, or that such vessels have been employed, used, improved or offending, or are the property of any inhabitant or inhabitants of Great Britain as aforesaid, he, the said judge, shall condemn such vessel or vessels, and decree them to be sold, with their cargoes and appurtenances, at public vendue; and shall also order the charges of said trial and condemnation to be paid out of the money which such vessel and cargo, with her appurtenances, shall sell for, to the officers of the court, according to the table of fees, last established by law of this colony, and shall order the residue thereof to be delivered to the captors, their agents or attorneys, for the use and benefit of such captors and others concerned therein: and if two or more vessels (the commanders whereof shall be properly commissioned) shall jointly take such vessel, the money which she and her cargo shall sell for (after payment
*59] of charges as aforesaid) shall *be divided between the captors, in proportion to their men. And the said judge is hereby authorized to make out his precept, under his hand and seal, directed to the sheriff of the county aforesaid (or if thereto requested by the captors or agents, to any other person to be appointed by the said judge), to sell such vessel and appurtenances and cargo, at public vendue, and such sheriff or other person, after deducting his own charges for the same, to pay and deliver the residue, according to the decree of the said judge.

"That any person or persons, claiming the whole, or any part or share, either as owner or captor of any such vessel or vessels, against which a libel is so filed, may jointly, or by themselves, or by their attorneys or agents, five days before the day set and appointed for the trial of such vessel or vessels, file their claim before the said judge; which claim shall be com mitted to the jury, with the libel which is first filed, and the jury shall thereupon determine and return their verdict, of what part or share such claimant or claimants shall have of the capture or captures; and every person or persons who shall neglect to file his or their claim, in the manner as aforesaid, shall be for ever barred therefrom.

"That every vessel, which shall be taken and brought into this colony, by the armed vessels of any of the united colonies of America, and shall be condemned as aforesaid, the proceeds of such vessels and cargoes shall go and be, one-third part to the use of the captors, and the other two-thirds to the use of the colony, at whose charge such armed vessel was fitted out. And where any vessel or vessels shall be taken by the fleet and army of the united colonies, and brought into this colony, and condemned as aforesaid, the said judge shall distribute and dispose of the said vessels and cargoes, according to the resolves and orders of the American congress.

"And whereas, the honorable continental congress have recommended, that in certain cases, an appeal should be granted from the court aforesaid: Be it therefore enacted, that from all judgments or decrees, hereafter to be given in the said court maritime, on the capture of any vessel, appurtenances or cargoes, where such vessel is taken, or shall be taken, by any armed vessel, fitted out at the charge of the united colonies, an appeal shall be allowed to the continental congress, or to such person or persons, as they already have, or shall hereafter appoint, for the trials of appeals, provided
*60] the appeal be demanded within five days after definitive sentence given, and such appeal shall be lodged *with the secretary of the con

gress, within forty days afterwards; and provided, the party appealing, shall give security to prosecute said appeal with effect; and in case of the death of the secretary, during the recess of the congress, the said appeal shall be lodged in congress, within twenty days after the next meeting thereof; and that from the judgment, decrees or sentence of the said court, on the capture of any vessel or cargo which have been or shall hereafter be brought into this colony, by any person or persons, excepting those who are in the service of the united colonies, an appeal shall be allowed to the superior court of judicature, which shall next be held in the county aforesaid.

"And whereas, no provision has been made by any of the said resolves, for an appeal from the sentence or decree of the said judge, where the caption of any such vessel or vessels may be made by a vessel in the service of the united colonies, and of any particular colony, or person together: Therefore, be it enacted by the authority aforesaid, that in such cases, the appeal shall be allowed to the then next superior court as aforesaid: provided, the appellant shall enter into bonds, with sufficient sureties, to prosecute his appeal with effect. And such superior court, to which the appeal shall be, shall take cognisance thereof, in the same manner as if the appeal was from the inferior court of common pleas, and shall condemn or acquit such vessel or vessels, their cargoes and appurtenances, and in the sale and disposition of them, proceed according to this act. And the appellant shall pay the court and jury such fees as are allowed by law in civil actions."

That on the 30th January 1777, congress resolved, that a standing committee, to consist of five members, be appointed, to hear and determine upon appeals brought against sentences passed on libels in the courts of admiralty in the respective states.

That Joshua Stackpole, a citizen of New Hampshire, commander of the armed brigantine called the McClary, acting under the commission and authority of congress, did, in the month of October 1777, on the high seas, capture the brigantine Susanna, as lawful prize. That John Penhallow, Joshua Wentworth, Ammi R. Cutter, Nathaniel Folsom, Samuel Sherburne, Thomas Martin, Moses Woodward, Niel McIntire, George Turner, Richard Champney and Robert Furness, all citizens of New Hampshire, were owners of the brigantine McClary. That George Wentworth was agent for the captors.

That on the 11th November, 1777, a libel was exhibited to the maritime court of New Hampshire, in the names of John *Penhallow and Jacob Treadwell, in behalf of the owners of the McClary, and of [*61 George Wentworth, agent for the captors, against the Susanna and her cargo; to which claims were put in by Elisha Doane, Isaiah Doane and James Shepherd, citizens of Massachusetts. That on the 16th December 1777, a trial was had before the said court, when the jury found a verdict in favor of the libellants; whereupon, judgment was rendered, that the Susanna, her cargo, &c., should be forfeited, and deemed lawful prize, and the same were thereby ordered to be distributed according to law. That an appeal to congress was, in due time, demanded, but refused by the said court, because it was contrary to the law of the state. That then, the said claimants prayed an appeal to the superior court of New Hampshire, which was granted.

That on the first Tuesday of September 1778, the superior court of New

Hampshire proceeded to the trial of the said appeal, when the jury found in favor of the libellants; that thereupon, the court gave judgment, that the Susanna, with her goods, claimed by Elisha Doane, Isaiah Doane and James Shepherd, were forfeited to the libellants, and the same were ordered to be sold, at public vendue, for their use and benefit, and that the proceeds thereof, after deducting the costs of suit, and charges of sale, be paid to John Penhallow and Jacob Treadwell, agents for the owners, and to George Wentworth, agent for the captors, to be by them paid and distributed according to law. That the claimants did, in due time, demand an appeal from the said sentence to congress, and did also tender sufficient security or caution, to prosecute the said appeal to effect, and that the same was lodged in congress, within forty days after the definitive sentence was pronounced in the superior court of New Hampshire.

That on the 9th of October 1778, a petition from Elisha Doane was read in congress, accompanied with the proceedings of a court of admiralty for the state of New Hampshire, on the libel, Treadwell and Penhallow *v.* Brig Susanna, &c., praying, that he may be allowed an appeal to congress; whereupon, it was ordered, that the same be referred to the committee on appeals. Fourth Journal of Congress, 586. That on the 26th June 1779, the commissioners of appeal, or the court of commissioners, gave their opinion, that they had jurisdiction of the cause.

That the articles of confederation bear date the 9th July 1778, and were ratified by all the states on the 1st March 1781. *That, by these arti- *62] cles, the United States were vested with the sole and exclusive power of establishing courts for receiving and determining finally appeals in all cases of capture. That such a court was established, by the style of "The Court of Appeals in cases of capture." By the commission, the judges were "to hear, try and determine all appeals from the courts of admiralty in the states, respectively, in cases of capture." Sixth Journal of Congress, 14, 21, 75. That on the 24th May 1780, congress resolved, "that all matters respecting appeals in cases of capture, now depending before congress, or the commissioners of appeals, consisting of members of congress, be referred to the newly erected court of appeals, to be there adjudged and determined according to law."

That in the month of September 1783, the court of appeals, before whom appeared the parties by their advocates, did, after a full hearing and solemn argument, finally adjudge and decree, that the sentences or decrees passed by the inferior and superior courts of judicature of New Hampshire, so far as the same respected Elisha Doane, Isaiah Doane and James Shepherd should be revoked, reversed and annulled, and that the property specified in their claims, should be restored, and that the parties each pay their own costs on the said appeal.

Here the cause rested, until the adoption of the existing constitution of the United States; except an ineffectual struggle before congress, on the part of New Hampshire, and an unavailing experiment, at common law, to obtain redress, on the part of the appellants. After the organization of the judiciary, under the present government, the representatives of Elisha Doane, who was one of the appellants, exhibited a libel in the district court of New Hampshire, which was legally transferred to the circuit court, against John Penhallow, Joshua Wentworth, Ammi R. Cutter, Nathaniel Folsom, Samuel

Sherburne, Thomas Martin, Moses Woodward, Niel McIntire, George Turner, Richard Champley, Robert Furness and George Wentworth.

This libel, after setting forth the proceedings in the different courts, states, that the brigantine Susanna, with her tackle, furniture, apparel and cargo, and also the moneys arising from the sales thereof, came, after the capture, to the hands and possession of Joshua Wentworth and George Wentworth, whereby they became liable for the same, together with the captors and owners. That after the death of Elisha Doane, letters of administration of the personal estate of the said Elisha were granted to Anna Doane, his widow, and Isaiah Doane, and that the widow afterwards intermarried with David Stoddard Greenough. The libellants pray process against the respondents *to show cause, why the decree of the court of appeals should not be carried into execution, and they also pray [*63 that right and justice may be done in the premises, and that they may recover such damages as they gave sustained, by reason of the taking of the Susanna.

The respondents, protesting that they never were owners of the McClary, and that they have none of the effects of the Susanna, nor her cargo, in their possession, say, that the Susanna was in the custody of the marshal, and, upon the final decree of the superior court of New Hampshire, sold for the benefit of the owners and mariners of the McClary, and distributed among them, according to law; that the decision of the said court was final; that no other court ever had, or hath, or ever can have, power to revoke, reverse and annul the said decree, and in a subsequent part of the pleadings, that the district court of New Hampshire hath no authority to carry the decree of the court of appeals into execution, or to give damages.

To this sort of plea and answer, neither and yet both, the libellants reply, that the matters contained in their libel are just and true; and that they are ready to verify and prove the same; that the matters and things alleged by the respondents are false and untrue; that the court of commissioners, and court of appeals, were duly constituted, and had jurisdiction of the subject-matter; that no other court hath or can have authority to draw into question the legality of their decisions, and that the district court of New Hampshire hath jurisdiction.

I have extracted and consolidated the material parts of the libel, plea, answer, replication, rejoinder, sur-rejoinder, &c., if they may be so termed, without detailing the allegations of the parties as they arise in the course of procedure.

Upon these pleadings, the parties went to a hearing before the circuit court of New Hampshire, which, after full consideration, decreed, that the respondents should pay to the libellants their damages and costs, occasioned by their not complying with the decree of the court of appeals; the *quantum* of which to be ascertained by commissioners. This interlocutory sentence was pronounced the 24th October 1793. The commissioners reported, that the Susanna, her cargo, &c., were, on the 2d October 1778, being the assumed time of sale, worth £5895 14 10

That they calculated thereon sixteen years' interest, viz., from the 2d October 1778, to 2d October 1794, amounting to 5659 17 4

£11,555 12 1

51

*On this report being affirmed, the circuit court pronounced their definitive sentence, on the 24th October 1794, that the libellants recover against the respondents the sum of $38,518.69 damages, and $154.30 costs. The respondents, conceiving themselves aggrieved, have removed the cause before this court for revision.

The record being returned, the plaintiff in error, on the 2d February 1798, assigned the following errors:

To the chief justice and the associate justices of the supreme court of the United States, to be holden at the city of Philadelphia, on the first Monday of February, in the year of our Lord one thousand seven hundred and ninety-five, John Penhallow, Joshua Wentworth, Ammi Ruhammah Cutter, Nathaniel Fulsom, Samuel Sherburne, sen., Thomas Martin, Moses Woodward, Neal McIntire, George Turner, Richard Champney, Robert Furness and George Wentworth, plaintiffs in error, against David Stoddart Grenough and Anna his wife, and Isaiah Doane, administrators of the estate of Elisha Doane, deceased, defendants: Humbly show, that in the record and process aforesaid, hereto annexed, and in passing the final decree, it is manifestly erred in this, viz.: That whereas, it was decreed in favor of the said David Stoddart Grenough and Anna his wife, and Isaiah Doane, the said decree ought to have been in favor of the said John Penhallow and others, the plaintiffs: And for other and further errors, they assign the following, viz.:

1st. That by said decree it was ordered, that the said John Penhallow and others, plaintiffs, be condemned in damages for their not performing a certain decree of a court claiming appellate jurisdiction in prize causes, held in the city of Philadelphia, on the seventeenth day of September, Anno Domini, 1783, when, in fact, the said last-mentioned court had no jurisdiction, power or authority whatever, by law, to make and pass the said decree; and that the said decree was illegal and a nullity.

2d. That there is also manifest error in this, viz.: That if the said last-mentioned court had, at the time of their passing said decree, appellate jurisdiction of said cause, yet said decree was altogether erroneous and impossible to be performed or executed, because (as by the said Greenough's and others own showing, in their libel aforesaid), the said Elisha Doane was, at the time of making and passing the said decree, viz., on the seventeenth day of September, Anno Domini, 1783, and long before that time, dead; when, by the same decree, it is ordered that restoration of said property be made to said Elisha Doane.

3d. There is also manifest error in this, viz.: That said cause was not brought before congress, or the commissioners *by them appointed to hear and try appeals in prize causes, according to the resolve of congress, but repugnant thereto, viz., by way of complaint, and that no appeal from the said decree of said court of New Hampshire, was allowed by the same court or by congress.

*65]

4th. There is also manifest error in this, viz.: That in and by the said libel, upon which the decree aforesaid in said circuit court is made, damages for not performing the decree of said court of appeals are not prayed for—wherefore, the said circuit court ought not to have decreed or condemned the plaintiffs in damages, as is done by said final decree.

5th. There is also manifest error in this, viz. : That said final decree of said circuit court was not made upon a due trial and examination of the merits of the capture of the said brigantine Susanna, her tackle, apparel and furniture, and of the goods, wares and merchandises, and of the evidences or proofs which might have been adduced by the plaintiffs in error, if such trial had been had. But the decree of the court of appeals was received and admitted as the only evidence of the right of claim of the said Grenough and others, the libellants, to the said brigantine, her tackle, apparel and furniture, and of the said goods, wares and merchandises, condemned, and of the illegality of the capture and condemnation aforementioned in said libel, which is contrary to the usage and customs of admiralty, maritime and prize courts, and altogether unwarranted by law.

6th. There is manifest error also in this, viz. : That by the showing of the said libellants, the moneys arising from the sale of said brigantine and cargo, &c., were paid to the said Joshua Wentworth and George Wentworth, as agents, to be distributed according to law, viz., one-half to the owners of the said privateer McClary, and the other to the captors, viz., to the officers and seamen on board, which were distributed accordingly. Whereas, in fact, by said final decree, they, the plaintiffs in error, and Joshua and George, as agents, and the other plaintiffs as owners, are made liable, and condemned in full damages for the whole value of said brigantine, her tackle, apparel and furniture, and of said goods, wares and merchandises, which is altogether illegal.

7th. There is also manifest error in this, viz. : That it doth not appear by the copy of the record of said court of appeals, filed and used in this cause, how the same cause, in which that court decreed as aforesaid, came before said court, or was legally instituted, or had day therein, at the time of passing said decree.

8th. There is manifest error in this, also, viz. : That said circuit court, in passing said final decree, and in all the *proceedings in the same, acted and proceeded as a court of admiralty, when, as such, they, by law, had no jurisdiction of said cause, and could not legally take cognisance thereof. [*66

Wherefore, for these and other errors in the record and process, and final decree aforesaid, of the said circuit court, the said plaintiffs in error pray that the final decree aforesaid, of the said circuit court, may be reversed, annulled and held to be altogether void, and they restored to all things which they have lost. JOHN S. SHERBURNE.

The defendants replied, in *nullo est erratum;* and thereupon, issue was joined.

For the *plaintiffs* in error, the arguments were of the following purport :

1st Error. This is a question between citizens of the United States ; a citizen of one state being a citizen of every state. Const. art. IV., § 2. Questions between subjects of different states belong entirely to the law of nations (3 Bl. Com. 69); but between citizens of the same state the municipal law, even in questions of prize, during a war, is of supereminent control. 1 Wood. 137 ; 2 Ibid.; 3 Ibid. 454 ; Hen. Bl.; 4 T. R. 382; 3 Atk. 195 ; Park, 166, 180 ; 3 Bro. 304. But this appeal was never properly before the congressional court of appeals. Doane petitioned congress, and

congress referred the petition to the committee of appeals. 6 Vol. Journ. Cong. 133, 167. In the case of the *Sandwich Packet*, a committee was appointed, and upon their report congress allowed the appeal. Regularly, in the present instance, the appeal ought to have been allowed by the court below, and the record lodged with the secretary of congress; or there should, at least, appear a special allowance of the appeal by congress, as in the case of the *Sandwich Packet*, and not a mere reference to a committee. The court of New Hampshire, in fact, refused to allow the appeal; and the appearance of the party in the congressional court of appeals, could not cure any defect, as he there pleaded directly to the jurisdiction, and notice signifies nothing against a compulsory judgment. The legal customary modes to compel the return of a record, by *certiorari*, and a writ of diminution, &c., might have been resorted to. 3 Bac. Abr. 204; Conset on Courts, 187. There was no privity between the court of appeals and the circuit court, and an inferior court cannot execute the decrees of a superior court. 1 Sid. 418; 1 Vent. 32; 6 Vin. 373, pl. 2; Esp. 87; 1 Lev. 243; Raym. 473; Doug. 580; Cowp. 176.

But had the congressional court of appeals jurisdiction in this case? That court is extinct, and may now be considered in the light of a foreign court, and the decrees of foreign courts are regarded on *a footing of reciprocity. Whether, then, the congressional court of appeals, was, in this instance, a court of the last resort, is the gist of the controversy; and we contend, that it was not, but that the superior court of New Hampshire was, by the law of the state, the court of the last resort. On an appeal, or on a writ of error, like this, in the nature of an appeal, the plaintiff in error may use every defence which he could have urged below; and the authorities evince that the competency of the court giving the judgment may be inquired into. 1 Bac. Abr. 630; Doug. 5; 3 T. R. 29, 130, 32, 269; Carth.; Park on Ins.; 11 State Trials, 222, 232; 2 Dom. 676; Ayl. 72–3. Whether the congressional court had any jurisdiction at all must depend on a comparison between the resolves of congress of November 1775, and the law of New Hampshire of July 1776; and to solve that difficulty, three subordinate questions may be discussed: 1st. Had congress *exclusive* jurisdiction of prize causes in November 1775? 2d. Are their resolutions on that subject mandatory and absolute, or recommendatory? 3d. Did they necessarily imply, and authorize, a revision of facts, which had already been established by the verdict of a jury?

*67]

1. Had congress exclusive jurisdiction of prize causes, in November 1775? If New Hampshire had any original right to take cognisance of prize causes, the plaintiff in error must prevail; for in such case, the jurisdiction would be, at least, concurrent with that claimed by congress. But wherever an alliance is not corporate, but confederate, the sovereignty resides in each state. Federalist; Adams' Def. 162–3. And in the histories of Holland and of Germany, the rule will be illustrated and confirmed. 1 Montesq. 263; 7 Vol. Encyclopœdia, 709; Chesterfield's Works, 1 vol.; Sir William Temple, 114; Adams' Def. 362. Now, the state retained all the powers which she did not expressly surrender to the Union; a state cannot cease to be sovereign, without its own act; nor can sovereignty be asserted but upon a clear title. 7 Journ. Cong. p. 49, &c. Congress had only the power to recommend certain acts to the states, they had no absolute right to enforce

a performance, nor to inflict a penalty for disobedience. Whatever power congress possessed must have been derived from the people. If congress had a right of erecting courts of appeals from New Hampshire, it must be in consequence of an authority derived from New Hampshire—all the other twelve states could not give it. Nor had congress the exclusive power of war; as a retrospective view of the revolutionary occurrences will demonstrate. The colonies, totally independent of each other, before the war, became distinct, independent states, when they threw off their allegiance to the British crown, and congress was no longer a convention of agents for colonies, but of ambassadors from *sovereign states. Adams' Def. 1 vol. 362–4. In that character, they were uniformly considered by congress; and on the 24th of June 1776 (2 vol. Journ. Cong. 229), when that body recommends passing laws on the subject of treason, the crime is declared to be committed against the colonies, individually, and not against the confederation. The powers of the first congress of 1774, were, indeed, only those of consultation, to protect the proper measures for obtaining a redress of grievances: they were, in effect, a council of advice. Their credentials, as well as the opinions of writers, manifest the truth of this assertion. 1 Ramsay's Hist. 143; 1 Journ. Cong. 17, 54, 55. The second congress sat on the same authority: with the same latitude to obtain a redress of grievances; but all the credentials of the members bear date before the news of the battle of Lexington (19th April 1775); those from Pennsylvania, New Jersey and Virginia merely authorize a meeting in congress; and none of the rest hold out the idea of war, though those from Massachusetts seem to have given the greatest latitude. 1 Journ. Cong. 56; 3 vol. Cong. 14. It appears clearly, then, that congress, at those stages of the revolution, possessed no positive powers, by express delegation. When, however, the war afterwards came on, congress seized on such powers as the necessity of the case required to be exercised: but still, the validity of those powers depends on subsequent ratifications, or universal acquiescence; and if New Hampshire has ever ratified the assumption of a right to hold appeals in all cases of capture as prize, we abandon the cause. But in a variety of instances, it is manifest, that, although some of the assumed powers of congress were confirmed, others were denied and repelled. Thus, the power of embargo was desired by congress, but never conceded by the states; 4 Journ. Cong. 575, 321, 331; and in Pennsylvania, it was even thought necessary to pass a law to indemnify all persons who acted under the authority of the resolutions of congress, &c. 2 Dall. Laws, 111. Still, however it is conceded, that congress, from the necessity of the case, and a general acquiescence, might raise an army, and direct the military operations of the war; though even in that respect, it is questionable, whether Massachusetts would have consented to the congressional appointment of a commander in chief, had General Ward been successful at Bunker's Hill. But the states, by their acquiescence in this exercise of the rights of war, on the part of congress, did not convey an exclusive power to the federal head, nor divest themselves of their individual authority to wage war, issue letters of marque &c. War is that state in which a nation prosecutes its rights by force. Vatt. lib. 3, c. 1, § 1. Now, the fact is, that the New *England colonies had first made war, according to this definition; and at their instance, the other colonies afterwards joined them. 1 Ramsay's Hist.

[*68

[*69

192. New Hampshire, accordingly, voted 2000 men for the service; Ib. 395; established post-offices; and vested a committee of safety with powers equal to those of a dictator. Ib. 395. Connecticut, likewise, made war on her own individual authority; Ticonderoga was taken by Allen; and Arnold made a prize of a vessel on Lake Champlain. Gord. Hist. 349; 1 vol. Journ. Cong. 81. At this period, the states must have been possessed of individual sovereignty; for the sovereign power alone can raise troops; Vatt. lib. 2, c. 2, § 7; and both Massachusetts and Connecticut had actually fitted out and armed vessels to cruise against the enemy, in October 1775 (South Carolina soon following the example), whereas, the resolution of congress respecting prizes did not pass until the succeeding month. Gord. Hist. 428; Ramsay's Hist. 224. Could the resolutions of congress at that time take away the jurisdiction of New Hampshire, without her own consent? And the articles of confederation, at a later period, expressly reserved to the respective states, the right of issuing letters of marque, &c., after a declaration of war by the United States.

By considering the circumstances under which congress exercised other powers, we may be furnished with some analogies in support of our doctrine, respecting the power claimed, as an incident of war, to hold appeals in all cases of capture. Congress were allowed to issue money; but they could not guard it from counterfeit, nor make it a legal tender; nor effectually bind the states to redeem it; though all these incidents were essential to support the credit and currency of the money. Congress assumed the power of regulating the post-office; but they could impose no penalties for a breach of their resolution on the subject. Congress received ambassadors and other public ministers; but when the immunity of the French minister's house was violated, the state of Pennsylvania only could punish the offender. *De Longchamp's case*, 1 Dall. 111. Congress made treaties, but they could make no law to enforce an observance of them. Even for effectuating their resolutions, relative to admiralty jurisdiction, congress were obliged to address themselves by recommendation to the states, individually; 5 Journ. Cong. 215; and New Hampshire passed a law, granting to congress the power that was requested in the case of foreigners only, with an allowance of only a day for making the appeal. In that law, congress acquiesced, Ib. 459; until the dispute arose in this very case. 9 Journ. Cong. 45, 87, 97, 98; 1 Dall. 71. This distinction has been taken in Pennsylvania, that on the evacuation of Philadelphia, all public military property belonged to congress, and all private property to the state.

*70] *To manifest, if possible, more forcibly, the participation of the individual states, in the power assumed and exercised by congress, we find, that the very commissions issued by congress, were countersigned by the governors of the respective states. By the law of New Hampshire, passed in July 1776, a power was given to the executive to issue letters of marque, &c., and the act of countersigning the congressional commissions was equivalent to the exercise of that power. In the instructions to privateers, it is likewise observable, that congress authorize the captors to proceed to libel and condemn their prizes "in any court erected for the trial of maritime affairs in any of these colonies." 2 Journ. Cong. 106, 116, 118. But surely it is possible for a state to delegate the power of issuing letters of marque, &c., and yet retain a jurisdiction over prizes brought into her ports;

or, reversing the proposition, to give up that jurisdiction, and yet retain the power of issuing letters of marque.

A court of appeal is not a necessary incident of sovereignty. If there be a court judging by the law of nations, no complaint can be made by foreign powers; the rest depends on municipal law. 4 T. R. 382; 3 Atk. 401; Coll. Jurid. It has been questioned, indeed, whether any court can decide on the legality of a prize, which has been captured under the authority of a different power, from that by which the court was constituted: but in the case of a confederated sovereignty, each member of the confederation may, undoubtedly, give power to the others to decide on prizes taken under its separate authority. Thus, likewise, it appears, that France established courts in the West Indies, to determine the legality of prizes taken by American vessels, although no article of the treaty provided for such an establishment. 5 Journ. Cong. 440. In other treaties, however, the case is expressly provided for, and the judicatures of the place into which the prize, taken by either of the contracting parties, shall have been conducted, may decide on the legality of the captures, according to the laws and regulations of the states, to which the captors belong. Prussian Treaty, art. 21, § 4; Dutch Treaty, art. 5; Swedish Treaty, art. 18, § 4.

But the language of the articles of confederation demonstrates the political independence, and separate authority of the states: "each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not, by this confederation, expressly delegated to the United States in congress assembled." Art. 3. If, indeed, the states had not, individually, all the powers of sovereignty, how could they transfer such powers or any of them to congress? Does not congress itself, by the appointment of a committee to draft the articles of confederation, and by its earnest solicitation, that the several states would ratify *the instrument, evince a sense of its own political impotence, and of the plenitude of the state authorities? [*71

But after all, it must be considered, that Doane, the defendant in error, waived the appeal to congress, by carrying his case into the supreme court of New Hampshire, instead of applying immediately for relief to congress, when the inferior state court refused to grant an appeal to the congressional court of appeals; and the supreme court of Massachusetts has determined, in an action of trover between the same parties, that the court of appeals had no jurisdiction in this cause. *Sit finis litium.*

2. The second subordinate question is—Are the resolutions of congress, respecting prize causes, mandatory and absolute, or only recommendatory? In spirit and in terms, they are no more than recommendatory; such as the state might, at pleasure, either carry into effect or reject. The state which erected the court of admiralty, possessed the power likewise to regulate the appellate jurisdiction from its decrees. Thus, the act of Pennsylvania modelled the appellate power in a special manner, as to the time of appealing; and denied the appeal altogether, as to facts found by the verdict of a jury. The supreme court of New Hampshire was in existence, long before the resolutions of congress were passed; and there is no pretence for congress to claim a controlling, or appellate power, upon the judgments or decrees there pronounced; though congress might recommend a particular mode of proceeding as convenient and advantageous. So far as respected

foreigners, New Hampshire concurred in the opinion of congress; but rejected it, in cases like the present, between citizens.

3. The third subordinate question is—Whether the resolutions of congress necessarily imply and authorize a revision of facts, which had already been established by the verdict of a jury? The fair construction of the resolution of congress is, that there shall be an appeal on points of law appearing on the record. The appeal from a jury is not known here, though it is familiar in New England; but even in New England, the appeal is always from one jury to another jury, and a jury may, in some measure, proceed on their own knowledge. 3 Bl. Com. 330, 367. In the case of the *Sloop Active* (2 Dall. 160), the Chief Justice (McKean) was decisively of opinion, that an appeal did not lie from the admiralty of the state to the congressional court of appeals, as to facts found by a jury: and, in the same case, the general assembly expressed the same opinion, by their instructions to the delegates in congress. Journals, 31st of January 1780. After a jury trial, facts cannot be re-examined on a writ of error. 3 Bl. Com. 330, 367.

*72] *2d Error. It appears on the record, that Doane was dead, when the judgment was given: for the libel itself sets forth the commitment of administration to his representatives before judgment; and although that may not be conclusive, it is strong evidence of his death, upon which the court will decide the fact. Pr. Reg. ch. 1, p. 264; 3 & 4 Wood. 377; 2 Bac. 204; 4 Vin. 429; T. Raym. 463. It has been said, that even if Doane were dead, it was no abatement, being in a civil law court; 1 Chan. Ca. 122: but the case referred to as an authority, was merely a bill of review, which is not *stricti juris*, and was dismissed. Besides, the person who filed that bill had no privity, and was not entitled to it; and even if he had, the exception might have been error, notwithstanding the dismissal of the bill. It is likewise said, that death was no abatement in an ecclesiastical court; 1 Lev. 164; but it is evident from the authority cited, that the party representing the deceased, must come into court before judgment can go against him. 3 Huberus 582. The most that can reasonably be urged is, that the decree was good, so far as it pronounced the captured ship to be free; but it was void, so far as it made any order upon Doane to do any particular act. See 3 T. R. 323. The circuit court (which has been called a court of review) was, in fact, only the court of appeals continued; but Doane's administrators were never called upon, and therefore, could not be obliged to go into that court. The ground of the opinion of the circuit court is, that damages shall be recovered for not restoring the property to Doane; who being then dead, the restitution was impossible. Besides, letters of administration were only taken out in Massachusetts, which would not operate in New Hampshire, where alone, if anywhere, the debt was valid. Lovelace on Wills.

3d Error. The argument in support of this error has been anticipated in discussing the 1st error assigned.

4th Error. Damages were not asked by the libellant in the circuit court. The libel prays, indeed, that the decree of the court of appeals might be carried into effect; that damages might be given for the illegal capture of the ship; and that general relief might be granted; but it does not pray for damages on account of the non-performance of the decree of the court of

appeals. A judgment which gives damages, where they ought not to be given, is erroneous: as, where the damages are laid at 100*l.* in the declaration, and the judgment is rendered for 200*l.* No damages are to be allowed on reversal. Lee on Capt. 241. There ought to have been an account of the value of the thing to be restored by the decree of the court of appeals; and as that court gave no damages for the unlawful taking of the vessel, no other court had power to give *them. Nor, indeed, ought any damages to have been given, as the order for restitution was not directed [*73 to the respondents. Besides, the damages are given against the defendants jointly, whereas, each should have been charged severally with the sum which came into his hands; 3 T. R. 371; Cowp. 506; 4 Vin. 444; 7 Ibid. 252. And it does not even appear, that they had notice of the decree of the court of appeals, though it is stated on the record that they were heard, by their advocates, some time before it was pronounced. A monition should have issued; and the superior court should have inhibited the court of New Hampshire from proceeding on their judgment: otherwise, if that court did so proceed, and under their order the vessel was sold and the money paid away, the persons who paid it are not responsible. 3 T. R. 125. An agent paying over trust money, without notice of appeal, is excused. 4 Burr. 1985; Cowp. 565; 2 Ld. Raym. 1210. And the admiralty only compels agents to account for the money actually in their hands. H. Bl. 476, 483; 3 T. R. 323, 326–7, 343; 4 T. R. 382, 393; 1 W. Bl. 315. In the admiralty, a number of persons are joined, in order to prevent a multiplicity of suits: but, substantially, each person stands on his own separate ground, and a mode is established for assessing several damages. Doug. 579. (*a*)

5th Error. That the court below did not examine into the merits, cannot be deemed error, if they had no jurisdiction to meddle with the subject at all. This assignment of error, therefore, cannot be maintained.

6th Error. The argument on this, was anticipated in the discussion of the 4th error assigned.

7th Error. The argument on this, was anticipated in the discussion of the 1st error assigned.

8th Error. The fate of this error was submitted, without remark, to the opinion of the court.

For the *defendant* in error, the answers were of the following tenor:

1st Error. The objection that the appeal was not properly before the congressional court, ought not, at this stage, to be sustained, since the party appeared there and pleaded to the jurisdiction; and the court took cognisance of the cause. The court *ad quem* and not the court *à quo*, the proceeding is brought, must determine whether the appeal lay. A certified *copy of the decree of the court of New Hampshire was lodged with congress; and the case was treated in the same way that congress [*74 (who were not bound down to particular forms) treated other similar cases. Nor can it injure the defendant in error, that he took his first appeal to the

(*a*) Paterson, Justice.—If the damages were improperly given, jointly by the circuit court, can this court rectify the error, or direct the circuit court to do it?

Bradford.—This court cannot do it, because they are not possessed of evidence to show in what proportions the damages ought to be paid by the respondents.

superior court of New Hampshire; for that state had certainly a right to establish different courts of appeal, provided the last resort was made to congress. But an appeal was tendered and refused; and a certiorari only lies to courts of record, which was not the case with the inferior court of New Hampshire. The act of congress directs a removal by writ of error in all cases, and therefore, takes away all objections not appearing on the record.

Nor is it effectual to say, that an inferior court cannot execute the judgment of a superior court; for we had no remedy at common law; the question of prize or no prize being solely of admiralty jurisdiction. 1 Dall. 218. The only remedy was in the district court of New Hampshire. It has even been contended, that a court of admiralty of England may grant execution on a judgment in Friezland, against an Englishman; 6 Vin. 513, pl. 12; 1 Lev. 267; 1 Vent. 32; Godb. 260; and a court of admiralty may proceed to give effect to its own sentence, upon a new libel being filed. 4 T. R. 385. We contend then, that congress had jurisdiction to determine the appeal as well before, as after, the ratification of the articles of confederation—before the ratification, from the nature and necessity of the case; and after the ratification, from the force of the compact.

Congress was chosen by the representatives of the people; and when war commenced, it could not have been prosecuted, without vesting that body with a jurisdiction, which should pervade the whole continent. A formal compact is not essential to the institution of a government. Every nation that governs itself, under what form soever, without any dependence on a foreign power, is a sovereign state. In every society, there must be a sovereignty. 1 Dall. 46, 57; Vatt. lib. 1, ch. 1, § 4. The powers of war form an inherent characteristic of national sovereignty; and it is not denied, that congress possessed those powers. As, therefore, the decision of the question, whether prize or no prize, is a part of the power and law of war, Doug. 585–6, and must be governed by the law of nations, 3 Bl. Com. 68, 69; 2 Wood. 139; 4 T. R. 394, 400, 401, it follows, as a necessary consequence, that if congress possessed the whole power of war, it possessed all the parts—the incidents as well as the principal jurisdiction. Under this impression, congress recommended the institution of prize courts in the several states; but reserved to itself the right of appeal; and its journals are filled with the exercise of powers derived from the same source, and having *no greater pretensions to validity. On the 2d May 1775, the militia are directed to be trained for defence. On the 1st June, congress declare that they stand on the defensive merely, and the invasion of Canada by any of the colonies is objected to. On the 14th June, an army is directed to be raised. On 15th June, a general is appointed. On the 6th July, war is, in effect, declared. On the 7th November, the articles of war, inflicting death in certain cases, were passed. On the 25th November, the resolutions concerning prizes were adopted. On the 28th November, rules and orders were established for the government of the navy. On the 5th December, provision was made for salvage, in the case of re-captured vessels. On the 13th December, a fleet was established. On 20th December, it was declared, that the law of nations should regulate the proceedings in prize causes. On 22d December, the naval committee act. On 26th December, the united colonies are pledged for the redemption of the paper money. On the 23d

*75]

March and 24th July 1776, the equipment of privateers is authorized. On 2d and 3d April, the form of a commission for privateers is settled. On the 4th July, independence is declared, On 26th August, half-pay was allowed to disabled officers. On 5th September, it was resolved, that propositions for peace should only be made to congress. On the 9th September, a committee is appointed on an appeal in the case of the *Schooner Thistle*, and the style of the confederation was changed from "United Colonies" to "United States." On 16th September, additional battalions were raised. On 20th September, a new set of of articles of war were substituted instead of the former. On the 21st October, the oath to be taken by officers in the continental service was prescribed. On 30th January and 8th May 1777, a standing committee was appointed, to hear and determine appeals. On 31st January, a decree of a committee was set aside, on an appeal. On 8th May, a new commission for privateers was settled. On the 14th October, congress resolved to retaliate, by condemning, as prize, the enemy's vessels, brought in by their own mariners. On the 6th February 1778, congress formed a treaty of alliance with France. On 9th July 1778, the articles of confederation were ratified and signed by all the states, except New Jersey, Delaware and Maryland. On 27th July 1778, new members were added to the committee of appeals. On 14th January 1779, congress resolved that they would not conclude a truce or treaty with Great Britain, without the consent of France. On the 6th of March, the objection to the appellate jurisdiction of congress, as to facts found by a jury, was urged by Pennsylvania, in the case of the *Sloop Active*. On 15th January 1780, and 24th May, a court of appeals in the case of captures was instituted. On 21st January and 30th March 1780, the proceedings in the case of *The Susanna*, came *before congress. On 24th May 1780, the style of the court of appeals was settled. On 26th June 1780, a court of review was instituted. After so extensive a display of power and jurisdiction, it is absurd to oppose theory to practice, and to reason in the abstract, instead of adopting the evidence of facts. [*76

But on principle, as well as practice, the old commissioners of appeals had jurisdiction. Congress had an imperfect sovereignty, previous to the declaration of independence; and the articles of confederation are only a definement of rights, before vague and uncertain. The acts of congress were either performed by virtue of delegated powers, or of subsequent ratifications, and the acquiescence of the state legislatures and the people. On the declaration of independence, a new body politic was created; congress was the organ of the declaration; but it was the act of the people, not of the state legislatures, which were likewise nothing more than organs of the people. Having, therefore, a national sovereignty, extending to all the powers of war and peace, including, as a necessary incident, the right to judge of captures, the commissioners of appeals were lawfully instituted; and it is absurd to say, that both the federal and state governments held sovereignty in the same points, nor can the jurisdiction of the court of appeals that succeeded the commissioners be now questioned. There would, indeed, be no end of disputes, if the judgments of a supreme court, on the point of jurisdiction, could be inquired into. Lee on Capt. 242; Collec. Jurid. 153, 139; 3 Bl. Com. 411, 57; 1 Bac. Abr. 524. That point was lawfully before the court of appeals; and the court of appeals, when they

made their decree, in 1783, were clearly the supreme court of admiralty, under the confederation. The court of appeals took the cause up, as it had been left by the commissioners of appeals; and not on a new appeal from New Hampshire; they, therefore, virtually decided, that the commissioners of appeals had jurisdiction. If, then, this court may now inquire into the judgment of the court of appeals, every district court in the Union may do the same; and the controversy would never be at rest.

The individual states had no right to erect courts of prize, but under the authority of congress, who derived their authority from the whole people of America, as one united body. Was it not considered, during the war, by every man, that congress were thus vested with this and all the other rights of war and peace, and not the individual states? Why, else, was it necessary, by a special resolution of congress (4th April 1777), to give validity to captures made by privateers bearing commissions issued by the governor of North Carolina, previously to the 4th of April 1777? And on what other
*77] principle, *could that resolution be "transmitted to each of the United States, as a law in any prize cause, which may be depending or instituted in any of the courts therein, and to secure the condemnation of vessels taken under such commissions?" The very privateer that made the capture in question, was commissioned by congress; and the usual bond was given by her owners to the president of congress: Could, then, a privateer acting under the commission of congress, be deemed to act under any other authority; or be governed by any other laws than those which congress had prescribed? Had New Hampshire a right to erect courts for the condemnation of prizes made by vessels commissioned by congress, unless by the authority of congress, and upon the terms of their resolutions?

It is urged, however, that this is a case between citizens of the same country; and therefore, not within the general principle: but we answer, that a citizen of Massachusetts is a foreigner with regard to New Hampshire. The law of New Hampshire, respecting admiralty matters, passed in 1776, long before the articles of confederation were ratified; and until those articles were ratified, there is no color to allege, that the citizens of one state were citizens of all the rest. But if congress had a jurisdiction co-extensive with the object, they are alone competent to modify or limit its exercise: and when they reserved to themselves the appeal in all cases, it is clear, that they intended an appeal should lie, as well in cases between citizens, as in cases between citizens and foreigners—from the verdict of a jury on matters of fact, as well as from the judgment of the court in matters of law. Nor can the municipal law of a state govern the question of prize or no prize, even between citizens; though it may regulate the distribution of prize money, for in that respect, none but the citizens of the state can be interested. In the case of the *Sloop Active*, all the states but Pennsylvania voted originally that the decision should be according to the law of nations, and not according to the municipal law of the state; and although in the year 1784, six of the states voted in support of a different opinion; yet, it must be recollected, that the hearing was then *ex parte;* congress were evidently influenced by an apprehension of the consequence of enforcing the decree of the court of appeals in that case, against the state of Pennsyl-

vania, as they have been in this case against the state of New Hampshire; and the whole proceeding was marked and discolored with want of candor.

2d Error. The death of Doane, under the circumstances that appear on the record, and the law and practice of the court, did not abate the appeal. Every intendment will be made to support a judgment. 1 Wils. 2; 2 Str. 1180. Regularly, indeed, *a suit abates by the death of the party; but the law is not invariably so, where the party dying is immaterial [*78 to the cause. 1 Eq. Abr. 1. The proceeding in the present case was *in rem;* and therefore, the life of the party was not material. Ayliff. The court refused to examine into an abatement by death, in a bill of review for that purpose, the decree being made twenty years before. 1 Chan. Cas. 122. Nor is there any abatement by death of parties, in a spiritual court. 2 Roll. Rep. 18; 2 Lev. 6. And this being a court of civil law, the principle equally applies. The present record states that the appellant and appellee appeared by their advocates; and if any error in this respect occurred in the court of appeals, a court of review was established by congress, who might have examined and corrected it; there is no court that has now a jurisdiction to do so; though the error, if it existed, should have been assigned, and relied on, in the circuit court for the district of New Hampshire. But after all, the court may reject that part of the libel, which states the administration to have been committed, prior to the time of pronouncing the judgment of the court of appeals. 2 Vin. 404, pl. 4, pl. 5, pl. 7, pl. 9, pl. 11. It is not said by the record, that Doane was then dead, but merely that administration had been granted on his estate, which is only evidence of his death. On this point also, were cited Brook., tit. Judgment, 113; Sal. 8, pl. 21; Salk. 33, pl. 6; Carth. 118.

3d Error. The argument in opposition to this assignment of errors, has been anticipated in discussing the first error.

4th Error. That the circuit court gave damages, whereas, the judgment of the court of appeals was for restitution, is not a valid objection. If the court of appeals had attached the party, damages must have been paid, before he would have been discharged: damages are the substance of the whole proceeding. Nor is it exceptionable, that damages are not expressly prayed for by the libel; since that is necessarily included in the prayer for general relief.

5th Error. That the circuit court did not inquire into the merits of the original decree, is surely no legal objection. There were no merits out of the record, brought before the court. If any facts had been offered and rejected, a bill of exceptions might have been taken. Nor can this court inquire into the facts. The law gives an appeal from the district to the circuit court; but a writ of error only lies from the circuit court to the supreme court. On a writ of error, no extrinsic fact can be inquired into; and the diversity of the process proves, that it was the intent of the legislature to preclude such an inquiry.

*6th Error. The damages, it is contended, ought to have been several and distributive, according to the actual receipt of the different [*79 parties; and it is said, that a mere agent ought not to be made responsible, after he has *bonâ fide* paid over the money; but the injury was done by the joint act of the original libellants; Wentworth's paying away the money which he had received as agent, is denied and traversed in the replication;

he must have had full notice of the appeal, and therefore, acted at his own peril. If, however, the judgment of the circuit court should be deemed erroneous in the mode of decreeing damages, this court will correct it, and give such a judgment as the court below ought to have done. On this point, the following authorities were cited: Doug. 577; 1 Dall. 95.

7th Error. The answer to this assignment of error was anticipated in the course of the preceding answers.

8th Error. That the circuit court had jurisdiction as a court of admiralty, has been decided in the case of *Glass* v. *The Sloop Betsey* (*ante*, p. 4).

On the 24th of February 1795, the judges delivered their opinions *seriatim*.

PATERSON, Justice.—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. [Here the judge delivered the historical narrative of the cause, with which this report is introduced, and then proceeded as follows:]

I have been particular in stating the case, and giving an historical narrative of the transaction, in order that the grounds of decision may be fully understood. The pleadings consist of a heap of materials, thrown together in an irregular manner, and, if examined by the strict rules of common law, cannot stand the test of legal criticism. We are, however, to view the proceedings as before a court of admiralty, which is not governed by the rigid principles of common law. Order and systematic arrangement are no small beauties in juridical proceedings; and whatever may be said to the contrary, it will, on fair investigation, appear, that good pleading is founded on sound logic and good sense.

In the discussion of the cause, several questions have been agitated; some of which, involving constitutional points, are of great importance. The jurisdiction of the commissioners of appeals has been questioned.
*80] *The jurisdiction of the court of appeals has been questioned. These jurisdictions turning on the competency of congress, it has been questioned whether that body had authority to institute such tribunals. And lastly, the jurisdiction of the district court of New Hampshire has been questioned. In every step we take, the point of jurisdiction meets us.

I. The question first in order is, whether the commissioners of appeals had jurisdiction, or, in other words, whether congress, before the ratification of the articles of confederation, had authority to institute such a tribunal, with appellate jurisdiction, in cases of prize?

Much has been said respecting the powers of congress. On this part of the subject, the counsel on both sides displayed great ingenuity and erudition, and that too in a style of eloquence equal to the magnitude of the question. The powers of congress were revolutionary in their nature, arising out of events, adequate to every national emergency, and co-extensive with the object to be attained. Congress was the general, supreme and controlling council of the nation, the centre of union, the centre of force, and the sun of the political system. To determine what their powers were, we must inquire what powers they exercised. Congress raised armies, fitted out a

navy, and prescribed rules for their government: congress conducted all military operations both by land and sea: congress emitted bills of credit, received and sent ambassadors, and made treaties: congress commissioned privateers to cruise against the enemy, directed what vessels should be liable to capture, and prescribed rules for the distribution of prizes. These high acts of sovereignty were submitted to, acquiesced in, and approved of, by the people of America. In congress were vested, because by congress were exercised, with the approbation of the people, the rights and powers of war and peace. In every government, whether it consists of many states, or of a few, or whether it be of a federal or consolidated nature, there must be a supreme power or will; the rights of war and peace are component parts of this supremacy, and incidental thereto is the question of prize. The question of prize grows out of the nature of the thing. If it be asked, in whom, during our revolution war, was lodged, and by whom was exercised, this supreme authority? No one will hesitate for an answer. It was lodged in, and exercised by, congress; it was there, or nowhere; the states individually did not, and, with safety, could not exercise it. Disastrous would have been the issue of the contest, if the states, separately, had exercised the powers of war. For in such case, there would have been as many supreme *wills as there were states, and as many wars as there were wills. Happily, [*81 however, for America, this was not the case; there was but one war, and one sovereign will to conduct it. The danger being imminent and common, it became necessary for the people or colonies to coalesce and act in concert, in order to divert or break the violence of the gathering storm; they accordingly grew into union, and formed one great political body, of which congress was the directing principle and soul. As to war and peace, and their necessary incidents, congress, by the unanimous voice of the people, exercised exclusive jurisdiction, and stood, like Jove, amidst the deities of old, paramount and supreme. The truth is, that the states, individually, were not known nor recognised as sovereign, by foreign nations, nor are they now; the states collectively, under congress, as the connecting point or head, were acknowledged by foreign powers as sovereign, particularly in that acceptation of the term, which is applicable to all great national concerns, and in the exercise of which, other sovereigns would be more immediately interested; such, for instance, as the rights of war and peace, of making treaties, and sending and receiving ambassadors.

Besides, everybody must be amenable to the authority under which he acts. If he accept from congress a commission to cruise against the enemy, he must be responsible to them for his conduct. If, under color of such commission, he had violated the law of nations, congress would have been called upon to make atonement and redress. The persons who exercise the right or authority of commissioning privateers, must, of course, have the right or authority of examining into the conduct of the officer acting under such commission, and of confirming or annulling his transactions and deeds. In the present case, the captain of the McClary obtained his commission from congress; under that commission, he cruised on the high seas, and captured the Susanna; and for the legality of that capture, he must ultimately be responsible to congress, or their constituted authority. This results from the nature of the thing; and, besides, was expressly stipulated on the part of congress. The authority exercised by congress, in granting commissions

to privateers, was approved and ratified by the several colonies or states, because they received and filled up the commissions and bonds, and returned the latter to congress; New Hampshire did so, as well as the rest.

Another circumstance worthy of notice, is the conduct of New Hampshire, by her delegate in congress, in the case of the *Sloop Active*. Acts of Congress, 6th March 1779. By this decision, New Hampshire concurred in binding the other states. Did she not also bind herself? Before the articles of confederation were ratified, or even formed, a league of some kind subsisted *among the states; and whether that league originated in compact, or a sort of tacit consent, resulting from their situation, the exigencies of the times, and the nature of the warfare, or from all combined, is utterly immaterial. The states, when in congress, stood on the floor of equality; and until otherwise stipulated, the majority of them must control. In such a confederacy, for a state to bind others, and not, in similar cases, be bound herself, is a solecism. Still, however, it is contended, that New Hampshire was not bound, nor congress sovereign as to war and peace, and their incidents, because they resisted this supremacy in the case of the *Susanna*. But I am, notwithstanding, of opinion, that New Hampshire was bound, and congress supreme, for the reasons already assigned, and that she continued to be bound, because she continued in the confederacy. As long as she continued to be one of the federal states, it must have been on equal terms. If she would not submit to the exercise of the act of sovereignty contended for by congress, and the other states, she should have withdrawn herself from the confederacy.

*82]

In the resolutions of congress of the 6th of March 1779, is contained a course of reasoning, which, in my opinion, is cogent and conclusive. 5 Journ. Cong. 86, 87, 88, 89, 90.

"The committee, consisting of Mr. Floyd, Mr. Ellery and Mr. Burke, to whom was referred the report of the committee on appeals, of January 19th, 1779, having, in pursuance of the instructions to them given, examined into the causes of the refusal of the judge of the court of admiralty for the state of Pennsylvania, to carry into execution the decree of the court or committee of appeals, report.

"That on a libel in the court of admiralty for the state of Pennsylvania, in the case of the *Sloop Active*, the jury found a verdict in the following words, viz.: "one-fourth of the net proceeds of the *Sloop Active* and her cargo to the first claimants; three-fourths of the net proceeds of the said sloop and her cargo to the libellant and the second claimant, as per agreement between them; which verdict was confirmed by the judge of the court, and sentence passed thereon. From this sentence or judgment and verdict, an appeal was lodged with the secretary of congress, and referred to the committee appointed by congress 'to hear and determine finally upon all appeals brought to congress,' from the courts of admiralty of the several states:

"That the said committee, after solemn argument, and full hearing of the parties by their advocates, and taking time to consider thereof, proceeded to the publication of their definitive sentence or decree, thereby reversing the sentence of the court of admiralty, making a new decree, and ordering process to *issue out of the court of admiralty for the state of Pennsylvania to carry this their decree into execution:

*83]

"That the judge of the court of admiralty refused to carry into execution

the decree of the said committee on appeals, and has assigned as the reason of his refusal, that an act of the legislature of the said state has declared, that the finding of a jury shall establish the facts, in all trials in the courts of admiralty, without re-examination or appeal, and that an appeal is permitted only from the decree of the judge:

"That having examined the said act, which is entitled, 'An act for establishing a court of admiralty,' passed at a session which commenced on the 4th of August 1778, the committee find the following words, viz., 'the finding of a jury shall establish the facts, without re-examination or appeal,' and in the seventh section of the same act, the following words, viz., 'in all cases of captures, an appeal from the decree of the judge of admiralty of this state, shall be allowed to the continental congress, or such person or persons as they may, from time to time, appoint for hearing and trying appeals.'

"That although congress, by their resolution of November 25th, 1775, recommended it to the several legislatures, to erect courts for the purpose of determining concerning captures, and to provide that all trials in such cases be had by a jury, yet it is provided, that in all cases, an appeal shall be allowed to congress, or to such person or persons as they shall appoint for the trial of appeals:" whereupon—

"Resolved, that congress, or such person or persons as they appoint, to hear and determine appeals from the courts of admiralty, have necessarily the power to examine as well into decisions on facts as decisions on the law, and to decree finally thereon, and that no finding of a jury in any court of admiralty, or court for determining the legality of captures on the high seas, can or ought to destroy the right of appeal, and the re-examination of the facts reserved to congress:

"That no act of any one state can or ought to destroy the right of appeals to congress, in the sense above declared: That congress is, by these United States, invested with the supreme sovereign power of war and peace: That the power of executing the law of nations is essential to the sovereign supreme power of war and peace: That the legality of all captures on the high seas must be determined by the law of nations: That the authority ultimately and finally to decide on all matters and questions touching the law of nations, does reside and is vested in the sovereign supreme power of war and peace: *That a control by appeal is necessary, in order to compel a just and uniform execution of the law of nations: That the said control must extend as well over the decisions of juries as judges, in courts for determining the legality of captures on the sea; otherwise, the juries would be possessed of the ultimate supreme power of executing the law of nations, in all cases of captures, and might, at any time, exercise the same, in such manner as to prevent a possibility of being controlled; a construction which involves many inconveniences and absurdities, destroys an essential part of the power of war and peace intrusted to congress, and would disable the congress of the United States from giving satisfaction to foreign nations, complaining of a violation of neutralities, of treaties, or other breaches of the law of nations, and would enable a jury, in any one state, to involve the United States in hostilities; a construction, which for these and many other reasons, is inadmissible: That this power of controlling by appeal, the several admiralty jurisdictions of the states, has hitherto been exercised by congress, by the medium of a committee of their

[*84

own members: Resolved, That the committee before whom was determined the appeal from the court of admiralty for the state of Pennsylvania, in the case of the *Sloop Active*, was duly constituted and authorized to determine the same."

The yeas and nays being taken, it appears, that the states of New Hampshire, Massachusetts Bay, Rhode Island, Connecticut, New York, Maryland, Virginia, North Carolina, South Carolina and Georgia, voted unanimously in the affirmative: the state of Pennsylvania, unanimously in the negative; and Mr. Witherspoon, who was alone from New Jersey, voted also in the negative. The congress then voted as follows, viz.:

"Resolved, That the said committee had competent jurisdiction to make thereon a final decree, and therefore, their decree ought to be carried into execution." The yeas and nays being taken on this resolution, it appears, that New Hampshire, Massachusetts Bay, Rhode Island, Connecticut, New York, Maryland, Virginia, North Carolina, South Carolina and Georgia, voted unanimously in the affirmative; Pennsylvania, unanimously in the negative; and Mr. Witherspoon, who was alone from New Jersey, voted on this occasion in the affirmative. The congress then resolved as follows, viz.:

"Resolved, That the general assembly of the state of Pennsylvania be requested to appoint a committee, to confer with a committee of congress, *85] on the subject of the proceedings *relative to the *Sloop Active*, and the objections made to the execution of the decree of the committee on appeals, to the end, that proper measures may be adopted for removing the said obstacles; and that a committee of three be appointed to hold the said conference, with the committee of the general assembly of Pennsylvania: The members chosen, Mr. Paca, Mr. Burke and Mr. R. H. Lee."

I shall close this head of discourse, with observing, that it is with diffidence I have ventured to give an opinion on a question so novel and intricate, and respecting which, men, eminent for their talents, their literary attainments, and skill in jurisprudence, have been divided in sentiment. The opinion, however, which has been given, is the result of conviction; if wrong, it is the error of the head, and as such will carry its apology with it.

II. Whether, after the articles of confederation were ratified, the court of appeals had jurisdiction of the subject-matter?

However problematical the opinion which has been delivered on the preceding point, may be, I apprehend, that little doubt or difficulty can arise on the present question. By the 9th article of the confederation, the United States in congress assembled, are vested, among other things, with the sole and exclusive power of establishing rules for deciding, in all cases, what captures on land or water shall be legal, and in what manner prizes, taken by land or naval forces in the service of the United States, shall be divided or appropriated; of granting letters of marque and reprisal in times of peace; appointing courts for the trial of piracies and felonies committed on the high seas, and establishing courts for receiving and determining finally, appeals in all cases of captures.

The court of appeals, in September 1783, decided upon the point of jurisdiction, either directly or incidentally; for after a full hearing, they decreed that the sentences passed by the superior and inferior courts of New Hamp-

shire should be reversed and annulled, and the property be restored. This decree being made by a court, constitutionally established, of competent authority, and the highest jurisdiction, is conclusive and final. It cannot be opened and investigated; for neither this court, nor any other, can, in a collateral way, review the proceedings of a tribunal which had jurisdiction of the subject-matter. The court of appeals was competent to the decision; they have adjudicated as well on the jurisdiction as the merits of the cause, and we must suppose that they have acted properly. This also is an answer as to irregularities, if any there were, which may have taken place in the proceedings *before the court of appeals, or in the mode of removing the cause before them. This court cannot take notice of irregularities [*86 in the proceedings, or error in the decision, of the court of appeals. The question is at rest; it ought not to be again disturbed.

III. Whether the district court of New Hampshire had jurisdiction; or, in other words, whether the libel exhibited before that court, was the proper remedy, or mode of carrying into execution, either specifically, or by way of damages, the decree of the court of appeals?

On this point, I entertain no doubts. Recurrence to facts will answer the question. The existence of the court of appeals terminated with the old government; this also was the case with the subordinate court of admiralty in the state of New Hampshire. The property was not restored to the libellants, nor were they compensated in damages; of course, the decree in their favor remains unsatisfied. They had no remedy at common law; they had none in equity; the only *forum* competent to give redress, is the district court of New Hampshire, because it has admiralty jurisdiction. There they applied, and in my opinion, with great propriety. Judges may die, and courts be at an end; but justice still lives, and though she may sleep for a while, will eventually awake, and must be satisfied.

Having discussed the preliminary questions relative to jurisdiction, we shall now consider the proceedings in the circuit court of New Hampshire And here the first question is, whether by the death of Elisha Doane, before the judgment rendered in the court of appeals, that judgment is not avoided? The death of Doane does not appear on the record of the proceedings before the court of appeals; it is in evidence from the certificate of the judge of probates, which is annexed to the record transmitted from the circuit court of New Hampshire. Many answers have been given to this question; some of which are cogent, as well as plausible. On this subject, it will be sufficient to observe, that admitting the death of Doane, and that it can be taken notice of in this court, it is unavailing, because the proceedings in a court of admiralty are *in rem*. The sentence of a court of admiralty, or of appeal, in questions of prize, binds all the world, as to everything contained in it, because all the world are parties to it. The sentence, so far as it goes, is conclusive to all persons.

The most formidable objections have been levelled against the damages: 1. It is said, that the damages ought not to have been given, because they were not prayed. The answer to this objection *is satisfactory—the prayer is for general relief, and therefore sufficient. [*87

2. If any damages ought to be given, yet none ought to have been awarded against George Wentworth, because he was an agent, and paid the money over under the decree of thecourt of New Hampshire.

If any agent pay over, after notice, he pays wrongfully, and shall not be excused. In this case, George Wentworth was a party to the suit, he appeared as one of the libellants, and must be liable to all the legal consequences resulting from such a situation. As a party, he was before the court, and privy to the appeal, which was made in due season. The appeal did, from the moment it was made, suspend the execution of the decree, and that whether it was received or not; especially, in cases like the present, where George Wentworth was a party to the suit, before the court, and had notice of its having been tendered or made. In such a predicament, he ought not to have paid over; but should have awaited the ultimate decision of the court of appeals. If he paid, it was at his peril; he took the risk upon himself, and in case of undue payment, became liable.

It has been said, that an inhibition should have been issued, and that without it, the appeal did not suspend the execution of the decree. The writ of inhibition is a proper and necessary writ, not because it suspends the effect of the decree, for that is already done by the appeal; but because it enables the court of appellate jurisdiction, in case of disobedience, to punish the inferior court as being in contempt. The appeal has not this effect, because it is the act of the party, and not of the superior court.

A monition, it is said, ought to have been addressed to the appellees to enforce their appearance before the court of appellate jurisdiction. The answer is, that George Wentworth, as well as the others, did appear, both before the court of commissioners and the court of appeals. If a defect, and inquirable into by this court, it is cured by appearance. In short, George Wentworth was a party to the suit, present in court, and had notice of the appeal. If, in such a situation, he undertook to distribute the proceeds, it was at his own risk: and in case of reversal, he made himself liable.

I have doubts how far the court below could inquire into the question of agency and payment over, especially, as the payment is said to have been made, previously to the argument before the court of appeals, or even the court of commissioners. The decree is for restoration. If the court of ap-
*88] peals had issued process to carry their definitive sentence into effect, or *had directed the maritime courts of New Hampshire to have done so, would it, in the instance of George Wentworth, have been a legal justification to have said, that he had delivered the property, or paid its proceeds, to the captors? Besides, whatever could have been brought forward, by way of defence, in the court of appeals, ought there to have been urged and relied upon; and if the party has omitted to do so, he has slipped his opportunity, and is precluded from taking advantage thereof in future.

I know, that a distinction is made between foreign and domestic judgments; that the latter are conclusive, whereas, the former are liable to investigation. Be it so. But is the principle upon which this distinction is founded, applicable to decrees, on questions of prize, in the highest court of admiralty, which, in such cases, is guided by the law of nations, and not municipal regulations? If it is, it must be under very special circumstances.

3. It is objected, that the damages awarded are joint; whereas, they ought to have been several. This objection is a sound one. But as the facts are spread on the record, it is in the power of the court to sever the damages, and so to apportion them as to effectuate substantial justice. The damages should have pursued and been admeasured by the original decree,

which directed, that one moiety of the proceeds should be paid to the owners, and the other to the captors. George Wentworth received a moiety only; he is liable for that, and no more.[1]

4. Another objection is, that interest has been calculated from a wrong period, to wit, from the 2d October 1778; and therefore, the decree of the circuit court is erroneous. The court of appeals pronounced their definitive sentence in September 1783; by which the judgments of the inferior and superior courts of New Hampshire were reversed, and restoration decreed; they also directed, that the parties should pay their own costs. I am of opinion, that interest should have been computed from the day on which the definitive sentence of the court of appeals was pronounced. Of this there can be no doubt, with respect to John Chancellor and the owners. Some doubts, however, have been entertained on this point with regard to George Wentworth. But, for the reasons which have been assigned, he must be considered in the same situation as the others.

Arguments, deducible from the hardship of the case, have been advanced and insisted upon. It is hard, that George Wentworth, who was an agent, should be made personally responsible. It is cruel, that George Wentworth should be cut down by the collision of conflicting jurisdictions. But motives of commiseration, from whatever source they flow, must not *mingle in the administration of justice. Judges, in the exercise of their functions, have frequent occasions to exclaim, "*durum valde durum, sed sic lex est.*" [*89

To conclude, the sum of £5895 14 10

appears, on the record, to be the aggregate value of the Susanna, her cargo, &c.

On this sum, interest should be calculated from 17th September 1783, until 24th October 1794, which will amount to . . 3920 13 4

Making in the whole, ... £9816 8 2

Equal to, $32,721.36. The one moiety whereof, being $16,360.68, I am of opinion, should be paid by John Penhallow and the owners, and the other moiety by George Wentworth. The costs in the courts below should be divided in the same manner. I am also of opinion, that the parties should bear their respective costs, which have arisen on the prosecution of the appeal in this court.

Iredell, Justice.—This case, which is of so much novelty and importance, has been argued at the bar with very great ability on both sides. I have listened with the most respectful attention to everything that has been said upon it, and the opinion which I am now to deliver, is the result of the best consideration which I have been able to bestow on the subject. The order in which it has appeared to me most convenient to arrange the different heads of inquiry is as follows:

1. Whether either of the decrees of June 1779, or September 1783, was originally valid?

2. If either of them was so, whether it was a decree which the district court of New Hampshire, or the circuit court of New Hampshire, acting

[1] Jennings *v.* Carson, 4 Cranch 2, 21.

specially in this cause, for the legal reason, alleged, had authority to enforce, either by decreeing a specific execution, or awarding damages for a non-performance of it?

3. Whether, if the district or circuit court had such an authority, it has been executed properly, in this instance, under all the circumstances of the case?

4. Whether, in case the libellants were entitled to a decree in their favor, but it shall appear, that the decree has been erroneous, in respect to the relief given, either in the whole or in part, this court can rectify the decree, or order it to be rectified by the court below, or must affirm or reverse in the whole?

Under the first head, it will be proper previously to consider if either of the decrees was final and conclusive, because if that point should be decided
*90] in the affirmative, it will render *unnecessary a decision of many important questions that otherwise arise in this cause. This previous point, however, cannot be decided, on satisfactory principles, without in some measure tracing the origin of the general powers of congress, from the time of the earliest exercise of their authority, to the period when definite and express powers were solemnly and formally given to them by the articles of confederation. I shall, therefore, make a few preliminary observations on this subject, though I by no means think it material to go into a full detail.

Under the British government, and before the opposition to the measures of the parliament of Great Britain became necessary, each province in America composed (as I conceive) a body politic, and the several provinces were no otherwise connected with each other, than as being subject to the same common sovereign. Each province had a distinct legislature, a distinct executive (subordinate to the king), a distinct judiciary; and in particular, the claim as to taxation, which began the contest, extended to a separate claim of each province to raise taxes within itself; no power then existed, or was claimed, for any joint authority on behalf of all the provinces to tax the whole. There were some disputes as to boundaries, whether certain lands were within the bounds of one province or another, but nobody denied that where the boundaries of any one province could be ascertained, all the permanent inhabitants within those boundaries were members of the body politic, and subject to all the laws of it. When acts were passed by the parliament of Great Britain, which were thought unconstitutional and unjust, and when every hope of redress by separate applications appeared desperate, then was conceived the noble idea, which laid the foundation of the present independence and happiness of this country (though independence was not then in contemplation), of forming a common council to consult for the common welfare of the whole, so far as an opposition to the measures of Great Britain was concerned. In order to compose this common council, each province chose for itself, in its own way, and by its own authority, without any previous concerted plan of the whole, deputies to attend at a general meeting to be held in this city. Some appointed by their assemblies; others, by conventions; some, perhaps, in other modes; but, in whatever way the appointment was made, it was notoriously done with the hearty consent and approbation of the great body of the people in each province, and therefore, the appointment was unexceptionable to all those who thought the opposition

just, and a union of the whole in the measures of opposition necessary. Each province even appointed as many or as few deputies as it pleased, at its own discretion, which was not objected to, because the members of congress did not *vote individually, but the votes given in congress were by provinces, as they afterwards were (subsequent to the declaration of independence, and until the present constitution of the United States was formed), by states. [*91

The powers of congress, at first, were indeed little more than advisory; but in proportion as the danger increased, their powers were gradually enlarged, either by express grant, or by implication arising from a kind of indefinite authority, suited to the unknown exigencies that might arise. That an undefined authority is dangerous, and ought to be intrusted as cautiously as possible, every man must admit, and none could take more pains, than congress, for a long time, did, to get their authority regularly defined by a ratification of the articles of confederation. But that previously thereto they did exercise, with the acquiescence of the states, high powers of what I may, perhaps, with propriety, for distinction, call external sovereignty, is unquestionable. Among numerous instances that might be given of this (and which were recited very minutely at the bar), were the treaties of France in 1778, which no friend to his country at the time questioned in point of authority, nor has been capable of reflecting upon since, without gratitude and satisfaction. Whether among these powers comprehended within their general authority, was that of instituting courts for the trial of all prize causes, was a great and awful question; a question that demanded deep consideration, and not, perhaps, susceptible of an easy decision. That in point of prudence and propriety, it was a power most fit for congress to exercise, I have no doubt. I think, all prize causes whatsoever ought to belong to the national sovereignty. They are to be determined by the law of nations. A prize court is, in effect, a court of all the nations in the world, because all persons, in every part of the world, are concluded by its sentences, in cases clearly coming within its jurisdiction. Even in the case of citizen and citizen, I do not think it a proper subject for mere municipal regulation, because, as was observed at the bar, a citizen may make a colorable claim, which the court may not be able to detect, and yet a foreigner be fatally injured by it. In case of a *bonâ fide* claim, it may appear to be good, by the proofs offered to the court, but another person, living at a distance, may have a superior claim, which he has no opportunity to exhibit. It is true, a general monition issues, and this is considered notice to all the world, but though this be the construction of the law, from the necessity of the case, it would be absurd to infer in fact, that all the world had actual notice, and therefore, no superior claimant to the one before the court could possibly exist. The court, therefore, can never know, with certainty, whether citizens only are interested in the inquiry.

But the words *" citizen and citizen " in this case, are very ill applied to the parties in question, they not having been citizens of the same state, the captors having been citizens of New Hampshire, and the claimant, a citizen of Massachusetts Bay. It never was considered, that before the actual signature of the articles of confederation, a citizen of one state was, to any one purpose, a citizen of another. He was to all substantial purposes, as a foreigner to their forensic jurisprudence. If rigorous law [*92

had been enforced, perhaps he might have been deemed an alien, without an express provision of the state to save him. And as an unjust decision upon the law of nations, in the case of a foreigner to all the states might, if redress had not been given, have ultimately led to a foreign war, an unjust decision on the same law in one state, to the prejudice of a citizen of another state, might have ultimately led, if redress had not been given, to a civil war, an evil much the more dreadful of the two. I have made these observations merely as to the propriety that this power should have been delegated, and therefore, to show, that if it was assumed without adequate authority, it was not an arbitrary and unnatural assumption of a power, that ought exclusively to belong to a single state; but by no means with a view to argue, that because it was proper to be given, therefore, it was actually given, a position which, as it would lead to dangerous and inadmissible consequences, cannot be the ground of a legitimate argument.

Some of the arguments at the bar, if pushed to an extreme, would tend to establish, that congress had unlimited power to act at their discretion, so far as the purposes of the war might require; and it was even said, that the *jus belli* never was in any one of the states, and therefore, it could not be delegated by any state to congress. My principles on this subject are totally different from those which were the foundation of this opinion, and as it is a point of no small importance, and I find on this occasion, as I have formerly done on others, considerable mistakes (as I conceive), by very able men, owing to a misapprehension of terms, I will endeavor to state my own principles on the subject, with so much clearness, that whether my opinion be right or wrong, it may, at least, be understood what the opinion really is.

If congress, previous to the articles of confederation, possessed any authority, it was an authority, as I have shown, derived from the people of each province, in the first instance. When the obnoxious acts of parliament passed, if the people in each province had chosen to resist separately, they undoubtedly had equal right to do so, as to join in general measures of resistance with the people of the other provinces, however unwise and de-
*93] structive such a policy might, and undoubtedly *would have been. If they had pursued this separate system, and afterwards, the people of each province had resolved that such province should be a free and independent state, the state, from that moment, would have become possessed of all the powers of sovereignty, internal and external (viz., the exclusive right of providing for their own government, and regulating their intercourse with foreign nations), as completely as any one of the ancient kingdoms or republics of the world, which never yet had formed, or thought of forming, any sort of federal union whatever. A distinction was taken at the bar between a state, and the people of a state. It is a distinction I am not capable of comprehending. By a state forming a republic (speaking of it as a moral person), I do not mean the legislature of the state, the executive of the state or the judiciary, but all the citizens which compose that state, and are, if I may so express myself, integral parts of it; all together forming a body politic.[1] The great distinction between monarchies and republics (at least our republics), in general, is, that in the former, the monarch is considered as the sovereign,

[1] Texas *v.* White, 7 Wall. 720.

and each individual of his nation as subject to him, though, in some countries, with many important special limitations: this, I say, is generally the case, for it has not been so universally. But in a republic, all the citizens, as such are equal, and no citizen can rightfully exercise any authority over another, but in virtue of a power constitutionally given by the whole community, and such authority, when exercised, is, in effect, an act of the whole community which forms such body politic. In such governments, therefore, the sovereignty resides in the great body of the people, but it resides in them, not as so many distinct individuals, but in their politic capacity only. Thus A., B., C. and D., citizens of Pennsylvania, and as such, together with all the citizens of Pennsylvania, share in the sovereignty of the state. Suppose, a state to consist exactly of the number of 100,000 citizens, and it were practicable for all of them to assemble at one time and in one place, and that 99,999 did actually assemble: the state would not be, in fact, assembled. Why? Because the state, in fact, is composed of all the citizens, not of a part only, however large that part may be, and one is wanting; in the same manner, as 99*l.* is not a hundred, because one pound is wanting to complete the full sum. But as such exactness in human affairs cannot take place, as the world would be at an end, or involved in universal massacre and confusion, if entire unanimity from every society was required; as the assembling in large numbers, if practicable, as to the actual meeting of all the citizens, or even a considerable part of them, could be productive of no rational result, because there could be no general debate, no consultation of the whole, nor, *of consequence, a determination grounded on reason and reflection, and a deliberate view of all the circumstances necessary to be [*94
taken into consideration, mankind have long practised (except where special exceptions have been solemnly adopted) upon the principle, that the majority shall bind the whole. But when they do so, they decide for the whole, and not for themselves only. Thus, when the legislature of any state passes a bill, by a majority, competent to bind the whole, it is an act of the whole assembly, not of the majority merely. So, when this court gives a judgment by the opinion of a majority, it is the judgment, in a legal sense, of the whole court. So, I conceive, when any law is passed, in any state, in pursuance of constitutional authority, it is a law of the whole state, acting in its legislative capacity; as are, also, executive and judiciary acts, constitutionally authorized, acts of the whole state, in its executive or judiciary capacity, and not the personal acts alone of the individuals composing those branches of government. The same principles apply as to legislative, exective or judicial acts of the United States, which are acts of the people of the United States, in those respective capacities, as the former are of the people of a single state. These principles have long been familiar in regard to the exercise of a constitutional power as to treaties. These are deemed the treaties of the two nations, not of the persons only, whose authority was actually employed in their formation. There is not one principle that I can imagine, which gives such an effect as to treaties, that has not such an operation on any other legitimate act of government, all powers being equally derived from the same fountain, all held equally in trust, and all, when rightfully exercised, equally binding upon those from whom the authority was derived.

I conclude, therefore, that every particle of authority which originally

resided either in congress, or in any branch of the state governments, was derived from the people, who were permanent inhabitants of each province, in the first instance, and afterwards became citizens of each state; that this authority was conveyed by each body politic separately, and not by all the people in the several provinces or states, jointly, and of course, that no authority could be conveyed to the whole, but that which previously was possessed by the several parts; that the distinction between a state and the people of a state has in this respect no foundation, each expression, in substance, meaning the same thing; consequently, that one ground of argument at the bar, tending to show the superior sovereignty of congress, in the instance in question, was not tenable, and therefore, that upon that ground, the exercise of the authority in question cannot be supported.

*95] *I have already, however, stated my opinion, that from the nature of our political situation, it was highly reasonable and proper, that congress should be possessed of such an authority, and this is a consideration of no small weight to induce an inference that they actually possessed it, when their powers were so indefinite, and when it seems to have been the sense of all the states, that congress should possess all the incidents to external sovereignty, or, in other words, the power of war and peace, so far as other nations were concerned, though the states in some particulars differed as to the construction of the general powers given for that purpose. Two principles appear to me to be clear. 1. The authority was not possessed by congress, unless given by all the states. 2. If once given, no state could, by any act of its own, disavow and recall the authority previously given, without withdrawing from the confederation.

In the case of *The Active*, ten states out of twelve recognised the authority, New Hampshire voting in support of it. This was in 1779, long after the act of New Hampshire was passed which has given occasion to the controversy in this cause, and in the same year when the second act of New Hampshire was passed, which allowed an appeal to congress in cases (as the act expressed it) "wherein any subject or subjects of any foreign nation or state, in amity with this and the United States of America, should, in due form of law, claim the whole, or any part of the vessel and cargo in dispute." The resolution of congress was dated the 6th March 1779; the act of New Hampshire, in November following. The vote of the delegates of New Hampshire, in the case of *The Active*, would not, indeed, be equivalent to a clear grant of the power, but it is a respectable support of the construction contended for by the defendants in error. It has been properly observed, that a court cannot, by its own decision, give itself jurisdiction, where it had none before; but if courts are so constituted that one is necessarily superior to another, the decision of the superior must, to be sure, prevail. This, perhaps, is not conclusive as to the court of commissioners, because it cannot be decided, whether it was, in fact, the superior court in respect to New Hampshire, without deciding whether it was constitutionally so, in virtue of power from all the states. This point it would be now necessary for this court to decide, if it were not for the decision of the court of appeals, in 1783, a court of acknowledged prize jurisdiction, established in virtue of express authority from all the states (New Hampshire included), and made a court in the last resort as to all prize causes, or, in other words (as expressed in the article of confederation itself), in all cases

of captures. And the decision of this court on the subject of the two contending jurisdictions, I *consider to be final and conclusive, for the following reasons: [*96

1st. At the time the decision was given, it was the only court of final appellate jurisdiction, as to cases of captures, in the United States. It seems therefore, to follow, necessarily, that upon all questions of capture, their decision should be final and conclusive, as much as the decision of this court upon a writ of error from the circuit court, or any other branch of its jurisdiction, would be so.

2d. To the suggestion at the bar, that the court of appeals could have no retrospect, several answers, I conceive, may be given.

1. It is taking for granted the very point in dispute, that this decision was retrospective. If congress possessed this authority before, and the articles of confederation amounted only to a solemn confirmation of it, it was in no manner retrospective. It was, in effect, a continuance of the same court, acting under an express, instead (as before) of acting under an implied authority, and allowing the full benefit of an appeal regularly prayed, and rightfully enforced by the superior tribunal, after an unwarranted disallowance by the inferior.

2. Whether the article in the confederation, giving authority to this court, as a superior tribunal in all cases of capture, did authorize them to receive appeals in cases circumstanced like this, was a point for them to decide; since it was a question arising in a case of capture, of all which cases (without any exception) they were constituted judges in the last resort. The merits of their decision we surely cannot now inquire into, but their authority to decide, not being limited, there was no method, by applying to any other court, of correcting any error they might commit, if, in reality, they should have committed any.

3. Whether their decision was right or wrong, yet nobody can deny that the jurisdiction of the commissioners was, at least, doubtful; of course, the court of appeals found a case then depending in the former court of the commissioners, after a preliminary, but not a final, determination, for such I consider it to have been. It was, therefore, a cause then *sub judice*, and it being a case of capture, and a question of appeal, no other court on earth, but *that*, in my opinion, could decide it. And no objection can be urged, in this case, against the authority of such a decision, or the propriety of its being final, but such as may be urged against all courts in the last resort, with respect to the merits of whose decisions there may be eternal disputes, but such disputes would be productive of eternal war, if some court had not authority to settle such questions for ever.

I, therefore, have not the smallest doubt, that the decision of *the court, in 1783, was final and conclusive as to the parties to the decree. [*97 And this point appears to me so plain, that I think it useless to take notice of any authorities quoted on either side, in relation to it, none of them, I conceive, in any manner contravening the conclusive quality of such decrees, upon the principles I have stated, and some of them, clearly, and beyond all question, supporting it.

The decree of September 1783, being by me thus deemed final and conclusive, the next inquiry is, whether it was a decree which the district court of New Hampshire, or the circuit court of New Hampshire, acting specially

in this cause, for the legal reason alleged, had authority to enforce, either by decreeing a specific execution, or awarding damages for a non-performance of it?

Upon this branch of the subject, a few words will be sufficient. The district court, by the act of congress, hath the whole original jurisdiction in admiralty and maritime causes. Whatever doubt might otherwise have arisen, the decision of this court, upon the writ of error from Maryland, last February, fully established, that this includes a prize jurisdiction, as well as other cases of a maritime nature. I was not present, when the decision was given; had I been so, I probably should have concurred in it, because the words, "all civil causes of admiralty and maritime jurisdiction," evidently include all maritime causes, whether peculiarly of admiralty jurisdiction or not; because a question of prize on the high seas, is clearly of a maritime nature, and therefore, the English distinction between an instance (which is strictly an admiralty) court, and a prize court, does not apply to this case; more especially, as the district court having as large authority given to it in all maritime causes of a civil nature, as the constitution itself prescribes. If that court does not possess such an authority, no court can be instituted with powers adequate to that purpose, so that, under the present constitution, there could be no prize jurisdiction at all; and the very tenure of all the judges (which is for good behavior) naturally excludes the idea of a temporary and occasional establishment of any courts whatsoever. I mention these reasons, not because the authority of the case receives any additional sanction from my opinion, but because I was desirous to take so favorable an opportunity of expressing my concurrence in a decision of so much importance. (*a*)

It was clearly shown at the bar, that a court of admiralty, in one nation, can carry into effect the determination of the court of admiralty of another.[1] A court of prize being equally grounded on the law of nations as a court of admiralty, and proceeding also, as that does, on the principles of the civil law,
*98] *must, in common reason, have the same authority. I think it was rightly observed, that the sentence consisted, in effect, of two parts, one reversing the decree, and therefore, vesting a right to a restitution, or a recovery in value, in the appellant, the other, ordering a specific restitution. If that specific redress is, from any cause, rendered impracticable, those who have unjustly, and upon a sentence determined to be erroneous, received the property, or its value, to their own use, must, in justice, be accountable; otherwise, form, which ought only to be the handmaid of right, might prove its treacherous destroyer. The district court having sole original authority in cases of this kind, must have equal power as to such subjects with the power possessed by this court, in any case where it has original jurisdiction, with this difference only, that in the one case, a writ of error is allowed, in the other, not. The court of appeals which passed the final decree, having expired, there seems, at least, as much reason for a court of similar jurisdiction as to the subject-matter, proceeding to give effect to its decisions, as there can be for a court of admiralty of one nation giving effect to the decision of a court of admiralty of another, to

(*a*) Glass *v.* The Betsey, *ante*, p. 6.

[1] See Otis *v.* The Rio Grande, 1 Woods 279; s. c. 7 Chicago Leg. News 356.

which, perhaps, it is a perfect stranger, and of which it may know little more, than that they equally belong to the great family of mankind. I am, therefore, of opinion, that the district court or the circuit court, acting specially in this instance, on account of the incapacity of the former (as the law empowered it to do), had authority to enforce the decree in question, by decreeing damages in lieu of a specific restitution, which was impracticable.

The third question is—Whether the authority hath been exercised properly, in this instance, under all the circumstances of the case?

The material circumstances to be considered, either from facts admitted on the face of the record, or the public proceedings referred to by it, and of which we are judicially to take notice, seem to be as follows: That the brig McClary was fitted out, under the authority, and pursuant to certain resolutions of congress, in consequence of which, an act of the legislature had passed, in the state of New Hampshire, which complied partially with those resolutions, but made some regulations apparently intended as a restriction upon them (whatever might be their legal operation): That on the 30th October 1777, she captured the brig Susanna and cargo, on the high seas: That the captured property was libelled in the court maritime of New Hampshire (erected by the state law), on the 11th November 1777: That Elisha Doane (whose administrators are the defendants in error in this cause) exhibited his claim, on the 1st December following; and *on [*99
the 16th, the property was condemned, and ordered to be distributed according to law: That within five days (the time for praying an appeal prescribed by the resolutions of congress), Doane prayed an appeal to congress, which was disallowed: That he then prayed and obtained an appeal to the superior court of New Hampshire, agreeable to the directions of the state law, which allowed of such an appeal, in cases of this kind, the act providing for an appeal to congress, only in case of a capture by an armed vessel fitted out at the charge of the united colonies: That on the first Tuesday in September 1778, the superior court adjudged the property to be forfeited, and ordered it to be sold by the sheriff, at public vendue, for the use of the libellants; and the court further ordered, "that the proceeds thereof, after deducting charges, should be paid to John Penhallow and Jacob Treadwell, agents for the owners, and to George Wentworth, agent for the captors, to be by the said agents paid and distributed to the persons mentioned therein, according to the law of the state in that case made."

That an appeal from this decree to congress was prayed within five days, and disallowed: and that afterwards, in obedience to the decree, and in virtue of it, the property was sold, and distributed to those entitled under the decree; and the proportionate shares (upon the supposition of a lawful capture) are admitted to have rightly been, one-half to the owners, and the other half to the officers, mariners and seamen.

That an application was afterwards made to the commissioners for hearing appeals under the authority of congress; and after due notice to the libellants in the original suit, who appeared and pleaded to the jurisdiction, stating not only the defect of the authority of the court to sustain the appeal under any circumstances, but also special reasons why the appellant was not entitled to the benefit of an appeal, under the circumstances of the case (viz., the appellant's waiving the benefit of his appeal to congress, by taking

an actual appeal to the superior court of New Hampshire; that the appeal first demanded, was not prosecuted for more than forty days; and that by the resolution of congress, no appeal should be had from the verdict of a jury, but only the sentence of the judge), the commissioners, on the 26th June 1779, decreed that they had jurisdiction, but declined any further proceedings, at that time, in the cause, for a reason they allege.

That on the 12th September 1783, this case again came before the court of appeals, established under the articles of confederation; which, after a full hearing and solemn argument by the advocates on both sides, passed a definitive decree in these words, viz.:

*100] *"It is hereby considered, and finally adjudged and decreed by this court, that the sentences or decrees passed by the inferior and superior courts of judicature for the county of Rockingham, in the above cause, so far as the same have relation to the property specified in the claims of Elisha Doane, Isaiah Doane and James Shepherd, be and the same are hereby revoked, reversed and annulled, and that the said property specified in the said claims, be restored to the said claimants, respectively; and it is hereby ordered, that the parties to the appeal each pay their own costs, which have accrued in the prosecution of the said appeal in this court."

In this case, considerable difficulty has arisen, from the peculiar manner of pleading, which is said to be warranted by local practice, but which certainly has very much contributed to embarrass the question in the cause. There is neither a complete demurrer, nor, I conceive, a regular issue; and it may be deemed doubtful, whether, what is termed a plea, ought to be considered as a plea or an answer. I had, therefore, at first, strong doubts whether there was sufficient matter before us, to ground a final decree: But upon reflection, it seems to me, that as the case has been argued on both sides, upon a supposition that a final decree could be made; as there has been no application on either, for the examination of testimony, but the hearing took place, without objection, upon the pleadings as they stand, and consequently, we can regard the facts only as stated on the record; as in express consent that the cause should be decided on this footing, would undoubtedly have been binding, and the circumstances in this case evidently prove an implied one; I think, the pleadings as they stand, will afford sufficient foundation for a decree, especially, according to those principles of practice, which, we are told, prevail in the state from which this record comes—a practice which, until altered, we, undoubtedly, ought to pursue, when it is not substantially inconsistent with justice.

Several objections have been offered (admitting the validity of the final decree, in respect to the authority of the court upon the points then before them), which I will consider in the best manner in my power.

I. It is objected, that the appellant, Doane, was dead, before the final decision which was given in September 1783; and this it is alleged, though not appearing on the face of the record, does appear from the letters of administration produced by the libellants, which letters are dated in February 1783. Admitting that the courts are bound to inspect the date of the letters, and to regard that date as conclusive, and to infer the fact accordingly from it, several answers have been given to this objection; either of which, if valid, is decisive.

*101] *1. That the proceeding in question was a proceeding *in rem*, and

upon such proceeding in civil law courts, the death of a party, does not abate. I incline to think the law is so, but as my opinion is clear on other points in answer to the objection, I avoid giving an opinion on this.

2. That admitting the decree for this cause to be erroneous, it can only be avoided by a solemn proceeding in the nature of a proceeding in error, and cannot be inquired into in this collateral way. Upon this point, I am clear, that the decree was not rendered absolutely void, but must stand regularly good, until reversed for this error, if it be one. So the matter stood, while the court of appeals was in being. If the appellees could have avoided the decree for this error, they might have applied to that court, to have reviewed its decree upon this suggestion. The expiration of the court is no reason why the law in this particular should be considered as changed. It is true, in many cases where there has been error in a suit, and this has affected the right of a person not a party, this error has been admitted to be shown in a suit where the point came collaterally in question; but it has never been permitted to a party who might have set aside the original judgment for error. I speak now of proceedings at common law. The same reason, I think, applies in this case. It does, indeed, seem reasonable, that if one party can proceed in the district court to enforce the decree, the other party may to impeach it. But then this ought to be done in the same mode as in the other court, and that for a very substantial reason: because, when that suggestion is the sole ground of inquiry, the other party may come prepared to show many things to do away its force. He may (for aught I know) be permitted to show a mistake in the date of the letters; he may show an actual knowledge of the fact by the other party, previous to the decree, and an acquiescence in it, he may possibly show that the administrators were in fact before the court, though this does not appear on the face of the proceedings; as the inquiry in this case is into a fact, perhaps, anything of this kind may be shown, and if so, there surely ought to be an opportunity of doing it.

3. There seems great reason in what was alleged at the bar, that though it might have been competent for the administrators, had the decree been against Doane, to have shown this fact for error, because neither the principal nor they had any opportunity of supporting their right before the court, when the decree was given, the former being dead, and the latter not being called upon, yet, that it is not competent for the appellees, who were before the court, were heard, and cannot allege (had that been the fact) that *they* had sustained any prejudice, by their being heard *ex parte*.

*It is a rule at common law (the reason applies in equity and other civil law cases), that if a party can plead a fact, material to his [*102
defence, and omits to do it, at the proper time, he can never avail himself of it afterwards. They had a day in court, to plead the death of the appellant. If they say, they did not know of it, the same might be alleged in any case at common law, where we know it will not avail. The law rather chooses that a party should incur a risk of this nature, than leave a door open to endless litigation, upon pretences, the truth of which it is very difficult to discover.

4. This is an error in fact, and in my opinion, it was a powerful argument, that if we cannot reverse a decree, even of a district or circuit court, for any error in fact, we have no ground to set aside the solemn and final

decree of a court that has expired, for such an error. The argument, in my opinion, is altogether *à fortiori.*

II. The death of Doane has been alleged for another purpose. It is said, that the decree is to restore to Elisha Doane, which was impossible, because Elisha Doane was not then in being. Admitting that, upon this record, we are to take judicial notice that Doane was dead at the time of pronouncing the decree (in which I am by no means clear), yet if this was the real reason why the plaintiffs in error had withheld the property or its proceeds, they might themselves have said so. They have not, and as each party generally makes the best of his own case, we are to presume, that did not, in fact, constitute their reason. In this case, it could be of no avail, but, at the utmost, to prevent the allowance of interest, until a demand actually made. It never could destroy the whole beneficial effect of a decree given *in rem*, and when the parties who make the objection were in court, and parties to the very decree complained of. I think, nothing can be more evident than that if the decree be not totally void, the administrators are entitled to the benefit of it, at least, until it is set aside for error, if there be any error in it, and such a remedy is now practicable. If a *scire facias* was necessary, before execution could have been obtained out of the court which passed the decree, it could be for no other reason than that the other party might have an opportunity to contest the validity of the letters, and the existence of the administration, if any such objection could be supported. Such an objection might have been made here: it has not been made. There is, therefore, I conceive, no principle of law or justice which forbids giving effect to the decree, upon this ground.

*103] *III. Another objection is, that the cause was not regularly brought up to the court of appeals, and proceeded on, agreeable to the resolutions of congress. There does not appear any ground for this objection in point of fact. But I am clear, that this is a point not now inquirable into. When a court has final and exclusive jurisdiction in a case, and has pronounced a solemn judgment, every other court must presume that all their previous proceedings were right, of which, indeed, they were the only competent judges.

IV. It is alleged, damages were not prayed for by the libel. It is a sufficient answer, that there is a prayer for general relief. And so little do I think of this objection, and so much of the duty of a court, unaided by formal applications, where there is a substantial one, that I am strongly induced to think, if a case proper for a specific relief was laid before a civil law court, and the direct contrary to the proper relief was prayed for, yet the court, even in this case, would be justified in granting the relief that might be properly afforded, if the party who had committed the mistake consented to it: without that, indeed, it might be improper, for no court ought to force a benefit on a party unwilling to receive it.

These objections being all gotten over, which were urged against any relief whatsoever, it is necessary to consider the particular objections against the relief actually afforded. And here, I think, very formidable objections occur. I think the decree erroneous, in these particulars: 1st. In decreeing interest for the time previous to the date of the decree in 1783. 2d. In granting full damages against all the parties, without distinguishing between the owners to whom one-half was distributed, and the agent who received

the other half, for the benefit of the officers, mariners and seamen. 3d, In making George Wentworth, the agent, personally liable for any part.

1. As to the first point, as this libel proceeds only, and can be supported, as I conceive, upon no other ground, upon the principle of enforcing the decree of September 1783, so that the libellants might recover such benefit from it as the nature of the case could admit, their case is not to be made better or worse, as to the original right, than as the court of appeals decided it. The court of appeals might have decreed satisfaction for detention, but did not. They did not even decree costs, but ordered each party to pay his own costs. These things were altogether discretionary in the court; that was the proper court to judge, whether any damages should be allowed for detention. If the decree is to be final and conclusive as to the *subject-matter, it must be so, as completely, in respect to the detention, [*104 which formed one part of the case, as to the restoration, which formed the principal object of it. I should, indeed, have had some doubts as to the subsequent interest, had it appeared that the defendants had been unable to comply substantially with the decree, owing to the death of Doane, and the want (had that been the case) of a subsequent demand by the administrators. But as that is not alleged, and they set up their whole defence upon the point of right, merely, we are not to presume, that those circumstances (if the administrators did not make a demand, with respect to which nothing appears) had any weight in inducing their non-compliance with the decree.

2. I am of opinion, that damages against all the defendants jointly, ought not to have been given. We are to look at substance, not form. There were, in effect, two decrees, originally, one-half of the value of the property to one party, the other half to another. The reversal of the decree ought to affect the decree itself, in the manner in which it was given; consequently, each party ought only to be required to restore what he was adjudged to receive. The case of joint trespassers, stated at the bar, does, in my opinion, by no means apply; the privateer in question had a lawful commission. In the execution of such an authority, difficulties often arise; where they happen, *bonâ fide*, the master is considered in no fault, and neither he nor his owners made accountable, even in case of a mistaken seizure, but for restoration, and, at the utmost, costs. In case of gross misbehavior, not only costs, but damages, will be allowed by the court of prize. It seems now to be settled, that they have exclusive jurisdiction on all such subjects. As not even costs were allowed in this case, we are to infer, that the seizure was *primâ facie* innocent; consequently, if a principle of the common law, deemed by many highly rigorous, and founded, perhaps, rather on the forms of proceeding, than on strict justice, if those forms did not interfere, could be applied to a case arising in a court, not only authorized, but bound, to distinguish between a mere mistake, and a wanton abuse of power, there is no foundation for such an application, in fact, in the present instance. As owners are, in all instances, made jointly liable *ex contractu*, and their respective shares are matters of private cognisance, so that they, in all instances, appear jointly before the court, and a payment to one owner is, in law, a payment to all, I can discover no principle, upon which any discrimination could be properly made in this case, in regard to the different interests and actual receipts of the owners. I think, therefore, the decree, in regard to one moiety, ought to be jointly against all the owners.

*3. The third error in the decree, in my opinion, is, making George Wentworth, the agent, liable for any part. I have had considerable doubts on this subject, but upon the fullest consideration I have been able to bestow on it, I think he is not liable. Had he held any of the property, at the time of the decree of the court of appeals, he would have been undoubtedly liable. Had he any now, or any of the proceeds in his hands, he would also be liable. Perhaps, he might, had he held any of the property or proceeds, after actual notice of the court of appeals taking cognisance of this case. Neither of these facts appears on the face of the record, and as they are of importance, and neither is asserted, neither is to be presumed. The contrary, indeed, may be fairly inferred, from the statement on the record, and has been candidly acknowledged to be the real truth. He, therefore, appears in the character of a mere agent, acting avowedly for the benefit of others, and not for his own; and as he had paid away the money in virtue of a decree of a court, having *primâ facie* authority for the time, to decide whether an appeal did, or did not lie; I think, he ought not to be ordered to refund.

It is alleged, that the prayer of an appeal, in a case where an appeal lies, *ipso facto*, suspends the proceedings, and all afterwards is *coram non judice*. I cannot admit the doctrine in that extent. Where there are inferior and superior jurisdictions, and an appeal is allowed from the former to the latter, and it is the express duty of the party praying an appeal, to apply in the first instance, to the inferior court (as I conceive it was in this case under the resolutions of congress, which directed an appeal to be prayed for within five days, and security to be taken), I must presume, that that court is *primâ facie* to judge whether it is applied for in a proper manner, and whether all the requisites previous to his being fully entitled to it, are complied with. If the court decides, in any of these particulars, erroneously, it would be absurd to say, that the party should lose the benefit of his appeal; but in my opinion, it would be equally unjust, to hold, that a party who obeyed the decree of a court, over whom he had no control, should suffer by his respect to the law, which constituted that court, and which must, therefore, mean to support its decisions, in a cause coming within its jurisdiction, while they remain uncontrolled by any superior tribunal. It was shown, that an inhibition, in cases of this kind, sometimes, at least, issues, to forbid the court's further proceeding. Can there be a stronger proof, that the court had authority *de facto* (whatever may be said as to its authority *de jure*), without that interposition? The law never does a nugatory act, and therefore, I presume, would not forbid the doing of a thing, which, if done, is totally and absolutely void. It was said, this was to bring the judge into contempt.

*106] *But if the conduct of the judge, who is bound to know his jurisdiction, is, in the meantime, innocent, surely, an obedience to him, by a party, who is not to be presumed capable of deciding on the jurisdiction, by his own judgment, must be so.

George Wentworth, on the face of the whole proceedings, was a mere agent, an attorney in fact, and for aught I can see, as little liable to refund, in a case of this sort, as any attorney in fact, or even an attorney at law, to whom money had been paid under a judgment or decree, and who had paid it away to his client. An agent, in cases of this kind, is allowed by law; they are recognized, I believe, in all prize acts; mariners, whose employment is on

the sea, cannot be required, without injustice, to attend their cases in person. In cases of privateers, the captors are so numerous, that the employment of one or more agents on shore, seems unavoidable. The law, when it allows a benefit, never intends that it shall be imperfectly enjoyed; therefore, in allowing privateering, it allows agents. These I consider as nominal parties, and that the real parties are their principals. Now, I will suppose, that in a common-law case, an infant sues in a personal action, by his guardian, and obtains a judgment; the guardian receives the money, and pays it to the infant, after he comes of age; the judgment is afterwards reversed. Can the guardian ever be made to refund to the defendant, or must the person who was the infant do it? This case appears to me a very parallel one, in all its circumstances. The infant cannot act for himself, and therefore, is allowed to act by his guardian. The law takes notice, by allowing agents, that persons concerned in privateers, at least, cannot do well without them. The guardian is nominally a party; so is the agent: but the infant, in the one case, and the principals, in the other, are the real parties. The guardian is accountable to the infant, for money he received for him: so is the agent to the principal for money he receives. There is, that I can imagine, but one difference that can be suggested between them; that in the one case, the judgment is good, until reversed; and therefore, all lawful acts intermediately done, are valid; but the disallowance of the appeal, is said to be a nullity, and all subsequent proceedings in that court are void. I admit the consequence, if the law be so; but I have already stated reasons, why I think it is otherwise. A court of justice, indeed, ought, at its peril, to take notice of its own jurisdiction, and it is not often that cases of such doubt arise, that a judge can be at a loss on the subject. But it may happen, and does sometimes happen, that innocent and serious doubts, are really entertained. Is a court, therefore, because its judgments may be finally dissented from, by a superior tribunal, to be considered as flying in the face of the law, so that parties before it, shall not *only be protected in disobeying it, but punished for their obedience? If this be the case, [*107 the old maxim, *cedunt arma togæ*, will very ill apply to courts of justice. Instead of being the peaceful arbiters of right, and the sacred asylum of unprotected innocence, their very *forums* will be the seat of war and confusion.

I admit, indeed, where there is a conflict of jurisdiction, and the party entitled to a decree, is prohibited from obeying it, by a power claiming a superior cognisance, he must, at his peril, obey one or the other; but this arises from the absolute necessity of the case, because, whether the one or the other be right or wrong, must depend on a subsequent decision. In this case, George Wentworth, before the distribution, received no monition, nor any other process from the tribunal alleged to be superior. He could not even be certain that the appellants would carry their application further. I consider him, therefore, justifiable in obeying the decree, which at the time, was compulsory upon him, and for a disobedience to which, he might have been committed for a contempt, according to the opinion of the court which pronounced it. The parties still have their remedy against those who actually received the money, or their representatives, if they can be found. They may perhaps be entitled to a remedy under the bond given, when the commission of the privateer was granted.

If either of these remedies be difficult or inefficient, that does not make George Wentworth, in point of law, more liable than if they were perfectly easy, and clearly effectual. It will be one melancholy instance, in addition to a thousand others, of the distress incident to a doubtful and imperfect system of jurisprudence, which has been since happily changed for one so precise and so comprehensive, as to leave little room for such painful and destructive questions hereafter.

4. The 4th question is—whether this court can now rectify the decree in respect to the parts of it considered to be erroneous, or must affirm or reverse in the whole. The latter is certainly the general method, at common law, and it has been contended, that as this proceeding is on a writ of error, it must have all the incidents of a writ of error at common law. The argument would be conclusive, if this was a common-law proceeding, but as it is not, I do not conceive, that it necessarily applies. An incident to one subject cannot be presumed, by the very name of such an incident, to be intended to apply to a subject totally different. I presume, the term, "writ of error," was made use of, because we are prohibited from reviewing facts, and therefore, must be confined to the errors on the record. But as this is a civil law proceeding, I conceive the word "error" must be applied to such *108] errors *as are deemed such by the principles of the civil law, and that in rectifying the error, we must proceed according to those principles. In a civil law court, I believe, it is the constant practice, to modify a decree, upon an appeal, as the justice of the case requires; and in this instance, it appears to me, under the 24th section of the judicial act, we are to render such a decree as, in our opinion, the district court ought to have rendered. If this was a case, wherein damages were uncertain, and wherein, for that reason, the cause should be remanded for a final decision (which it does not appear to be, because the libellants in the original suit had a decree in their favor, which is now to be affirmed in part), yet the damages here are not uncertain, because we all agree, that interest ought to be allowed from the date of the decree, in September 1783, upon the value of the property, as specified in the report, against those who are to be adjudged to pay the principal.

Upon the whole, my opinion is, that the decree be affirmed in respect to the recovery of the libellants, in the original action against all the defendants but George Wentworth; that the libel against him, be adjudged to be dismissed; but that there be recovered against the other defendants in the original action, the value of the property they received, as ascertained in the circuit court, with interest from the 17th of September 1783. I am also of opinion, that the respective parties should pay their own costs.

Blair, Justice.—When this cause came before me, at Exeter, in New Hampshire, I felt myself in a delicate situation, in having a cause of such magnitude, and at the same time, of such novelty and difficulty, as to have drawn the judgment of men of eminence different ways, brought before me for my single decision. It was, however, a consolation to know, that whatever that decision might be, it was not intended to be final, and I can truly say, it will give me pleasure to have any errors I may have committed, corrected in this court. Two points, and if I mistake not, only two, were brought before me: the first, whether, under the description of admiralty

and maritime jurisdiction, the judiciary bill gave to the district court any jurisdiction concerning prizes: I decided in the affirmative; and the same decision having been afterwards made in this court, in the case of *Glass and others*, I consider that as now settled. The other point was, whether the court of appeals, erected by congress, had authority to reverse the sentences given in the courts of admiralty of the several states; and the source of the objection upon this point, was the defect of authority in the congress itself: here also my sentence affirmed the jurisdiction.

I have attended as diligently, and as impartially as I could, *to the arguments of the gentlemen, upon the present occasion, to discover, if possible, how I may have been led astray, in the decision of this question; but as the impressions which my mind first received, continue uneffaced (whether through the force of truth, or from the difficulty of changing opinions, once deliberately formed), I will repeat here the opinion which I delivered in the circuit court, as the best method I can take for explaining the reasons upon which it was founded. I would premise, however, that it contains something relative to what had been said at the bar of the circuit court, but which I believe was not mentioned on this occasion. [*109

"The immediate question is, whether congress had a right to exercise, by themselves, by their committees, or by any regular court of appeals by them erected, an appellate jurisdiction, to affirm or reverse a sentence of a state court of admiralty, in a question whether prize or no prize. If they possessed such an authority, it must be derivative, and its source, either mediately or immediately, the will of the people; usurpation can give no right. The respondents contend, they had no such authority, until the completion of the confederation in 1781, but only a recommendatory power; the libellants insist, that congress was considered as the sovereign power of war and peace respecting Great Britain, and that to that power is necessarily incident that of carrying on war in a regular way, of raising armies, making regulations for their discipline and government, commissioning officers, equipping fleets granting letters of marque and reprisal, the power (now contested) of deciding, in all cases of capture, questions whether prize or not, and every power necessarily incident to a state of war. It is, at least, certain, that the political situation of the American colonies required a union of council and of force, by wise measures, to bring about, if possible, a reconciliation with the mother-country, on a basis of freedom and security, or, if this should fail, by vigorous measures, to defeat the designs of their tyrannical invaders; and although this alone cannot suffice for an investiture in congress of the powers necessary to that end, yet, if the powers given be delegated in terms large enough to comprehend this extent of authority, but which may also be satisfied by a more limited construction, the supposed necessity for such powers given to a federal head (and the counsel for the respondents have admitted that it would have been good policy), is no contemptible argument for supposing it actually given.

"In the beginning of the year 1775, our affairs were drawing fast to a crisis, and for some time before the battle of Lexington, a state of warfare must, in the minds of all men, have been an expected event. Some of the delegations (I think three) of members to the congress which met in May of that year, *contain nothing but simple powers to meet congress; the rest expressly give authority to their delegates to consent to all such [*110

further measures as they and the said congress shall think necessary for obtaining a redress of American grievances and a security of their rights. It is not in all of them worded alike, but in substance, that seems to be the sense. Everything which may be deemed necessary! I think, it cannot well be supposed, that in such a delegation of authority, at such a time, there was not an eye to war, if that should become necessary. But it is objected, that at most, no greater power was given to congress, than to enter into a definitive war with Great Britain, not the right of war and peace generally: and even that war, until the declaration of independence, would be only a civil war. But why is not a definitive war against Great Britain (call it if you will a civil war) to be conducted on the same principles as any other: if it was a civil war, still, we do not allow it to have been a rebellion—America resisted, and became thereby engaged in what she deemed a just war. It was not the war of a lawless banditti, but of freemen fighting for their dearest rights, and of men, lovers of order and good government. Was it not as necessary, in such a war, as in any between contending nations, that the law of nations should be observed, and that those who had the conducting of it, should be armed with every authority for preventing injuries to neutral powers, and their subjects, and even cruelty to the enemy? The power supposed to have been given to congress, being confined to a definitive war against Great Britain, and not extending to the rights of peace and war, generally, appears to me to make no material difference; still the same necessity recurs, of confining the evil of the war to the enemy against whom it is waged. Until a formal declaration of independence, the people of the colonies are said to have continued subjects to Great Britain; true, and that circumstance it is, which denominates the war a civil war, as to which I have already stated how, in my mind, the question is affected by that circumstance. But it was asked, whether, if during the war, Great Britain, at any time before the declaration of independence, had declared war against any nation of Europe, that nation would not have had a right to treat America with hostility, as being subject to Great Britain? According to this supposition, Great Britain might have had some temptation to declare such war, that she might have the co-operation of her enemy, to reduce her colonies to obedience. But Great Britain was too wise to adopt such a policy; she knew, that by her engaging in such a war, the colonies, instead of finding a new enemy to oppose, would have known where to find a friend; they might have formed an alliance with such a power, who, probably, *111] would have considered it as an acquisition, *and congress might have been the sooner encouraged to separate from Great Britain, by a formal declaration of independence.

"As the supposition that congress was invested with all the rights of war, in respect to Great Britain, is of great moment, in the present cause, and as the power may not be so satisfactorily conveyed by the instructions to the several delegates, as might be wished, partly because some of them did not exhibit further instructions than to attend congress, and partly because the instructions given to the rest, may be satisfied by a different construction, it may be proper to consider the manner in which congress, by their proceedings, appear to have considered their powers; not that by anything of this sort, they had a right to extend their authority to the desired point, if it was not given, but because, in showing, by such means, their

sense of the extent of their power, they gave an opportunity to their constituents to express their disapprobation, if they conceived congress to have usurped power, or, by their co-operation, to confirm the construction of congress; which would be as legitimate a source of authority, as if it had been given at first. If they were only a mere council, to unite, by their advice and recommendation, all the states, in the same common measures (which, by the by, if not uniformly pursued, might be disappointed), then, the several members might be justly compared to ambassadors met in a congress, and could only report their proceedings for the ratification of their principals; but congress resolved to put the colonies in a state of defence; they raised an army, they appointed a commander-in-chief, with other general and field officers; they modelled the army, disposed of the troops, emitted bills of credit, pledged the confederated colonies for the redemption of them, and in short, acted in all respects like a body completely armed with all the powers of war; and at all this, I find not the least symptom of discontent among all the confederated states, or the whole people of America; on the contrary, congress were universally revered, and looked up to as our political fathers, and the saviors of their country.

"But if congress possessed the right of war, they had also authority to equip a naval force; they did so, and exercised the same authority over it, as they had done over the army; they passed a resolution for permitting the inhabitants of the colonies to fit out armed vessels to cruise against the enemies of America; directed what vessels should be subject to capture, and prescribed a rule of distribution of prizes, together with a form of commission, and instructions to the commanders of private ships of war: they directed that the general assemblies, conventions and councils, or committees of safety, of the united colonies, should be supplied with blank commissions, signed by the president of congress, *to be by them filled up, and [*112 delivered to any person intending to fit out private ships of war, on his executing a bond, forms of which were to be sent with the commissions, and the bonds to be returned to congress. These bonds are given to the president of congress, in trust for the use of the united colonies, with condition to conform to the commission and instructions. The commission, under which the captain of the respondents acted, was one of these commissions, it seems, only this is attempted to be qualified by saying that it was countersigned by the governor of New Hampshire; but this circumstance seems to me to be of no importance. Whoever has the right of commissioning and instructing, must certainly have the right of examining and controlling, of confirming or annulling, the acts of him who accepts the commission, and acts under it. And this exercise of authority in granting commissions, seems to have had the special sanction of the several colonies, as they filled up the commissions, took the bonds, and transmitted them to congress.

"It was urged, in the course of the argument, that if congress did enjoy the power contended for, the confederation, which was a thing of such long and anxious expectation, was not of any consequence; but it is to be observed, that that instrument contained some important powers which could not be derived from the right of war and peace; it was of importance also, as a confirmation of the powers claimed as necessarily incident to war, because some of the states appeared not to be sensible of, nor to have acknowledged such incidency; and yet the power may have existed before. It is

true, that instrument is worded in a manner, on which some stress has been laid, that the several states should retain their sovereignties, and all powers not thereby expressly delegated to congress, as if they were, until the ratification of that compact, in possession of all the powers thereby delegated; but it seems to me, that it would be going too far, from a single expression, used perhaps in a loose sense, to draw an inference so contrary to a known fact, to wit, that congress was, with the approbation of the states, in possession of some of the powers there mentioned, which yet, if the word '*retain*' be taken in so strict a sense, it must be supposed they never had. I take the truth to be, that the framers of that instrument were contemplating what powers congress ought to have had at the beginning; and that in reference to the first occasion of their assembling to oppose the tyranny of Great Britain, at least, in reference to the time of framing the confederation, say, the states shall retain. But however that may be, as I said before, I think, it is laying too great a stress upon a single word, to contradict some things which were evidently true.

*113] "But it was said, that New Hampshire had a right to revoke *any authority she may have consented to give to congress, and that by her acts of assembly, she did in fact revoke it, if it were ever given. To this, a very satisfactory answer was made: if she had such a right, there was but one way of exercising it, that is, by withdrawing herself from the confederacy; while she continued a member, and had representatives in congress, she was certainly bound by the acts of congress. I am, therefore, of opinion, that those acts of New Hampshire which restrain the jurisdiction of congress, being contrary to the legitimate powers of congress, can have no binding force; and that under the authority of congress, an appeal well lay from the courts of admiralty of that state, to the court of commissioners of appeals. That court has already affirmed their jurisdiction in this particular case, upon a plea put in against it; and upon that account also, I incline to think, that this court, not being a court of superior authority, ought not to call it in question. Under these impressions, I must, of course, decree (whatever may be the hardship of the case) that the respondents, pay to the libellants their damages and costs, occasioned by not complying with the decree of the court of appeals, the *quantum* of which to be ascertained by commissioners."

If the reasoning upon which I went, in pronouncing the above decree, in favor of the jurisdiction of the court of appeals, be unsound, and if the decree stand in need of some better support, it will probably find it in the confederation, by which authority is given to congress to erect courts of appeal in all cases; and from that time the authority of the court of appeals is confessed; the present case was then depending before that court, they asserted their jurisdiction, and gave a final decree. As to the objection, that previously to the confederation, congress were themselves sensible that they did not possess supreme admiralty jurisdiction, because of their recommending to the several states that they should erect courts of admiralty for the trial of prizes, with appeal to congress, I see not how such recommendations can prove anything of the kind; for congress might have authority to establish such courts in the respective states, when yet they chose only to recommend to the states to do it.

But, admitting the authority of the court of appeals, and the propriety

of applying to the district court of New Hampshire to enforce that decree in the way of damages, for not restoring the vessel and cargo, when through the disobedience of the present plaintiffs in error, specific restitution was become impossible, yet, if anything erroneous can be found in the decree of the circuit court, it is the duty of this court to correct it. It is objected, that the damages allowed were too high, including interest on the appreciation *of the Susanna and her cargo, from so remote a period as the sale of the vessel and cargo. That George Wentworth, being a mere [*114 agent, and having distributed among those who were entitled, under the decrees of the courts of admiralty of New Hampshire, all the money by him received for their use, ought not to have been subjected by the decree of the circuit court, to the repayment of that money. And that a lumping decree, subjecting the respondents indiscriminately to the payment of all the damages, although their interests were several and distinct, was also erroneous.

It does not, indeed, appear to me, that the decree is for the payment of too large a sum, the damages having been swelled by interest calculated upon the appraised value of the Susanna, her apparel, and of her cargo, from so remote a period. The decree of the court of appeals was merely for restitution, and that the appellants should be placed at that time in the same situation as they were in previous to the capture. A compensation for the loss they sustained in being, in the meantime, deprived of their property, was not provided for in the decree, nor were even costs allowed. The libel in the circuit court being bottomed on the decree of reversal, sought only a compensation in damages, equivalent to a restitution at the time of the reversal. Interest, therefore, ought, I think, to have been allowed only from that time.

George Wentworth, it is true, was not concerned in interest; he represented the interest of the officers and seamen, but had none himself; and a mere agent, who has paid away all, or any part of the money by him received in that character, without having been by a monition notified of the appeal, will be allowed credit in his account for the money so paid away. But George Wentworth appears, I think, in another character besides that of an agent; he was a party libellant; as such, he knew that the claimants were dissatisfied with the decrees of the admiralty courts of New Hampshire, having prayed an appeal to congress and offered the requisite security; and when the petition of appeal was referred to the court of commissioners, and they directed notice to be given to the parties who appeared before that court, it seems evident, that they had notice. What then is the effect of this? Was anything further necessary to suspend the decrees of the state courts? An inhibition is, indeed, worded in a manner naturally leading to the supposition, that that instrument was necessary to effect a suspension; but this, I think, cannot be the case; for it is observable, that by the practice, an interval of three months is allowed, before the inhibition is sued out, in which time, if nothing had antecedently suspended the sentence, it might be carried *into complete effect, and everybody be justified in [*115 their conduct, as paying obedience to a decree continuing in full force. The inhibition may be intended only as a more formal direction to cease further proceedings, when yet they may have been inhibited before: it has a further use also, for it appoints a day for the attendance of the parties.

Conformable to this idea, it is said, in Domat, that the appeal suspends the decree. But a distinction is attempted here; it is admitted, that an appeal allowed by the inferior court, suspends, while an appeal received by a superior court, is denied to have that effect. But according to Domat, it works a suspension, even against the will of the inferior judge; and it would be very strange, if the suspending operation of an appeal, to a judge who has an authority to reverse, should depend upon the consent of the inferior judge. But if the sentences of the state courts were indeed suspended, no person had authority to act under them; and if any do, he takes upon himself the consequences.

Besides, if George Wentworth had, innocently, and without notice, distributed the money which came to his hands, should not this have been shown to the court of appeals? If that had been done, perhaps, after reversing the decrees of the state court, instead of decreeing restitution, they might have only decreed that the owners should pay to the appellants, the moiety of the sales by them received. But they have decreed restitution specifically; and if this court should so model the decree of the circuit court, as to exonerate Mr. Wentworth, as to the moiety of the money by him received, it will substantially alter the decree of the court of appeals; and yet we say that the decree now is to be bottomed on that of the court of appeals, which is now to be supposed right; and that, for that reason, it was erroneous in the circuit court, to carry interest further back than from the period of reversal, and in this way give damages, which were not intended by the court of appeals.

The decree of the circuit court, appears now, I confess, to be wrong, in that it subjects all the defendants, indiscriminately, to the payment of all the damages. In the original libel, they had indeed joined, but it was in right of several interests, which I think ought to have been distinguished in the decree; justice obviously requires this; so obviously, that it is enough to state the case, to obtain the mind's assent to the propriety of distributive damages, instead of those which the decree contemplates. I will only say further, that I have no remembrance of having had this point brought to my view at the circuit court, and it certainly did not occur to myself; but if anything was said upon the point, and I, with deliberation, then preferred the decree as it stands, I am clearly now of a different opinion. Upon the whole, I think, the decree of the *circuit court will stand as it ought, when corrected by reducing the damages in the manner proposed, and when so reduced, by proportioning them among the then defendants, according to their distinct interests.

*116]

Cushing, Justice.—The facts of this case being already fully stated by the court, I shall go on to inquire, whether the decree of the circuit court ought to be reversed, for any of the errors assigned.

The first is, that the court of appeals, which made the decree of restoration, had not jurisdiction of the cause. In answer to this, I concur with the rest of the court, that the court of appeals, being a court, under the confederation of 1781, of all the states, and being a court for "determining finally appeals in all cases of capture," and so being the highest court, the dernier resort in all such cases, their decision upon the jurisdiction and upon the merits of the cause, having heard the parties by their counsel, must be final

and conclusive, to this and all other courts: to this, as a court of admiralty, because it is a court of the same kind, so far as relates to prize, and without any controling or revisory powers over it; to this, as a court of common law, because it is entirely a prize matter, and not of common-law cognisance. The cases, therefore, cited to show, that the common law is of general jurisdiction, and that the court of king's bench prohibits, controls and keeps within their line, admiralty courts, spiritual courts, and other courts of a special, limited jurisdiction, do not, I conceive, touch this case.

It is conceded by all, that the decision of a court competent, is final and binding. Now, if the court of appeals was, under the confederation of all the states, a court constituted "for determining finally appeals in all cases of capture," it was a court competent; and they have decided. Again, the admiralty of England gives credence and force to the decisions of foreign courts of admiralty; why not equal reason here? It is true, the courts of common law there, will not allow a greater latitude to the jurisdiction of foreign courts of admiralty, than to their own; as it seems natural and reasonable, they should not; for instance, holding plea of a contract made entirely at land, which seems to have been the substantial ground of a prohibition, in the cases cited, respecting the decree in Spain.[1]

If the decree of the court of appeals must be considered as binding, as it must, or there may never be an end to this controversy; that will carry an answer to several other errors assigned, viz., the third, fifth and seventh, respecting the cause not being regularly before congress or the court, and respecting the circuit court not entering into the merits—and to *some other particular exceptions; as, that appealing to the superior court [*117 of New Hampshire, was a waiver of the right of appeal to congress; if that appeal was consistent with the resolve of congress, which only provided an appeal to congress in the last resort, it was not a waiver. Again, it is said, there ought to have been a jury at the court of appeals; but that, clearly, was not the intent of the resolve of congress, nor of the confederation, nor correspondent to the proceedings in courts of admiralty, even where trials by jury are used and accustomed in other matters; nor was it thought a proper or necessary provision in the present constitution, which has been adopted by the people of the United States. As to the original question of the powers of congress, respecting captures, much has been well and eloquently said on both sides. I have no doubt of the sovereignty of the states, saving the powers delegated to congress, being such as were "proper and necessary" to carry on, unitedly, the common defence in the open war, that was waged against this country, and in support of their liberties, to the end of the contest. But as has been said, I conceive, we are concluded upon that point, by a final decision heretofore made.

The second exception in error is, that the sentence of the court of appeals was void by the death of Mr. Doane. That fact does not appear upon the record of the court of appeals, and I think, we cannot reverse the decree in this incidental way, if it could be done upon a writ of error. If it was pleadable in abatement, it ought to have been pleaded or suggested there, by the

[1] The general maritime law is only so far operative, as it has been adopted by our laws and usages; it has no inherent force of its own; its true limit is a judicial question, which cannot be affected either by state or federal legislation. The Lottawanna, 21 Wall. 558.

opposite party. On the contrary, it is implied by the record, that Doane was alive; otherwise, he could not have been heard by his counsel, as the record sets forth; for a dead man could not have counsel or attorney. On the other hand, the letters of administration imply that he was dead at the time; but those letters were not before the court, and therefore, could not be a ground for their abating the suit, if it was abatable at all, for such a cause. Here seems to be record against record, so far as implications go, and I take it to be an error in fact, for which, by the judicial act, there is to be no reversal. Upon this head, a case in Sir T. Raymond is cited by the counsel for the plaintiff in error, of trover, by five plaintiffs, one dies, the rest proceed to verdict and judgment, and adjudged error, because every man is to recover according to the right he has at the time of bringing the action; and here, each one was not, at the time of bringing the action, entitled to so much as at the death of one of the plaintiffs. But a case in Chancery Cases, p. 122, is more in point—where money was made payable by the decree, to a man that *was dead, and yet adjudged, among other things, no error. *118] But another matter which seems well to rule this case, is, that, being a suit *in rem*, death does not abate it. So say some books, and I do not remember to have heard any to the contrary. It does not affect the justice of the cause; it makes no odds to the plaintiff in error, whether the money is to be paid to Colonel Doane, being alive, or to his legal representatives, if dead.

The 4th exception, that damages are not prayed for, yet decreed, is answered by a prayer for general relief.

The 8th exception is, that the district and circuit court possessed not admiralty jurisdiction, and that the circuit court had no right to carry the decree into execution. If courts of admiralty can carry into execution decrees of foreign admiralties, as seems to be settled law and usage; and if the district and circuit courts have admiralty powers by the law and constitution, as was adjudged and determined by this court, last February, I think, there can be no doubt upon this point.

Another question of consequence is, whether Mr. George Wentworth, being agent for the captors, and having paid over, can be answerable jointly with the other libellants, for the whole, or, in any way, for any part. If it was simply the case of an agent regularly paying over, I should suppose he could not justly be called upon to refund. But it seems, he was an original libellant, a party through the whole course of the suit; and an appeal being claimed in time, at the court and term at which the libellants obtained the decree (of which, therefore, he had legal notice), the appeal, if a lawful one, in my opinion, suspended the sentence, and must make him answerable for whatever moneys he should receive under that decree, in case of reversal: every man being bound to take notice of the law, at his peril.

It is suggested, that an inhibition was necessary to take off the force of the sentence. An inhibition (according to the form of one produced, which issued in England, last July, near four months after the trial and appeal at New Providence, inhibits the judge and the party from doing anything in prejudice of the appeal, or of the jurisdiction of the court appealed to, and cites the party to appear and answer the party appellant, at a certain time and place. The citation to the party to appear and answer at the proper time and place, I take to be the most substantial part of the process; the

inhibitory part to be rather matter of form, or in pursuance of the suspending nature of the appeal, and as a further guard and caution against misapplying the property. For it appears to me absurd, to suppose, that an inhibition, taken out seven or eight months after the *appeal (nine [*119
months being allowed for the purpose) should be the only thing that suspended the sentence, leaving the judge below and the party, all that time, to carry the sentence into complete execution. The judicial act, in providing an appeal in maritime causes to the circuit court, contains no hint of an inhibition, as necessary to suspend the sentence. Domat is express, that an appeal has that effect, and I believe, other civil law writers.

The rejection of the appeal, if unwarranted, could not take away the right of the citizen. There does not appear anything actually compulsory upon Mr. George Wentworth, to pay the money, except what may be supposed to be contained in the decree appealed from, the force of which was suspended. All this matter might have been offered at the court of appeals, where the parties were fully heard, and if offered, was, no doubt, involved in their decision.

It is said, if I understood the matter right, that there ought to have been a monition from the circuit court to Mr. Wentworth, to bring in what he had in his hands. I see no necessity for a monition, exactly in that form. There was a monition to come in and answer the libellants upon the justice of the cause, as set forth—he came in, and had an opportunity to defend himself: and the question was, whether he was answerable, upon the circumstances of the case, which was determined by the court. By the cases in Term Reports, as well as from other books, it is clear, that the admiralty has not only jurisdiction *in rem*, but also power over the persons of the captors and all those who have come to the possession of the proceeds of the prize, to do complete justice, as the case requires, to captors and claimants. But I cannot conceive why the decree of the court of appeals is not conclusive upon Mr. George Wentworth, as much as upon the other libellants.

Again, it is objected, that the decree being for restoration, damages could not be awarded. The decree was not complied with—the thing was gone. How, then, could justice be done, without giving damages? Then, the question is, how are we to understand the decree; as joint upon all the libellants for the whole, Mr. George Wentworth included, or as decreeing the owners to restore one-half, and Mr. George Wentworth, agent for the captors, the other half. If the latter, which perhaps may be a reasonable and just construction, conformable to the spirit of the original libel, then the decree of the circuit court is in that respect erroneous. *Also, as to damages, [*120
I suppose, interest ought not to have been allowed farther back than the decree.

The only question that remains, is, whether this court can rectify those errors, consistently with the judicial act. And I think it may, as there is sufficient matter, apparent upon the record, to do it by. I agree that each party bear their own costs of this court.

By the Court.—Ordered, That against all the plaintiffs in error, except George Wentworth, sixteen thousand, three hundred and sixty dollars, and sixty-eight cents, be recovered by the defendants in error, and the same sum against George Wentworth; and that against the plaintiffs in error, the

costs of the circuit court be recovered, one-half against George Wentworth, and the other half against the other plaintiffs in error; and that, in this court, the parties pay their own costs.

RULES.

FEBRUARY TERM, 1795.

ORDERED, That the gentlemen of the bar be notified, that the court will hereafter expect to be furnished with a statement of the material points of the case, from the counsel on each side of a cause.

ORDERED, That all evidence, on motions for a discharge of prisoners upon bail, shall be by way of deposition, and not *vivâ voce*. *United States* v. *Hamilton*.

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*121] *AUGUST TERM, 1795.

A COMMISSION, bearing date the 1st of July 1795, was read, by which, during the recess of congress, JOHN RUTLEDGE, Esquire, was appointed CHIEF JUSTICE, until the end of the next session of the senate.

UNITED STATES *v.* RICHARD PETERS, District Judge.

Admiralty jurisdiction.—Prohibition.

The district court has no jurisdiction of a libel for damages, against a privateer, commissioned by a foreign belligerent power, for the capture of an American vessel as prize—the captured vessel not being within the jurisdiction.

The supreme court will grant a writ of prohibition to a district judge, when he is proceeding in a cause of which the district court has no jurisdiction.[1]

THIS was a motion for a probibition to the District Court of Pennsylvania, where a libel had been filed by James Yard, and process of attachment thereupon issued, against the Cassius, an armed corvette belonging to the French Republic, and Samuel Davis, her commander. The libel was in these words:

"To the honorable Richard Peters, Esquire, judge of the district court of Pennsylvania: The libel and complaint of James Yard, of the state of Pennsylvania, in the United States of America, humbly showeth, That the said James Yard is the owner of the schooner William Lindsey,

[1] The writ of prohibition only lies, where the district court is proceeding as a court of admiralty. Ex parte Christy, 3 How. 292; Ex parte Graham, 10 Wall. 541; Ex parte Easton, 95 U. S. 72; and it can only be used as a preventive remedy, not for an act already completed; if nothing remains to be done, either by way of executing the decree, or otherwise, no prohibition can be granted. United States *v.* Hoffman, 4 Wall. 158; Ex parte Easton, *ut supra*.